The

Madras Law Journal Reports.

II] JULY [1950

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD GREENE, LORD OAKSEY, LORD RADCLIFFE AND SIR LIONEL LEACH.

Govindram Gordhandas Seksaria and another .. *Appellant* *

v.

State of Gondal by His Highness the Maharaja of Gondal and others .. *Respondents.*

Contract Act (IX of 1872), *section* 69—"*Bound by law to pay*"—"*Interested in the payment of money*"—*Meaning—Payment of taxes due in respect of mills by person who had contracted to buy them under an agreement to sell—Right to reimbursement—Civil Procedure Code (V of* 1908), *section* 86—*Certificate by the Crown Representative—Competency of Court to examine its propriety.*

The words "bound by law to pay" in section 69 of the Contract Act do not exclude those obligations of law which arise *inter partes* whether by contract or tort and is not confined only to those public duties which are imposed by statute or general law. They extend to any obligation which is an effective bond in law.

It is not correct to say that a person could not be "interested in the payment of money" within the meaning of section 69 of the Contract Act unless he was at the same time entitled to some legal interest in the property in respect of which such payment might be made. The words themselves do not require that a person to be interested in a payment should at the same time have a legal proprietary interest in respect of which the payment is made.

S had become the purchaser of certain mills and was handed over possession in 9th September, 1937. On 29th November, 1937, *S* entered into an agreement by way of sub-sale with a company under which he agreed to sell the mills to the company at the same price as that at which he bought them. Before that date, it was found that large amounts were outstanding in respect of municipal taxes on the mills and in spite of correspondence between the original owners and S and the company which purchased from him, the latter company was forced to pay that sum to avoid legal proceedings for the enforcement of the statutory charge. In a suit by the company and its vendor against the original owners for the recovery of the sum so paid,

Held, the payment made can in no sense be said to be a voluntary one. The company had contracted to buy the mills and they were imminently threatened with a forced sale which would defeat its purchase. No one was disposed to pay the taxes due and so the company paid. To describe it in such circumstances as having made a voluntary payment would involve some misuse of language. The company was also interested in the payment of taxes though the actual sale deed in their favour was executed subsequently.

For the Court the test whether a Sovereign Prince is rightly impleaded before it is the existence of the consent of the Crown representative duly certified by the signature of the political secretary. It is no part of its functions to try by its process the question of fact whether any of the conditions required for the giving of the consent existed or even the question whether it had appeared to the Crown representative that one or more of them did exist. The certificate of consent is in all ordinary cases conclusive evidence that it did so appear

D. N. Pritt, Sir Thomas Strangman and *R. J. T. Gibson* for Appellants.

S. P. Khambatta, L. M. Jopling and *J. M. R. Jayakar* for State of Gondal and *Sir Herbert Cunliffe*, and *R. Parikh* for *J. D. Rathod* for Respondents.

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* P. C. A. Nos. 24 and 25 of 1947. 19th December, 1949.

Their Lordships' Judgment was delivered by

LORD RADCLIFFE.—These are consolidated appeals from two decrees of the High Court of Judicature at Bombay dated 8th November, 1943. The first of these decrees reversed a judgment against the respondent the State of Gondal in favour of the present appellants which had been given on 15th January, 1943, by the High Court in its ordinary original civil jurisdiction ; the second decree dismissed an appeal by these appellants from the same judgment in so far as it rejected their claim in the suit against respondents 2 and 3.

The facts out of which the litigation arises are simple and they have produced no material divergence of view in the Courts in India. The real question is how the law should be applied to those facts. All that it is necessary to notice may be briefly set out as follows. On 1st October, 1926, a limited company called The Currimbhoy Mills Co., Ltd., executed a debenture trust deed mortgaging two mills known as the Currimbhoy Mill and the Mahomedbhoy Mill together with certain plant thereon to trustees for debenture holders to secure an issue of debentures. Respondents 2 and 3 (whom it will be convenient to refer to as "the Trustees") were two of the trustees acting under the trust deed and were the only trustees who were made parties to the suit : respondent 1, the State of Gondal, acting through His Highness the Maharajah (hereinafter referred to as "the Maharajah"), was at all material times the owner of all the debentures secured by the trust deed. By October, 1933, the Trustees, in exercise of their powers under the deed, had entered into possession of the mills which, it seems, lay within the municipal limits of the City of Bombay, and remained in possession until 9th September, 1937, when the mills were handed over to Mr. Seksaria whose legal personal representatives are the first Appellants. At that date Mr. Seksaria had just become the purchaser of the mills for a sum of Rs. 12,50,000 under a contract between the Maharajah and himself, one of the terms of which was that possession should be given on payment of the full purchase price and before formal transfer. The full price Rs. 12,50,000, was in fact paid into the Maharajah's bank account on 7th September, 1937, the contract in question having been effected by and contained in (i) a letter which Mr. Seksaria wrote to the Maharajah dated 1st September, 1937, (ii) a telegram and confirming letter, dated 4th September, 1937, from the Dewan of the State of Gondal to Mr. Seksaria, (iii) a telegram from Mr. Seksaria to the Dewan dated 5th September, 1937, a telegram in reply of the following day and a final telegram in reply to that on the same day.

What happened after the conclusion of the sale contract was this. On 29th November, 1937, Mr. Seksaria entered into an agreement by way of sub-sale with the appellant company under which he agreed to sell the mills to the company for the same price of Rs. 12,50,000. It is impossible to ascertain from the evidence in the suit at what date, if any, prior to the formal transfer from the trustees the appellant company entered into possession of the mills in place of Mr. Seksaria. During the hearing of the appeals before the High Court, that Court heard and refused an application on behalf of the appellants for leave to adduce further evidence on this point. In these circumstances their Lordships are unable to treat the appellant company as having entered into possession at any date before transfer. But before the sub-sale of 29th November a new and disturbing fact had come to light. On 7th October the Assessor and Collector of Municipal taxes, Bombay, addressed a letter to Mr. Seksaria informing him that bills amounting to Rs. 1,24,092-1-0 were outstanding in respect of municipal taxes on the mills, and that, as such taxes were a first charge on the properties, subject always to Government land revenue, payment "at a very early date" was requested. Statements enclosed with the letter showed unpaid taxes to the amount stated going back to the date 1st April, 1933, and covering not only the general tax but water charge as well. From this date until 23rd February, 1939, a correspondence went on in which there took part from time to time Messrs. Kanga and Co., solicitors for Mr. Seksaria and the appellant company, Messrs. Craigie Blunt and Caroe, solicitors for the Maharajah and the trustees, the Assessor and Collector of the Bombay Munici-

pality and, at a late stage, Messrs. Crawford Bayley and Co., his solicitors. Out of this correspondence certain facts appear clearly enough. Firstly, no one disputed that there were unpaid municipal taxes due in respect of the mills, but Messrs. Craigie Blunt and Caroe raised the point that the assessments were too high in view of the fact that the mills had been closed since 1st April, 1933, and by May 1938, the assessments had at their request been reduced to a sum of Rs. 89,318-8-0 in all. Secondly, Messrs. Kanga and Co., maintained from first to last that so much of the taxes as related to the period before 9th September, 1937, was for the vendor's not the purchaser's account and asked for it to be discharged accordingly. Mr. Seksaria himself addressed a long and reasoned letter to the Maharajah on 8th December, 1938, when the Municipality was pressing for payment, in which he requested that directions for payment should be given at once " in order to avoid unnecessary litigation and unpleasantness." This letter was not answered or even acknowledged. Thirdly, at no time did Messrs. Craigie Blunt and Caroe make any suggestion that their clients, the trustees, had not come under liability for the taxes by virtue of their possession which had terminated on 9th September, 1937, and it is quite clear from some of the letters that they did in fact, no doubt rightly, regard them as so liable. Fourthly, neither the Maharajah nor the trustees made any attempt to pay the sums due. Fifthly, the Municipality were becoming increasingly insistent that the unpaid taxes should be paid by one or other of the parties and as early as May, 1938, they declined to give to appellant company or Mr. Seksaria a connection for the supply of water to the mills until the dues were paid. By July the Municipality were threatening action and on 31st October of the same year their solicitors wrote to Messrs. Kanga and Co., stating that they were instructed to institute legal proceedings to enforce the statutory charge upon the property. Eventually, on 23rd February, 1939, after further requests for payment by the Maharajah or the trustees had proved unavailing, the appellant company paid the Municipality the sum of Rs. 78,466-12-0 in full satisfaction of the claim against the mills.

On 25th March, 1939, a deed was executed whereby the trustees and a third trustee who was then residing in Paris transferred the mills to the appellant company free from the right of redemption and all claims under the Debenture Trust Deed. Mr. Seksaria executed this deed as a confirming party. The recitals to the deed—inaccurately, but no doubt immaterially—stated that Mr. Seksaria had contracted with the trustees for the purchase of the mills for Rs. 12,50,000 and had paid this sum to them. The recitals also mentioned the sub-sale by Mr. Seksaria to the appellant company.

The property having been thus conveyed in pursuance of the contract, Mr. Seksaria and the appellant company instituted the present suit as joint plaintiffs claiming that the respondents should be ordered to pay to them the sum of Rs. 77,522-6-0 (being so much of the sum of Rs. 78,466-12-0 paid as related to the period up to 9th September, 1937) with interest. The trial Judge gave judgment for both Mr. Seksaria and the appellant company against the Maharajah in the sum of Rs. 95,630, covering the sum claimed and interest, with costs, but he dismissed their suit as against the trustees. He ordered them to pay the trustees' costs but directed that they should be at liberty to add those costs to the costs that they were entitled to recover from the Maharajah. The basis of the learned Judge's view was that the Maharajah had made a contract with Mr. Seksaria into which were imported by law the provisions of section 55, Transfer of Property Act. The result of that was to impose upon him an obligation to clear off the unpaid minicipal taxes up to 9th September, 1937. Although Mr. Seksaria had not himself paid the money to discharge these taxes, the learned Judge interpreted the sub-sale to the appellant company as being an actual sale of Mr. Seksaria's contractual right against the Maharajah and, so holding, considered that there has been an assignment by Mr. Seksaria to the appellant company of his right of action for damages in respect of the Maharajah's breach of contract. Since assignor and assignee were both before the Court, he considered that there was no difficulty in giving judgment

for them both against the Maharajah. As to the trustees, they had made no contract with either of the plaintiffs and he saw no ground of action against them.

Both sides appealed from this decision. The High Court sitting in its appellate jurisdiction dismissed the appeal of Mr. Seksaria and the appellant company as against the trustees; but the Maharajah's appeal was allowed. By two decrees dated 8th November, 1943 (which are the decrees that are under appeal before this Board), the suit was dismissed as against all the defendants to it, those defendants being given their costs both of the trial and of the appeal. The two Judges who heard the appeal, the Chief Justice and Kania, J., came to substantially the same conclusion. They held that Mr. Seksaria had no right of action against the Maharajah on the contract of sale because Mr. Seksaria had suffered no damage from the Maharajah's breach of contract in not paying of the taxes. He, Mr. Seksaria, had not found the money to make the payment. Secondly, they held that the appellant company had no right of action against the Maharajah, since there was no contract between them and the fact that at the date when it paid to the Municipality the sums demanded it had no interest which the law recognised in the mill property prevented any right arising under section 69, Contract Act. For some reason which is not clear to their Lordships the learned Judges appear to have considered that a person could not be "interested in the payment of money" within the meaning of that section unless he was at the same time entitled to some legal interest in the property in respect of which such payment might be made. Thirdly, as regards any claim against the Trustees, the learned Judges considered that no relevant obligation was imposed upon them by the terms of the conveyance of 25th March, 1939, since by that date the unpaid taxes had been paid off, and even if they were bound as between themselves and the Municipality to meet the taxes accruing during their period of possession (as Kania, J., seems to have thought that they were), the appellant company had acquired no rights against them by making its payment, since it made that payment "voluntarily" and at a date when it possessed no legal interest in the mills.

Their Lordships find themselves unable to agree with these conclusions. They do not consider that it would be right to treat Mr. Seksaria as having suffered no damages by reason of the Maharajah's breach of contract; they do not think that section 69 of the Contract Act has the limited meaning which the High Court have attached to it in this case; and they regard the appellant company's payment of the taxes as having been in no relevant sense a "voluntary" one. But before taking up these points in any detail it is convenient to notice a preliminary objection to the jurisdiction of the High Court which was advanced on the Maharajah's behalf.

This objection was advanced before both the Courts in India, although the form of the argument has not always been the same. It did not commend itself to either of those Courts and their Lordships entertain no doubt that they were right in overruling it. As the argument was put before their Lordships it can be summarised in this way. The Maharajah as a Sovereign Prince was not liable to be sued in the Courts of British India except in accordance with the rules prescribed by section 86, Civil Procedure Code. That section lays it down that such a Prince may be sued with the consent, but shall not be sued without the consent, of the Crown representative: and enacts in sub-Section (2) that consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of a specified class or classes and may specify, in the case of any suit or class of suits, the Court in which the Prince may be sued, but consent shall not be given "unless it appears to the consenting authority that" one at least of certain defined conditions exist. The consent of the Crown representative had been obtained in this case and had been expressed in the form of an authority under section 86 for Mr. Seksaria and the director and managing agent of the appellant company to institute a suit against the Maharajah in the High Court at Bombay in respect of the matters specified in the plaint that was attached to the document of consent. This was the same plaint as that which was actually delivered in this suit. Nothing, it would appear, could be more conclusive. But, it was argued,

a reading of the plaint would show that none of the conditions which must appear to the Crown representative to exist before a consent was given did in fact exist in this case, and therefore the sanction required has not been validly given.

In their Lordships' opinion this argument is misconceived. For the High Court the test whether the Maharajah was rightly impleaded before it was the existence of the consent of the Crown representative duly certified by the signature of the political secretary. It was no part of its function to try by its process the question of fact whether any of the conditions required for the giving of his consent existed, or even the question whether it had appeared to the Crown representative that one or more of them did exist. The certified consent is in all ordinary cases conclusive evidence that it did so appear. There might conceivably have been cases, as Kania, J., supposed in his judgment in which a certificate showed on the face of it that the Crown representative did not consider any of the necessary conditions to exist: or possibly special circumstances might have arisen entitling a Court to go behind a certificate and investigate the facts. Their Lordships express no opinion on that point, for in this case there was nothing to suggest that any such special circumstances existed. Indeed the certificate itself leaves it open as to which of the various conditions the Crown representative relied upon. The objection was no more than an attempt to get the Court to try for itself what the Act by section 86 has left to the Crown representative to ascertain. The trial Judge decided quite rightly that it was not for him to go behind the certificate or to entertain the objection, and their Lordships are at one with the Appellate Court in upholding this decision.

It remains to consider the merits of the appeals. A somewhat complicated structure of rights and liabilities was set up by the circumstance that, apart from the Maharajah and Mr. Seksaria who made the original contract for sale of the mills, there were the trustees, the legal owners of the mills who had actually been in possession of them, and the appellant company which sub-purchased from Mr. Seksaria and actually found the money to pay off the outstanding municipal taxes. But the basic fact is that the Maharajah contracted to sell the mills to Mr. Seksaria. By making such a contract he imposed upon himself the obligation imported by section 55 (1) (*g*), Transfer of Property Act,

"to pay all public charge ....accrued due in respect of the property up to the date of" possession and "to discharge all incumbrances on the property then existing".

In this case, the terms of the contract operate to substitute the date of possession for the date of sale that would otherwise be the determining date. Both the Courts in India have held that the Maharajah, not the trustees, was the contracting party and that section 55 (1) (*g*) was imported into his contract. Their Lordships agree with them. It was argued that the provisions of section 55 (1) (*g*) did not form a part of the Maharajah's contract for two reasons. One was that, since the trustees, and not he, were to be the conveying parties, he was not a 'seller' within the meaning of section 55 and that, consequently, his contract was not affected by that section. Their Lordships do not consider that the meaning of the word 'seller' is limited in that way and they have nothing to add to what was said by Kania, J., on that point. The other reason was that in a letter, dated 5th August, 1937, to Messrs. Kanga & Co., the Dewan of Gondal State had stated that the Maharajah desired to dispose of the mills at " a price of Rs. 12,50,000 net " and it was suggested that, in the light of this the later documents which in fact contained the contractual terms should be interpreted as excluding any obligation on the Maharajah such as section 55 (1) (*g*) would otherwise have imposed. Their Lordships regard this argument as untenable on two separate grounds. The word 'net' does not, expressly or by implication, appear in the sale contract that was actually made. If it had, it would not have been sufficient in the context to exclude the application of section 55 (1) (*g*).

Having undertaken by his contract to clear off the outstanding taxes the Maharajah defaulted on this obligation. There is no other way in which to inter-

pret his continued failure to make any provision for meeting them in the face of a series of requests for payment that began with Messrs. Kanga & Co.'s letter to Messrs. Craigie Blunt and Caroe, dated 12th October, 1937, and were reinforced by Mr. Seksaria's letter to the Maharajah himself which was despatched in December, 1938. By February, 1939, it was obvious that the Municipality were not going to wait any longer and in their Lordships' opinion Mr. Seksaria was quite entitled at that date to treat the Maharajah as having repudiated his obligation and to take what measures were open to him to prevent this breach of contract bringing about a forced sale of the purchased mills in realisation of the Municipality's charge. The monies required were provided by the appellant company and it is this circumstance that led the High Court to allow the Maharajah's appeal on the ground that Mr. Seksaria had suffered no damage. It is impossible to ascertain from the record the nature or extent of Mr. Seksaria's interest in the appellant company, and it is necessary to treat the two of them as independent legal persons for all purposes. The trial Judge escaped the difficulty with which the appeal Court were faced, because he held that Mr. Seksaria's sub-sale to the appellant company should be read as an actual assignment of his contractual rights against the Maharajah. Their Lordships do not think that this view can be adopted by them. The agreement, dated 29th November, 1937, was an ordinary sub-sale: it amounted to a contract to sell the property which Mr. Seksaria had agreed to purchase, but it neither assigned nor contracted to assign his contractual rights under that agreement. On the other hand, their Lordships cannot accept the view of the appeal Court that Mr. Seksaria has no claim against the Maharajah because he proved no damage. On the contrary, they think that his damage appears clearly enough from the facts themselves.

What was the position on 23rd February, 1939, when the taxes were paid? If it was the Maharajah's obligation, as between himself and Mr. Seksaria, to find the money, just as much was it Mr. Seksaria's, as between him and the appellant company. There is nothing in the sub-sale agreement to shift the obligation from the vendor. At that date he had failed in his duty to the company, not the less because the cause of his failure was the Maharajah's breach towards him. It is true that before instituting the present suit the appellant company did not go through the formality of notifying to Mr. Seksaria that it would assert its legal rights against him, either for breach of his obligation under section 55 (1) (*g*), Transfer of Property Act or under section 69, Contract Act (a section which will be more fully considered later). But why should it? The facts spoke for themselves and the immediate purpose both of Mr. Seksaria and the appellant company, once the property had been saved from forced sale, was to join together in a suit to recover from the persons primarily liable the amount of money that had been expended. It seems to their Lordships neither right in law nor just in practice, once it be conceded that the Maharajah had undertaken to Mr. Seksaria that he would clear off these taxes, that the Maharajah should be absolved from liability merely because Mr. Seksaria had not gone through the procedure of paying over to the appellant company, his co-plaintiff in the suit, the sum of money which he would certainly have to make good to it unless it could obtain indemnity from the Maharajah or the trustees direct.

It is now necessary to consider what are the rights of the company. In their Lordships' view those rights are to be found in section 69, Contract Act. That section runs as follows:

"A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other."

The learned Judges of the High Court in appeal held that the appellant company could not establish a right under this section because it was not interested in the payment of the money that it paid. The view that it was not 'interested' was based on the fact that at the date of the payment the company had no property interest in the mills in respect of which the taxes were claimed. And in accordance with this view, the company's payment was described by the learned Judges as a

voluntary one. To their Lordships it seems to have been very unlike a voluntary payment. The company had contracted to buy these mills, and they were imminently threatened with a forced sale which would, of course, defeat its purchase. Money had to be found for the taxes if the mills were to be saved. Neither the Maharajah nor the trustees showed any sign of paying the Municipality. So the appellant company paid. But to describe it in those circumstances as having made a voluntary payment appears to their Lordships to involve some misuse of language. Nor do they appreciate why it should not properly be described as interested in the payment. In any ordinary use of language, the company was interested in the taxes being paid at the time when they were paid since only through the payment could it realise the fruit of the contract that it had entered into. The words themselves do not require that a person to be interested in a payment should at the same time have a legal proprietary interest in the property in respect of which the payment is made. It is no doubt true that there have been decisions which have tested whether a person was interested in a payment by ascertaining whether he had such a proprietary interest. It may be a good test in appropriate circumstances. But it would be a sad fallacy to deduce from the circumstance that a person may be interested in a payment because he has an interest in the property to which it relates the conclusion that no one who has not an interest in a property can be interested in a payment made in respect of that property. In truth, section 69 invites no such judicial limitation. The section is part of a chapter of the Contract Act devoted to "Quasi Contract." The phrase itself is no doubt taken from a familiar branch of the English Common law, although there is no reason to suppose that the Indian Contract Act was intended to do no more than to reproduce in compendious phrases the precise doctrines of the English law of contract. But the general purport of the section is reasonably clear: to afford to a person who pays money in furtherance of some existing interest an indemnity in respect of the payment against any other person who, rather than he, could have been made liable at law to make the payment. So interpreted, section 69 appears to their Lordships to apply to the payment made by the appellant company in this case.

The Maharajah was bound to pay this money in the sense that he had made a legally enforceable contract with Mr. Seksaria to pay it. Unless the words "bound by law to pay," where they occur in the section, exclude those obligations of law which arise *inter partes*, whether by contract or by tort, and embrace no more than those public duties which are imposed by statute or general law, the Maharajah was a person from whom reimbursement could be claimed under the section. But their Lordships think that the words extend to any obligation which is an effective bond in law. Certainly the Common law of England afforded a right of indemnity to one who had paid "under compulsion of law" against the true obligor without limiting the circumstances in which the latter's liability had arisen. Certainly too, there is authority in the Courts of India for the proposition that "bound by law" covers obligations of contract or tort. Acccepting this interpretation, as their Lordships do, they hold that the act of payment by the appellant company gave to it a right of action against the Maharajah to obtain reimbursement of the sums so paid. Thus, as against him, both the plaintiffs in this suit ought to have been held to have good, though alternative, rights of action.

Nor does this exhaust the plaintiffs' rights. Not only did the appellant company's payment exonerate the Maharajah from his contractual bond but it at the same time exonerated the trustees from whatever liability they may have had to the Municipality by virtue of the provisions of section 146, Bombay Municipal Act of 1888. Their Lordships have had placed before them on behalf of the trustees all that can properly be said in support of the argument that there is no sufficient ground for holding them to have been under any such liability. The conveyance of 25th March, 1939 shows, it was said, that the mills were land held immediately from the Government; in such a case sub-section (1) of section 146 applies and it is only the "actual occupier" from whom the taxes may be levied. The trustees may have been in possession up to the 9th September, 1937, but that is not to say

that they were in occupation; the more likely occupiers were a firm, Messrs. Brady & Co., who were acting as the trustees' agents in looking after the property. Their Lordships have given careful consideration to the argument, but they are unable to feel any doubt that section 146 does operate to make the trustees themselves primarily liable for the taxes that accrued during their period of possession. That they were in possession from about October, 1933, until Mr. Seksaria took over is found as a fact by the trial Judge, and this fact is accepted by the Judges on appeal. There may in certain circumstances be a distinction between "actual occupation" and "legal possession," but their Lordships can see no reason at all to suppose that any such distinction existed in this case. The position which Messrs. Brady & Co. held is described in the trustees' own Statement of Defence: they are stated to have been in charge of the mills on behalf of the trustees. It is impossible that they could have been the occupiers for the purposes of section 146 (1), since such an occupier is described in the section as "holding" from Government or certain other persons. But if the occupiers were not Messrs. Brady & Co., who else could have been except the trustees who had the possession? It is of some interest to see, although the legal question whether the trustees were liable for the taxes or not does not depend on the attitude of the parties, or their advisers, that the trustees' solicitors had obviously been treating their clients as liable to the Municipality long before the Maharajah sold the mills to Mr. Seksaria. Indeed it was on their representation that the assessment of the mills was reduced.

The result is that section 69 of the Contract Act affords to the appellant company an additional right of recourse against the trustees, since its discharge of the outstanding taxes exonerated the trustees who were primarily liable by virtue of the Municipal Act.

Their Lordships are of opinion, therefore, that both these appeals should succeed. The two decrees of the High Court (in appeal) dated 8th November, 1943, should be set aside and the decree of the High Court (in Original Civil Jurisdiction), dated 15hth January, 1943, should be restored in so far as it gives judgment against the Maharajah in the sum of Rs. 95,630-12-0 and interest. There should also be judgment for the appellant company in the same sum with interest against the trustees; it being declared that the appellant's rights against the respective respondents are alternative and that they are to be at their election which they are to pursue. Having regard to the special relationship between the Maharajah on the one hand and the trustees on the other their Lordships think that justice will be done if the Maharajah is ordered to pay to the appellants the plaintiffs' costs of the suit up to and including the trial in the first Court without distinguishing between their costs as against the several respondents; and if the Maharajah is ordered to pay to the appellants the costs incurred by Mr. Seksaria and the appellant company as respondents to his appeal to the High Court, and the trustees are ordered to pay to the appellant company its costs of its appeal to the High Court. Their Lordships have humbly advised His Majesty accordingly.

The Maharajah must pay the appellants' costs of this appeal.

Solicitors for Appellant: *Lattey & Dawe.*

Solicitors for Respondent: *Barrow, Rogers & Nevill.*

V. S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

The Commissioner of Excess Profits Tax, Madras .. *Applicants* *

v.

Messrs. Goculdoss Jamnadoss & Co., 229, China Bazaar Road, Madras .. *Respondents.*

Excess Profits Tax Act (XV of 1940), *section* 5, *Third Proviso—Money-lending business by a resident of British India—Transaction of mortgage in Mysore State—Interest income arising therefrom—Whether separate business.*

Before the third proviso to section 5 of the Excess Profits Tax Act, can be invoked the following matters have to be established (i) there must be an identifiable or recognisable part of a business, (ii) profits which arise or accrue from that part, and (iii) that part of the business should be carried on and the profits should accrue or arise in an Indian State.

The expression "deemed to be a separate business" in the proviso means that in contradiction to actual facts a separate business is assumed to exist for the purposes of the proviso.

So, where the assessee carries on a money-lending business in Madras and the investment which yielded an interest income which is sought to be assessed during the chargeable accounting period was derived from a mortgage on the security of properties situate in Mysore and the debtor also being resident of that place, the transaction is doubtless part of the money-lending business but is a severable part. It was not interlaced, intertwined or intermixed with other transactions of the assessee and as such is exempt from the tax.

Ahmedbhai Umarbhai v. *Excess Profits Tax Officer*, (1948) 16 I.T.R. 192, referred to.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939, Act VII of 1939 in 66 R. A. 13 Madras of 1946—47 on its file.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondents.

The Court delivered the following

JUDGMENTS : *Satyanarayana Rao, J.*—The question referred to us by the Appellate Tribunal is as follows :

"Whether on the facts and in the circumstances of the case the interest receipt of Rs. 43,299 in question is exempt from excess profits tax as profit of a 'part of a business' accruing or arising in Mysore State within the meaning of the third proviso to section 5 of the Excess Profits Tax Act ?"

The question is confined to the interest receipt of Rs. 43,299. The assessee Messrs. Gokuldas Jamnadas and Company are residents in British India, carrying on money-lending business at Madras. The chargeable accounting period is the period commencing from 9th November, 1942 and ending with 28th October, 1943. During that period the assessee received the sum in question as interest accrued under a loan advanced to Messrs. M. L. Varadamanayya and Sons, Mysore, under a mortgage. The "property" comprised in the mortgage is in Mysore and the deed was executed on Mysore stamp paper and registered at Mysore. This amount was assessed to excess profits tax by the officer on the ground that the interest represented profit accruing and arising in British India to the assessee as it was part of the Madras business, during the chargeable accounting period. The assessee objected to the inclusion of this sum on the ground that under the last proviso to section 5 of the Excess Profits Tax Act, it represented profits which accrued to him in an Indian State, namely, Mysore, as part of his business which has to be deemed to be a separate business under the proviso and the whole of the profits so accrued in respect of that part of the business must be excluded from the computation of the profits. The question, therefore, is whether this sum is a profit of part of the business of the appellant within the meaning of the proviso. The Appellate Tribunal answered the question in favour of the assessee. Hence this reference.

* Case Referred No. 75 of 1946. 14th December, 1949.

Under section 5, the excess profits tax is made applicable to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (1) or sub-clause (2) of clause (*b*) of sub-section (1) of section 4 of the Indian Income-tax Act, 1922, or of clause (*c*) of that sub-section. But for the provisos the Act would apply to the profits of a business of a resident in British India even though such profits accrued or arose to the assessee without British India during such year.

The proviso which arises for consideration in this reference was introduced in the Act by the Excess Profits Act, Second Amendment Act XXIV of 1941. At the same time section 14 of the Indian Income-tax Act was also amended by section 8 of the Indian Income-tax Amending Act, 1941 (Act XXIII of 1941) by inserting in section 4 (2) a new clause (*c*). The object of those two amendments is to make provision in respect of profits or gains accruing or arising to an assessee within an Indian State. Under clause (*c*) of sub-section (2) of section 14 of the Income-tax Act such income, profits or gains accruing within an Indian State would not be assessable to income-tax unless they are received or deemed to be received in or are brought into British India in the accounting year by or on behalf of the assessee. Under the proviso to section 5 of the Excess Profits Tax Act, the Act is not made applicable to any business, the whole of the profits of which accrued or arose in an Indian State and there is a further provision in that proviso that where the profits of a part of a business accrued or arose in an Indian State such part shall, for the purposes of the provision, be deemed to be a separate business, the whole of the profits of which accrued or arose in an Indian State and the other part of the business shall, for all purposes of the Act, is deemed to be a separate business. In other words, if in respect of a part of a business, profits accrued or arose in an Indian State such part is deemed to be a separate business and the profits of such business are entirely excluded from the assessment during the chargeable accounting period.

The point for consideration, therefore, is whether this money-lending transaction of the assessee under which money was advanced to a resident in an Indian State and interest was received could be deemed to be a part of a business within the meaning of the proviso. The contention on behalf of the Crown is that "part of the business" means either a branch or at least a separate part of the organization of the business with separate accounts and a separate office; and, as in the present case, there was only a single transaction in respect of which profits accrued undoubtedly in a Native State, it cannot be treated as part of a business. The dictionary meaning of the word "part" is "portion of an whole" "that which with another makes up the whole." All that the section requires is that it must be a part and that part must earn profits and must be situate within an Indian State. The business of the assessee being money-lending business it is not disputed that this transaction is comprised in that business. But the argument is that the word "part" is used in the restricted sense of either a branch or part of the organization or a unit of the business. The transaction in question certainly earned profits and that in an Indian State. There is no reason for construing the word "part" in the restricted sense, as contended by the learned counsel for the Crown. In section 2 (5) of the Act "business" is defined in an extended sense and takes in the definition of business contained in section 2, sub-clause (4) of the Indian Income-tax Act. Even a single adventure is business under both the definitions and what is more under the definition contained in the Excess Profits Tax Act, even all the business of a person are treated as one single business for the purpose of the Act. If a single adventure could be a business there is no reason for not treating a single transaction of money-lending with a separate capital as evidenced by the principal advanced under the mortgage and that profits accruing as interest under the loan in the Indian State as part of the business. The very object of the two amendments introduced in 1941 in the Excess Profits Tax Act and in the Indian Income-tax Act was to exclude the income, profits and gains which accrued or arose in an Indian State. The transaction in question is undoubtedly part of the business of the assessee.

This clause came up for consideration before the Bombay High Court in *Ahmedbhai Umarbhai* v. *Excess Profits Tax Officer*[1]. The business in that case was the manufacture and sale of oil. The assessee which was a firm resident in British India had three oil mills in Bombay and one at Raichur in the Hyderabad State. Groundnuts were purchased and converted into oil in the mills and sold in and outside British India. With reference to the manufacturing business at Raichur the contention on behalf of the assessee in that case was that it was " part of the business " within the meaning of the proviso to section 5 and, therefore, the profits earned by that business must be excluded from the computation of profits for purposes of excess profits tax. The contention urged by the Advocate-General on behalf of the Commissioner was that as the business consisted of not only manufacture but also sale of oil and as the business at Raichur was only the manufacturing of oil and not a sale it could not be said that that was a part of the assessee's business. In other words, the contention was that there should be a vertical division of the business. It must be both manufacturing and selling in order to constitute the business at Raichur a part of the assessee's business. This contention was rejected by both the learned Judges, Chagla, C.J. and Tendolkar, J. At page 197 the learned Chief Justice observed that the expression " a part of a business " should receive a plain grammatical construction. The learned Chief Justice went on to observe :

> " I should have thought that when a business-man sells an article the acquiring of it is by no means an insignificant part of his business and if he manufactures it with a view to sell it that certainly is not only a part but also a very important part of his business. Therefore I have no doubt in my mind that the activity that the assessee carries on in Raichur is certainly a part of the business of the assessee."

Tendolkar, J., at page 202 in answer to the contention of the Advocate-General on behalf of the Commissioner stated as follows :

> " Taking first the first condition, it is a commonplace to say that carrying on of any business involves a number of operations. It is the case of the Advocate-General that the meaning to be assigned to the words ' part of a business ' in this proviso is not the ordinary dictionary meaning of the word ' part ', *viz.*, a portion only. He says that all the requisite operations constituting a business, only quantitatively less than the whole business can alone form a part of the business. In other words, a part of the business must be a complete cross section of the whole business and not merely one or more of the operations of that business. Applying this to the facts of the case before us, it is his case that if both the manufacture and sale of oil did in part take place outside British India, as it undoubtedly did, in respect of the oil manufactured and sold outside British India, that is a part of the business. But if only manufacture, which is one of the operations of the business takes place outside British India, that is not a part of the business. I see no justification for so restricting the meaning of the word ' part ' in this proviso. The normal meaning of the word is a portion in whatever way carved out and I have no doubt in my mind that any of the operations that go towards a complete business are a part of that business."

If the operation which is part of a business is carried on in a Native State and from that operation profits accrued or arose in a Native State there is no reason for not treating such an operation as part of the business of the assessee. A business consists of innumerable operations, but it is not every operation that constitutes a part under the proviso. The operation must be such or the transaction must be of a nature in respect of which profits accrued and arose in a Native State. The test is that the operation of the transaction should be such as to earn profits in a Native State.

Though it is not an authority on the construction of the section which is binding upon this Court, it is not without interest that this provision is understood by the Central Board of Revenue in the manner indicated above as is made clear by paragraph 24 of the Excess Profits Tax Manual—Notes of Instructions, 2nd Edn., which states :

> " In computing for such a chargeable accounting period the profits of a business part of which arise in an Indian State the profits arising in the Indian State must be excluded from the standard profits as well as from the profits of the chargeable accounting period. "

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1. (1948) 16 I.T.R. 192.

The test recognised in this is the accrual and the arising of the profits in the Indian State and that part which earns such profits is treated as part of the business.

For these reasons, in my judgment, the opinion of the Appellate Tribunal is correct and the question referred must be answered in the affirmative and in favour of the assessee. The assessee is entitled to his costs of this reference which I fix at Rs. 250.

Viswanatha Sastri, J.—This case raises a question relating to the Proper interpretation of the third proviso to section 5 of the Excess Profits Tax Act. For the sake of brevity I shall refer to this statutory provision as the proviso. The facts have been stated in the judgment of my learned brother and need not again be repeated. The argument of Mr. Rama Rao Sahib for the department is that it is not every single transaction relating to a business entered into in an Indian State that can be considered to be " part of a business " and therefore deemed to be " a separate business " within the meaning of the proviso. *Before* the proviso can be invoked the following matters have to be established : (1) There must be an identifiable or recognizable part of a busidess ; (2) profits which accrue or arise from that part ; and (3) that part of the business should be carried on and the profits should accrue or arise in an Indian State. It is not contended before us that the words " part of a business " in the proviso are confined only to a branch where every portion of the main business is carried on and that unless the business operations carried on in an Indian State are of the same character and are carried on in the same way as those which characterise the trade or business carried on in British India, the proviso would be inapplicable. Apart from the business from which profits are contemplated as accruing or arising, it may refer to a business organisation which is either a branch of the business carried on in British India but situate in an Indian State or a distinct and severable part of such business but conducted in an Indian State. Where, for instance, a factory is situate in an Indian State, but the owner is residing and the sales are effected in British India, the factory can rightly be regarded as part of the business, the business itself consisting of the manufacture and sale of goods. Where there are distinct processes either of manufacture or manufacture and sale, the profits resulting from the sale of the goods can be attributed in some measure to each of these processes. In such cases it may be said that they are different parts of the same business which produce a separate profit. The characteristics or attributes of a business must also appertain to the part of the business which is in question such as separate set of accounts, separate capital, separate establishment and so forth. As Mr. Rama Rao Sahib put it in the course of his arguments, you cannot speak of every brick that has gone into a wall as a part of the house. The part of the business must be such as to be capable of being identified as a distinct and severable portion of a business, but nevertheless partaking of the character of a business to which a portion of the total profits could be attributed. This is made clear from the provision that the part of the business contemplated by the proviso must be such as is capable of earning a portion of the profits. It is common both in legislative practice and in mercantile accountancy to separate manufacturing profits from the merchanting or selling profits where the same person is a manufacturer and trader, see *Kirk's case*[1] the *Saskatchewan case*[2] and *Ahmed Bhai Umar Bhai's case*[3]. These decisions proceed on the basis that unrealised profits accrue or arise in the case of a manufacture at the stage when a manufacturing process is complete and before sale of the goods and that enhanced values arising from manufacturing processes could be deemed to be profits, though it is only on sale that the increased value imparted by the manufacturing processes is converted into actual profits. It is this principle that has been given effect to in the proviso.

The present case, however, is somewhat peculiar. The assessee carries on a money-lending business in Madras. The investment which yielded an interest

1. (1900) A.C. 588.
2. (1949) A.C. 36.
3. (1948) 16 I.T.R. 192.

income of Rs. 43,299 during the chargeable accounting period was derived from a mortgage on the security of properties situate in Mysore, the debtors also being residents of that place. The transaction of mortgage was doubtless part of the money-lending business but was a severable part. It was not interlaced, intertwined or intermixed with other transactions of the assessee. The principal amount advanced and the interest earned are definite sums earmarked as pertaining to this particular transaction of mortgage and having no connection with other similar transactions. It is true that so far as income-tax is co-cerned,the sum of Rs. 43,299 received as interest by the assessee would be only one of the many items on the receipt side of the account against which will be set the outgoings and bad debts and the resulting balance alone would constitute the taxable profits of the money-lending business of the assessee. But the proviso makes an exception to the rule that profits derived from a composite business must be viewed as a whole by setting off against the entire receipts the entire outgoings and sanctions an apportionment and adjustment of the profits to the different stages in the scheme of profit making. Section 2 (4) of the Income-tax Act defines "business" as including any adventure or concern in the nature of trade, and section 2 (5) of the Excess Profits Tax Act defines the term even more widely. A transaction of mortgage entered into by a money-lender in the course of his business can be considered to be a part of his business even apart from the definitions above referred to. The expression "deemed to be a separate business" in the proviso means that in contradiction to actual facts a separate business is assumed to exist for the purposes of the proviso. When a thing is "deemed to be" something, the only meaning possible is that where as it is not in reality that something, the statute requires it to be treated as if it were, see The *Commissioner of Income-tax, Bombay* v. *The Bombay Trust Corporation*[1]. Act XXIII of 1941 which added section 14, sub-section (2), clause (*c*) to the Income-tax Act and Act XXIV of 1941 which added the proviso now in question to the Excess Profits Tax Act were pased at the same time and are in *pari materia* and both provisions were designed to exempt business incomes accruing or arising in Indian States from liability to British Indian Income-tax and Excess Profits Tax according to their respective terms. Looking fairly at the language of proviso 3 to section 5 of the Act, I find that it is plain and wide enough to exclude the interest income of the assessee derived from the Mysore mortgage from liability to excess profits tax.

I agree with my learned brother in the answer to the reference and the direction as regards costs.

V. P. S. *Reference answered in the affirmative and in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO, AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Naranappa Naicker .. *Appellant.**

v.

Ramalingam Pillai and others .. *Respondents.*

Limitation Act (*IX of* 1908), *section* 19—*Acknowledgment when effective—Purchaser subsequent to creation of charge—Acknowledgment by purchaser—Whether can save bar of limitation to execution.*

The appellant, a mortgagee decree-holder was seeking to execute the decree against properties in the hands of contesting respondent, the 22nd respondent, who came to be impleaded before decree as legal representative of 5th defendant in the suit. The 15th defendant was the purchaser of properties subsequent to the mortgage. In an execution filed more than 3 years from the date of the order in the last petition the appellant conended that the execution petition was saved from bar of limitation by a letter of acknowledgment passed by the 15th defendant within three years of the present petition. On the question whether the acknowledgment of the purchaser of the property subsequent to the charge could be deemed binding on the charge holder or her legal representative.

Held, that as the person sought to be bound by the acknowledgment was a person who had, prior to such acknowledgment or payment, acquired an interest in the property, the acknowledgment would be not binding upon him, although he making the acknowledgment or payment, was at the time possessed of some interest or other in the properties mortgaged.

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1. (1929) 58 M.L.J. 197 : L.R. 57 I.A. 49 : I.L.R. 54 Bom. 216 (P.C.).

* A.A.O. Nos. 106 and 107 of 1947. 17th Febuary 1950

Under section 19 of the Limitation Act, the 5th defendant or her legal representative the 22nd respondent, could not be treated as a person deriving title or liability from the 15th defendant long prior to whose purchase the charge in favour of 5th defendant had come into existence.

Pavayi v. *Palanivela*, (1940) 1 M.L.J. 766 : I.L.R. 1940 Mad. 872 (F.B.) and *Bank of Upper India Ltd.* v. *Robert Hendes Skinner*, (1942) 2 M.L.J. 559: I.L.R. 23 Lah. 686 (P.C.), relied on.

Appeal against the order of the Court of the Subordinate Judge, Mathurai dated 28th October, 1946, in E. P. No. 191 of 1946 in O. S. No. 76 of 1937, etc.

T. R. Srinivasan and *A. K. Annaswami Aiyar* for Appellant.

K. V. Srinivasa Ayyar for Respondents.

The Judgment of the Court was delivered by

Raghava Rao, J.—The question in these Civil Miscellaneous Appeals is whether the execution petition out of which this appeal arises is barred by time. The Court below has held that it is.

The appellant is a mortgagee decree-holder, who is in the present proceeding seeking to execute the decree against the properties in Schedule D-1 to the plaint in the hands of the contesting respondent, the 22nd respondent, who came to be impleaded before decree as the legal representative of the 5th defendant in the suit. The 15th defendant is the purchaser of the properties subsequent to the morrgage as well as the charge. The present execution petition against the 5th defendant is one presented admittedly more than three years from the date of the order on the last execution petition, namely, 31st January, 1941.

It was contended for the decree-holder in the Court below that the present execution petition stood saved from the bar of limitation by a letter of acknowledgment passed by the 15th defendant Ex. P-1 dated 5th January, 1944. The contention was rejected by the Court below on the ground that Ex. P-1 was not a *bona fide*, but collusive document. The finding of collusion and fraud recorded by the Court below cannot, in our opinion, be accepted. It is not based upon legal testimony, but only upon suspicion. There is no evidence on the side of the contesting respondent at all, the evidence oral and documentary being all on the side of the appellant.

But then, this does not dispose of the appeal in favour of the appellant. The respondent seeks to support the order of the court beolow on the ground that no acknowledgment made by the 15th defendant, the purchaser of the property subsequent to the charge, can be binding on the charge-holder or her legal representative. The contention is that under section 19 of the Indian Limitation Act, the 5th defendant or her legal representative, the 22nd respondent, cannot be treated as a person deriving title or liability from the 15th defendant long prior to whose purchase the charge in favour of the 5th defendant had come into existence. The contention is, in our opinion, borne out by the ruling of a Full Bench of this Court in *Pavayi* v. *Palanivela*[1], to which our attention has been drawn by the learned counsel for the respondent and must, therefore, be accepted whatever the view of this court prior to that ruling.

Mr. Srinivasan for the appellant drew our attention to a good deal of prior authority—the cases in *Lakshmanan Chetti* v. *Muthayya Chetti*[2], *Muthu Chettiar* v. *Muthuswami Aiyngar*[3], and *Narayana* v. *Venkataramanna*[4] which it is unnecessary to consider in view of the Full Bench ruling. The first paragraph, in the headnote to the Full Bench ruling is as follows :

"A mortgagor who has lost all interest in the mortgaged property cannot bind by an acknowledgment under section 19 or by a payment of principal or interest under section 20 of the Indian Limitation Act, 1908, the person on whom his interest has devolved, whether the devolution is of the whole of the mortgaged properties or only a part thereof. In order to be binding on the assignee, the acknowledgment or payment must be made before the person making it has parted with his interest in the property to the assignee."

1. (1940) 1 M.L.J. 766 : I.L.R. 1940 Mad. 872 (F.B.)
2. (1919) 40 M.L.J. 126.
3. (1932) 63 M.L.J. 111 : I.L.R. 55 Mad. 758.
4. A.I.R. 1935 Mad. 899.

It is the second sentence of the first paragraph of the headnote that applies to the present case and applies adversely to the appellant.

Mr. Srinivasan for the appellant contends that what all is decided by this Full Bench ruling is that if the person making the acknowledgment has lost all interest in the mortgaged properties any acknowledgment by him will not be binding upon the person on whom an interest in the mortgaged properties either in whole or in part has devolved already. In our opinion, this is not the way to read the head note to the judgment, which certainly embodies two distinct and different propositions :—

(1) that any acknowledgment or payment by the person making it must be of a person who is interested in the propeties mortgaged at the time that he makes it and (2) that in order that such an acknowledgment may be binding upon the assignee, the assignee must be one, who claims under the person making t e acknowledgment or payment by a title subsequent to such acknowledgment or payment. If the person sought to be bound by the acknowledgment or payment is a person, who has, prior to such acknowledgment or payment, acquired an interest in the property, the acknowledgment or payment will not not be binding upon him, although the person making the acknowledgment or payment is at the time possessed of some interest or other in the properties mortgaged. This will be apparent on a reference to the discussion of the question in the judgment of the Full Bench at pages 882 to 886 top. The learned Chief Justice in the judgment of the Court refers to the cases in *Muthu Chettiar* v. *Muthuswami Aiyangar*[1], *Yagnanarayana* v. *Venkata Krishnarao*[2], and certain other cases and winds up the discussion at the bottom of page 885 and the top of page 886 in the following terms :

"As I have shown, Coutts-Trotter, C. J. and Ramesam, J., in *Yagnanarayana* v. *Venkata Krishnarao*[2] accepted the opinion of Mookerji, J., in *Surjiram Marwari* v. *Barhamdeo Persad*,[3] that, in order to be binding on the assignee, the acknowledgment must be made before the person making it has parted with his interest in the property, and I see no reason to doubt the correctness of this opinion. And if a mortgagor, who has lost all interest in the mortgaged property cannot bind the purchaser of the equity of redemption by an acknowledgment, he cannot bind his assignee by a part payment of interest or principal."

All that we need say with reference to the headnote of the decision of the Full Bench, which we have already reproduced, is that we are not quite so clear whether the principle enunciated in the second sentence of the headnote is applicable to the case of a payment under section 20 as well as to the case of an acknowledgment under section 19. It may be that there is some difference between the two cases because of the difference in language noticeable between section 19 and section 20, the latter of which does not contain the words "by some person through whom he derives title or liability", which occur in the former. It is not necessary for our purpose in the present case to express any final opinion upon the question how far the principle that is enunciated in the second sentence of the first paragraph of the headnote to the Full Bench ruling in *Pavayi* v. *Palanivela*[4], is applicable to the case of a part payment as well as to the case of an acknowledgment.

The view that we have expressed above in regard to what the Full Bench ruling has decided concerning the validity of an acknowledgment by a mortgagor as against a person, who has already acquired an interest in the hypotheca in part or in whole prior to the acknowledgment, gains support from the decision of the Privy Council in *Bank of Upper India. Ltd.* v. *Robert Hercules Skinner*[5], which contains so full and lucid an exposition of the principle applicable at pages 690 and 691 of the report by that very distinguished and learned Lord, Lord Atkin that we cannot resist the temptation of reproducing here the passage concerned. Says his Lordship :

"The question is whether the acknowledgment by a transferor in order to bind the transferee can be given after the transfer of title, or whether the section only applies where the acknowledgment

1. (1932) 63 M.L.J. 111 : I.L.R. 53 Mad. 758.
2. A.I.R. 1925 Mad. 1108.
3. (1905) 1 C.L.J. 337.
4. (1940) 1 M.L.J. 766 : I.L.R. 1940 Mad. 872 (F.B.)
5. (1942) 2 M.L.J. 559 : I.L.R. 23 Lah. 686 (P.C.)

has been made before the transferee has derived his title from the acknowledgor. The matter has been frequently discussed in the Courts in India with conflicting decisions. Their Lordships have had the advantage of having the principal decisions discussed before them by counsel and have no doubt that 'much can be said on both sides'. But it must be remembered that the section is perfectly general, it is not confined to mortgages; it applies to every form of property moveable and immoveable; and it would appear strange that a man in wrongful possession of property may transfer it to a *bona fide* purchaser and that the latter is not quieted in his possession by the lapse of time, but may be defeated by acknowledgments made without his knowledge by the person from whom he derived title. This is a doctrine which Lord Westbury in *Bolding* v. *Lane*, said[1], leads to very extraordinary and alarming consequences. He was dealing with a suggestion that under the Real Property Limitation Act of 1843 an acknowledgment of the mortgagor entitles the first mortgagee to recover all the arrears of the interest out of the land as against the second and subsequent mortgagees, who would otherwise be protected by the statute. 'The Court.' he says, 'is bound by every principle of judicial interpretation to find if possible a construction of the statute which does not involve consequences so inconsistent with natural justice.' This principle was applied to this very section by Mukerji, J.—*Surjiram Marwari* v. *Barhamdeo Parsad*[2] and their Lordships are prepared to adopt the reasoning of that very learned Judge in the present case. In addition to the analogy used by Mukerji, J., of section 19 of the Civil Procedure Code there might be adduced the analogy of admissions under the Indian Evidence Act which are binding if made by persons from whom the parties to the suit have derived their intererest but only if they are made during the continuance of the interest of the person making the statements. The fact that the statute expressly limits the nature of the admission does not detract from the general propoistion that any different result would effect serious injustice."

The view expressed by Mr. Rustomjee in his Commentary, 5th edition, which is before the rulings of the Full Bench and Privy Council above referred to, is no doubt distinctly favourable to the appellant, but cannot be followed after and in view of those rulings. The matter as dealt with in U. N. Mitra's Law of Limitation and Prescription, 7th edn., 1949 (Vol. I) at pages 217 bottom and 218 top, although not quite erroneous, as we consider the exposition of law in Rustomjee's Commentary to be, is not at the same time quite clear. At the bottom of page 217 the commentary says:

"The decision of the Madras High Court in *Yagnanarayana* v. *Venkata Krishnarao*,[3] has has dissented from *Krishnachandra's case*[4] and has emphasised the distinction between cases of acknowledgement and cases of part payment".

So far there is no trouble. The learned commentators then proceed to observe:

"It (the Madras High Court) has held that an acknowledgment by a mortgagor after his interest in the property has ceased will 'only' bind him or 'persons claiming through him' *i.e.*, assignee from him after the acknowledgment."

That proposition too is perfectly clear to our minds, but the cases cited in the footnote to that statement of the law do not include the Full Bench ruling of this Court, although they include the Full Bench ruling of the Nagpur High Court —*Radhakrishan* v. *Babu Hazarilal*[5]. Then comes the sentence which runs as follows:

"It may be regarded as now definitely settled that an acknowledgment made by a mortgagor after he had parted with *all* his interest in the mortgaged property will not bind the prior purchaser from him."

In the footnote to this sentence we have reference made to the Privy Council ruling in *Bank of Upper India Ltd.* v. *Robert Hercules Skinner*[6]. But then, the word "all" in the sentence underlined by us may well raise the question whether if the mortgagor making the acknowledgment has an interest in the property hypothecated, in part, at any rate, his acknowledgment will not be binding upon a prior alienee of a portion of the property. As we have already stated, our opinion is that it will not be. The sentence just extracted by us from Mitra's Commentary is founded upon the last sentence of the paragraph of the Privy Council ruling in the case just cited above at page 691 of the report, which we have not already reproduced and that is:

"On the whole therefore their Lordships come to the conclusion that the acknowledgments made in this case by the mortgagors after they had parted with all their interest to the purchaser do not bind the purchaser, and that the High Court came to a correct conclusion on this point."

1. (1863) De G. J. & S. 122: 46 E.R. 47.
2. (1905) 1 C.L.J. 337 at 343-348.
3. A.I.R. 1925 Mad. 1108.
4. (1905) I.L.R. 32 Cal. 1077.
5. I.L.R. (1944) Nag. 383 (F.B.).
6. (1942) 2 M.L.J. 559: I.L.R. 23 Lah. 685 (P.C.).

This sentence of the Privy Council judgment, in our opinion, has reference only to the facts of the particular case before their Lordships, while the preceding part of the passage, as we have already quoted it, contains a discussion of principle, which makes it immaterial so far as the invalidity of an acknowledgment by the mortgagor as against a prior alienee is concerned, that the mortgagor making the acknowledgment has some interest at the time in the property hypothecated. In Mitra's Commentary then comes the sentence :

"In *Pavaji* v. *Palanivela*[1], a Full Bench of the Madras High Court has held that a mortgagor who has parted with the equity of redemption and the personal remedy against whom has also become barred cannot, by an acknowledgment within the meaning of section 19 or by the payment of interest or principal within the meaning of section 20 bind the person on whom his interest has devolved."

The effect of the Full Bench decision, as so stated, is of course not incorrect, although it may not be an exhaustive statement of the law as laid down by the Full Bench, as we have already made it clear.

In these circumstances, we have come to the conclusion that the order of the Court below is correct, though on a different ground to what the learned Judge below has adopted as the ground of his decision. These C. M. As. accordingly fail and are dismissed, with costs in C. M. A. No. 107 of 1947.

K. C. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE SOMASUNDARAM.

Irulayee Ammal .. *Appellant**

v.

T. V. Murugiah and others .. *Respondents.*

*Civil Procedure Code (V of 1908), sections 47, 144, 151 and Order 21, rule 95—Mortgage suit—Preliminary decree—Application for scaling down—One of the purchasers of properties not joining in the application—*Bona fide *purchasers in good faith—Title of the purchaser whether good.*

A mortgage suit was filed by second respondent herein for recovery of amount due under mortgage executed by defendants 1 to 4 in the suit. Defendants 5 to 8 and 9 and 12 were purchasers of portions of the hypotheca. The 13th defendant was a purchaser of 3 houses from 9th defendant and 14th defendant is a purchaser of one of them from 13th defendant. The 29th defendant, the contesting first respondent, was the legal representative of the 14th defendant. A preliminary decree was passed. Petitions for scaling down of debts under Madras Act IV of 1938 were made and they were also scaled down. The 13th defendant did not join in them. Subsequently he filed a petition under Order 21, rule 2, Civil Procedure Code. On rejection of it he filed an appeal. Pending disposal of it he also prayed for stay of execution in bringing properties to sale by decree-holder. The High Court passed a conditional order. There was no stay with regard to property sold to 14th defendant. Therefore the property was sold and decree-holder purchased the same. The 29th defendant did not take steps to have the debt scaled down so far as he was concerned nor was he a party to the appeal. The first respondent (29th defendant) put in a petition for re delivery of the house purchased by the decree-holder and sold subsequently to the appellant herein. The petition was filed under sections 47, 144, and 151 and Order 21, rule 95, Civil Procedure Code.

On the question whether the appeal was competent in a matter arising out of an order under section 151, Civil Procedure Code.

Held, that as the case related to the discharge and satisfaction of the decree it fell under section 47, Civil Procedure Code and therefore appealable.

Held also, on the question whether the 29th defendant could dispossess the appellant who was a purchaser from the decree-holder, that so far as 29th defendant was concerned the decree was voidable as he could have resisted execution by claiming benefit under the Act IV of 1938. He did not choose to do so and the appeal to the High Court was only by the 13th defendant and though the effect of this judgment may enure to his benefit, because he did not oppose the execution of the decree he cannot now come forward and call upon the appellant to deliver possession of the property purchased by him *bona fide*, and in good faith.

Case-law reviewed.

Appeal against the order of the Court of the Subordinate Judge, Mathurai, dated 8th April, 1947, in E. A. No. 627 of 1946 in E. P. No. 138 of 1943 in O. S. No. 20 of 1936.

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1. (1940) 1 M.L.J. 766 : I.L.R. 1940 Mad. 872 (F.B.).

* A. O. No. 308 of 1947. 7th December, 1949.

V. Ramaswami Aiyar for Appellant.

K. V. Ramachandra Aiyar, V. Meenakshisundaram, P. K. Narayanaswami, K. Viraswami and *K. N. Kasiviswanathan* for Respondents.

The Judgment of the Court was delivered by

Somasundaram, J.—This is an appeal against the order in E. A. No. 627 of 1946, in E. P. No., 138 of 1943, in O. S. No. 20 of 1936, on the file of the Subordinate Judge's Court, Mathurai.

The circumstances under which this appeal is preferred are these. O. S. No. 20 of 1936 was filed by the plaintiff, the second respondent herein, for recovery of the amount due under a mortgage executed by defendants 1 to 4 in the suit. Defendants 5 to 8 and 9 to 12 are purchasers of portions of the hypotheca. The 13th defendant is a purchaser of three houses from the 9th defendant and the 14th defendant is a purchaser of one of the three houses from the 13th defendant. The 29th defendant, the contesting first respondent in this appeal, is the legal representative of the 14th defendant. On 13th September, 1937, a preliminary mortgage decree was passed in O. S. No. 20 of 1936. Petitions for scaling down the debt under Madras Act IV of 1938 were filed by the mortgagors, defendants 1 to 4 and the purchasers defendants 5 to 8 and defendants 9 to 12. The applications of the mortgagors and of defendants 9 to 12 were allowed. On the ground that defendants 5 to 8 were not agriculturists their applications were rejected. With regard to the defendants whose applications were allowed, the decree amount was scaled down to Rs. 36,000. Defendants 5 to 8 appealed and the appeal was allowed by the High Court, so that after this appeal was allowed by the High Court, the total amount payable by defendants 1 to 12 was Rs. 36,000. There were other defendants with whom we are not concerned in this appeal and there was a balance amount due under the decree. The scaled down amount of Rs. 36,000 was deposited by the mortgagors and others and so far as they were concerned, satisfaction was entered. At that time the 13th defendant who purchased three houses from the 9th defendant did not join in filing the petition for scaling down the debt. Subsequently he filed E. A. No. 91 of 1944 under Order 21, rule 2, Civil Procedure Code. His application was rejected on 22nd April, 1944. He then preferred an appeal to the High Court, C. M. A. No. 410 of 1944. Pending disposal of that appeal, he prayed for stay of execution of E. P. No. 138 of 1943, by the decree-holder in bringing the properties to sale for the balance of the decree amount. The High Court in C. M. P. No. 3640 of 1944 passed a conditional order of stay on his (13th defendant's) undertaking to deposit Rs. 300 on or before 14th October, 1944. In passing the said conditional order, they limited stay of execution to the properties in the possession of the 13th defendant. There was thus no stay with regard to the execution as against the property sold to the 14th defendant and which was in her possession. The decree-holder therefore executed his decree against this property and on 18th December, 1944, this house was brought to sale and the decree-holder purchased the same. The sale was duly confirmed and delivery was effected to him on 20th March, 1945. On 8th January, 1946, judgment was delivered in C. M. A. No. 410 of 1944 allowing the appeal holding that the decree should be deemed to have been discharged even as against the 13th defendant inclusive of defendants 14 and 29. It may be mentioned here that the 29th defendant did not take any steps to have the debt scaled down so far as he was concerned nor was he a party to the appeal here. The decree-holder, after getting possession of the property, sold it to the appellant herein on 3rd July, 1946. The first respondent, *i.e.*, the 29th defendant taking advantage of the decision of this Court, in C. M. A. No. 410 of 1944, put in this petition for re-delivery of the house purchased by the decree-holder and sold subsequently to the appellant herein. In the lower Court the petition was filed under sections 47, 144 and 151 and Order 21, rule 95, Civil Procedure Code. The lower Court held that section 144 did not apply but held under section 151 that the first respondent was entitled to the benefits of restitution and on the question as to whether it can be allowed against the appellant

herein, held that where a party is bound to restore possession his legal representatives or assigns are equally liable. It also held that the principle of section 52 of the Transfer of Property Act applies and that the transfer was affected by *lis pendens*. Against the said order, the purchaser from the decree-holder who was the 2nd respondent in the lower Court has filed this appeal.

A preliminary objection is raised by learned counsel for the respondent that the order of the lower Court being one under section 151, Civil Procedure Code, no appeal lies and this appeal is therefore incompetent. In support of this contention he relies on *Palaniappa Chettiar* v. *Ramanathan Chettiar*[1]. Learned counsel for the appellant relying on *Rami Reddi* v. *Satyam*[2], contends that this is really an application under section 47, Civil Procedure Code and therefore an appeal lay. In the above decision at page 638 Wadsworth, J., observes that granting that an order under the inherent powers of the Court is not *per se* appealable, if that order is in fact an order passed on an application made by one of the parties as against another party and relating to the execution, discharge or satisfaction of the decree, it falls under section 47 and for that reason it is appealable. He further holds that an order under section 151 for something analogous to restitution would also fall under section 47 and be subject to an appeal and as pointed out in *Somasundaram* v. *Chockalingam*[3], section 47, Civil Procedure Code, covers all cases of restitution. Learned counsel also relies on *Unnamalai Ammal* v. *Mathan*[4] to show that section 47 governs such restitution and therefore the order is appealable. We think this is a case which relates to the discharge and satisfaction of the decree and falls under section 47, Civil Procedure Code, and therefore the order is appealable.

The next and the more important question is whether the 29th defendant can dispossess the appellant who was a purchaser from the decree-holder. It was not pleaded in the lower Court that he was not a *bona fide* purchaser from the decree-holder nor is that fact disputed here. The question therefore is how far the purchase is affected by the order of the High Court in the Civil Miscellaneous Appeal. It may be stated here that at the time the decree-holder brought the property to sale, there was no stay of sale in respect of this house and the decree therefore so far as this property is concerned can validly and legally be executed. The Court therefore had undoubted jurisdiction to sell the property. There was no flaw in the decree so as to fix the purchaser with any notice of such a defect. In such cases, it has been held that the equitable right to set aside such a decree cannot prevail against the rights of the subsequent purchaser for value without notice. In *Marimuthu Udayan* v. *Subbaraya Pillai*[5], the learned Judges observe at page 235:—

> "A purchase by the decree-holder, without the permission of the Court, being, under section 294, Civil Procedure Code (Order 21, rule 72 of the present Code), not void, but only voidable, it cannot for the above reasons be avoided against a transferee in good faith for valuable consideration, and this is in accordance with the principle of law that as a general rule, the right to avoid an avoidable contract is determined when the vendee has, before the vendor's election to avoid, transferred the property to a purchaser in good faith for valuable consideration."

In *Sheik Ismail Rowther* v. *Rajah Rowther*[6], it has been held that following *Marimuthu Udayan* v. *Subbaraya Pillai*[5], that a party claiming through a Court purchaser is entitled to rely upon the plea that he is a *bona fide* purchaser for value without notice. They further observed:

> "Assuming that the first defendant in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings were only voidable and a *bona fide* purchaser from him is entitled to rely on his title as such. The plaintiff had only an equity to set aside the proceedings which were the result of fraud or misrepresentation, and that equity cannot be allowed to prevail against persons in the position of the appellants."

Again in *Rhodes* v. *Padmanabha Chettiar*[7], Sadasiva Aiyar and Napier, JJ., state the law as follows:

1. (1934) 67 M.L.J. 49: I.L.R. 57 Mad. 849.
2. A.I.R. 1936 Mad. 636.
3. (1916) I.L.R. 40 Mad. 780.
4. (1917) 33 M.L.J. 413.
5. (1902) 13 M.L.J. 231.
6. (1906) 17 M.L.J. 165: I.L.R. 30 Mad. 295.
7. (1914) 1 L.W. 1033.

"In *Shiolal Bhagvan* v. *Shambu prasad*[1], the following passages occur: 'A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has on that investigation properly decreed a sale. He has no right to call upon the Court to protect him from a title not in issue in the cause and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate the title, although the decree may be erroneous and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubt on sales under the authority of the Court which would be highly mischievous.'

The effect of the reversal of a decree on a sale held under it was considered by the House of Lords in *Tommey* v. *White*[2]. Lord Brougham in delivering his opinion said: 'We cannot set aside the sale, for the sale was under the decree of the Court, to a *bona fide* purchaser, there being no fraud, and consequently the setting aside that sale is utterly and absolutely out of the question; the sale must stand.'"

Referring to *Sheik Ismail Rowther* v. *Rajah Rowther*[3], they state:

"It was held that even where the decree-holder himself purchases in Court auction and had been guilty of fraudulent proceedings in obtaining the sale, the title of a third party who had no notice of any defect in the decree and who purchased it *bona fide* from the decree-holder purchaser cannot be impeached."

Referring to *Zainulabdin* v. *Muhammad Ashgar Ali*[4], they state:

"Their Lordships of the Privy Council said that *bona fide* purchasers who were no parties to the decree which was then valid and in force had nothing to do further than to look to the decree and to the order for sale."

This has been referred to again in *Kannuswami Chetti* v. *Rahimat Ammal*[5]. There Sundaram Chetty, J., says:

"In *Zainulabdin Khan* v. *Muhammad Ashgar Ali*[4], their Lordships of the Privy Council have recognised the distinction between the cases of *bona fide* purchasers in Court auction who are no parties to the decree and the cases of the decree-holders themselves being the Court auction-purchasers. It was held that a sale which had taken place in execution of a decree in force at the time could not afterwards be set aside as against a *bona fide* purchaser not a party to the decree, because on further proceedings that decree was subsequently reversed by an appellate Court. In another case the Privy Council held that where property was sold in execution of a valid decree and purchased *bona fide* by a third party, the existence of a cross-decree for a higher amount in favour of the judgment-debtor would not support a suit by the latter against the purchaser to set aside the sale."

The above decisions clearly lay down the proposition that where a decree is voidable and is not avoided before the property was transferred to a purchaser in good faith and for valuable consideration, the title of the purchaser to the property cannot be affected by any subsequent decision affecting the decree. Learned counsel for the respondent relied on *Apparao Bahadur* v. *Seetharamiah*[6], which is referred to in *Balarama Reddi* v. *Govinda Reddi*[7]. The first is a case where the decree-holder purchased the property in execution of an *ex parte* decree which was set aside. The learned Judges held that the sale became *ipso facto* void. They observed:

"The decree-holder was the party having the conduct of the suit and it is difficult to see what equities can arise in his favour in cases where he obtains an *ex parte* decree which is set aside on the ground that the defendants were not served. *Cases where strangers have purchased in execution are distinguishable as also where the purchaser is a defendant. It is unnecessary to consider whether in cases of purchase by defendant, the sale is voidable or absolutely void.*"

In *Balarama Reddi* v. *Govinda Reddi*[7], Happell, J., has held that a sale held in execution of an *ex parte* decree is void when the *ex parte* decree is set aside. These two cases, as pointed out in *Apparao Bahadur* v. *Seetharamiah*[6], are distinguishable on the ground that the decree itself is void. The distinction, as already stated, is that where a decree is voidable and unless avoided, the title which passed under the decree in force cannot be disturbed.

Coming to the facts of this case, it is clear that the decree so far as the 29th defendant was concerned is only voidable as he could have resisted execution by claiming the benefit under Madras Act IV of 1938. He did not choose

1. (1905) I.L.R. 29 Bom. 435.
2. (1850) 3 H.L.C. 49.
3. (1906) 17 M.L.J. 165 : I.L.R. 30 Mad. 295.
4. (1887) I.L.R. 10 All. 166.
5. (1932) 65 M.L.J. 548.
6. (1915) 2 L.W. 1066.
7. (1946) 2 M.L.J. 108.

to do so and the appeal to the High Court was only by the 13th defendant and though the effect of this judgment may enure to the benefit of the 29th defendant, still at that time, as he did not oppose the execution of the decree, he cannot now come forward and call upon the appellant who has purchased the property *bona fide* and in good faith from the decree-holder to deliver possession of the same. We therefore hold that the purchaser has acquired good title to this property.

No other question arises in the case.

In the result, the order of the lower Court is set aside and the appeal is allowed with costs here and Court below as against the 1st respondent.

K. C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Jonnagadla Seethamma and another .. *Appellants**

v.

Jonnagadla Veeranna Chetty and others .. *Respondents.*

Hindu Law—Joint family—One member separating himself and property partitioned off for him—Status of remaining members—Widow of coparcener—Status of—Interest under Hindu Women's Rights to Property Act—Nature of.

When a member of a Hindu joint family separates himself from other members of the joint family and his share in the property is partitioned off for him, the remaining coparceners do not necessarily become separate in status and they may continue to be coparceners without any special agreement amongst themselves and to enjoy as members of a joint family what remained after such a partition of the family property. Whether the remaining members continue to be joint or not is a question of fact to be decided *inter alia* from the way in which they carried on their affairs after the departure of the previous coparcener.

Palani Ammal v. *Muthuvenkatachala*, (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 I.L.R. 48 Mad. 254 (257 and 258) (P.C.) and *Balkrishna* v. *Ramkrishna*, (1931) I.L.R. 53 All. 300 (306 and 307), relied on.

The status of a Hindu widow of a deceased member of a joint family governed by the Mitakshara under the provisions of the Hindu Women's Rights to Property Act is not that of a coparcener, but that of a member of the joint family with certain special statutory rights. The death of a coparcener who is a member of a Hindu joint family does not effect a severance or disruption of the joint family, merely because he leaves behind him a widow who has certain statutory rights under the Act. The widow cannot in any sense be regarded as the widow of the divided member. The result is that the joint family will continue as before except that the widow would have a special limited statutory right. Because the joint family continues, its well-recognised incidents will also continue, namely, the right of the kartha to represent the family and to be in management of its affairs. The widow cannot demand from the kartha an account of the management of the joint family except in special circumstances, *e.g.*, fraud, misappropriation, etc. The widow cannot be said to be a tenant in common with the surviving coparceners. The kartha is not liable to render an account of his management for any period prior to the issue of notices demanding partition.

Appeals against the decree of the Court of the Subordinate Judge of Bellary, dated 11th July, 1947, and passed in O. S. No. 3 of 1947.

P. Somasundaram and *P. Suryanarayana* for Appellants in Appeal No. 739 of 1947 and Respondents in Appeal No. 758 of 1947.

V. T. Rangaswami Ayyangar and *K. Kalyanasundaram* for Respondent in Appeal No. 739 of 1947 and Appellant in Appeal No. 758 of 1947.

The Judgment of the Court was delivered by

The Chief Justice.—These two appeals arise out of the same suit in O. S. No. 12 of 1945 originally instituted in the Court of the District Judge, Bellary and thereafter transferred to the file of the Court of the Subordinate Judge, Bellary and numbered as O. S. No. 3 of 1947. A. S. No. 739 is by the plaintiffs and A. S. No. 758 by the first defendant. The suit was for partition of immoveable and moveable properties and connected reliefs. The first plaintiff is the widow of one Rao Bahadur Papayya Setty who died on 21st October, 1937. She was his second

* Appeals Nos. 739 and 758 of 1947. 21st November, 1949.

wife. The second plaintiff is his son and defendants 2 and 3 are his daughters by the first plaintiff. He had also by her two other daughters, namely, one Saraswatamma (P. W. 3) married on the date of the institution of the suit and one Triveni who died before suit. By his first wife Papayya Setty had two sons, namely, the first defendant and one Seetharama Setty. After his death, the members of the family continued to be joint till the end of August, 1940, when Seetharama Setty left the family taking a quarter share of the family properties. On 28th August, 1940, Seetharama Setty executed what is styled a deed of relinquishment and a release by way of partition in favour of the first defendant and the two plaintiffs (Exhibit P-1). Though styled as a deed of relinquishment, it is common ground that it was really in the nature of a family settlement. The terms of the settlement briefly were as follows: Seetharama Setty took towards his one-fourth share the properties described in Schedule A to the document and the properties described in Schedule B thereto were taken by the remaining three members of the family. These were left in the possession of the first defendant who was the manager of the family. Seetharama Setty relinquished all his rights to the B Schedule properties as well as to the jewels which were on the person of his sister-in-law, *i.e.*, the wife of the first defendant and on the person of his step-mother the first plaintiff. He was declared to be not liable for the expenses of the marriages of his step-sisters, namely, the daughters of Papayya Setty by the first plaintiff and it was agreed that the first plaintiff should meet the expenses of their marriages. The only right which Seetharama Setty reserved to himself was the right which he may have after her lifetime in the share of the properties to which the first plaintiff was entitled. The document was signed also by the first plaintiff and the first defendant for himself and as guardian of his brother the second plaintiff. As some of the contentions of either side are based upon the language of the clauses of this deed, they will be set out later on. The first and second plaintiffs continued to remain in the family house along with the first defendant till September, 1944, though the relations between the first plaintiff and the first defendant were not very cordial for some time prior thereto. It is common ground that on or about 19th September, 1944, the first plaintiff left the family house with the second plaintiff and her unmarried daughters. Saraswatamma, her eldest daughter, who was married by the time and her husband continued to live in the family house for a few days thereafter, but they too left the house subsequently. On 21st September, 1944, the first plaintiff through her advocate issued two notices to the first defendant claiming partition of the family properties on her behalf and on behalf of her minor son. There was a reply by the first defendant's advocate on the 30th September, 1944. The suit was instituted on the 24th February, 194 .

The plaintiffs claimed a two-third share of the moveable and immoveable properties set out in Schedules A to C to the plaint and the family business carried on by the first defendant. The first plaintiff claimed a third share therein absolutely. The plaintiffs prayed that a decree may be passed dividing all the moveables and immoveable properties shown in Schedules A to G by metes and bounds into two parts and one part respectively, that an auditor may be appointed to take accounts of the profits of the joint family business carried on by the first defendant from 1st September, 1940, up to date on behalf of the family, that an account may be taken of the fraud and misappropriation committed by the first defendant, that a decree may be passed for the amount found due and that a commissioner may be appointed for effecting a division of the properties. Schedule A comprised house properties, Schedule B agricultural lands, Schedule C gold and silver and precious stones, furniture and other articles and cash. B Schedule related to outstanding due to the family of which the mortgages were separately set out in another Schedule E. F Schedule comprised furniture. The machinery described in G Schedule must admittedly be treated as a part of the family house, being in the nature of fixtures. It is not necessary to traverse in detail the pleas raised by the first defendant in his written statement as it will be more convenient to take up the items of dispute between the plaintiffs and the first defendant *seriatim* and deal with the contentions

of both the parties in respect of each dispute. The learned Subordinate Judge passed a preliminary decree directing that the houses except item 5 of Schedule A, all the lands described in Schedule B, all the items in Schedules C, F, and G, be partitioned into three equal shares, that accounts be taken as regards the outstandings, that the amounts realised from the debtors either by the first defendant or by the Receiver be ascertained and the first defendant be liable to account for the realisations made by him, that a commissioner be appointed to go through the accounts and ascertain the family liabilities. In respect of one debt, however, namely, the debt due to one Virupakshappa, the liability of the plaintiffs for the same was kept open for decision in the suit filed by the creditor to which plaintiffs and the first defendant were parties. The first defendant was directed to render an account of his management from the date of Exhibit P-1, 28th August, 1940, and if it was found that the first defendant was in possession of any monies, the plaintiffs will be entitled to get two-third share of the same. Defendants 2 and 3 were to be maintained by the estate till their marriages, and a charge was created to the extent of Rs. 20,000 against the first plaintiff's share for their marriage expenses. The debts due by the family were to be ascertained by a commissioner after going through the accounts, and had to be borne in three shares by the first plaintiff, second plaintiff and first defendant.

Mr. P. Somasundaram, the learned advocate for the plaintiffs, raised several contentions in their appeal. The first two depend upon the terms of Exhibit P-1. According to him, that deed effected a severance in status *inter se* between the first plaintiff, second plaintiff and the first defendant and the first plaintiff became entitled to a third share of all the properties including the agricultural land. There is very little in the language of the deed and still less in the evidence on record to support the contention of the appellants that when Seetharama Setty left the family taking his fourth share, there was a severance between the first plaintiff, the second plaintiff and the first defendant *inter se*. The family properties were divided into two schedules, A and B, of which the properties in Schedule A were allotted to Seetharama Setty for his one-fourth share and the properties in Schedule B were left for the remaining three members of the family. Clause 3 of the deed provided that these properties may be left in the possession of the first defendant as the family manager. There was no division of the properties in Schedule B into three shares. It is now well established that when a member of a joint family separates himself from other members of the joint family and his share in the property is partitioned off for him, the remaining coparceners do not necessarily become separate in status and they may continue to be coparceners without any special agreement amongst themselves and to enjoy as members of a joint family what remained after such a partition of the family property. Whether the remaining members continued to be joint or not is a question of fact to be decided *inter alia* from the way in which they carried on their affairs after the departure of the previous coparcener (see *Palani Ammal* v. *Muthuvenkatachala*[1] and *Balkrishna* v. *Ramkrishna*[2]). In this case there is clear evidence that the remaining members continued to be joint even after the execution of Exhibit P-1. It is sufficient to refer to the allegation in the plaintiffs' notices which preceded the suit, Exhibits P-2 and P-2 (a) that after the separation of Seetharama Setty, the rest of the family continued to be joint as before. The entire plaint proceeds on the footing that both the plaintiffs and the defendants were members of a Hindu joint family in joint possession of the family properties. The business is described as the ancestral family business which the first defendant was conducting on behalf of all the members. In paragraph 18 it is definitely stated that the "joint family" had absolutely no debts whatsoever. We have no hesitation in holding that there was no division in status between the plaintiffs and the first defendant until the date of the issue of the notices by the first plaintiff in September, 1944.

1. (1924) 48 M.L.J. 83 : L.R. 52 I.A. 83 : I.L.R. 48 Mad. 254 at 257 and 258 (P.C.).

2. (1931) I.L.R. 53 All. 300 at 306 and 307.

Mr. Somasundaram's contention that the first plaintiff is entitled to an absolute interest in a third share of the suit properties is based entirely on the terms of Exhibit P-1. Under the Hindu Women's Rights to Property Act, her interest would only be the limited interest of a Hindu widow. But it is contended that under clause 3 of Exhibit P-1 which was in the nature of a family settlement, an absolute estate was conferred on her. The material portion of clause 3 relating to this contention is as follows :—

"I or my heirs shall have no right to or interest in them (Schedule B properties). You are entitled to enjoy the said properties with full and absolute rights."

We do not agree that understood in its proper context, the last sentence above cited was intended to confer an absolute estate on the first plaintiff. In and by the clause of which it is a part, Seetharama Setty was relinquishing all his rights to the properties in B Schedule and the only reservation was that covered by paragraph 6. After stating that he and his heirs shall have no right to the properties in Schedule B, there is the counterpart of the statement that the other members of the family are entitled to enjoy them without any claims by him. It is in this sense that the words "with full and absolute rights" should be understood. Apart from this clause, there are two other clauses which make the intention of the parties indubitably clear as regards the nature of the estate to which the first plaintiff was entitled. These clauses are clauses 5 and 6, the relevant portions of which are as follows :—

"5. . . . . . * All of us have unanimously agreed and arranged that our step-mother should meet the expenses of the marriages of our sisters aforesaid from out of her share of B Schedule properties which has passed to her according to the present Hindu Law in force. . . . .

6. Reserving the right which I may have, according to the then prevailing Hindu Law, after the lifetime of my step-mother Seethamma, the third individual of us, in regard to her right under the Hindu Law now in force, that is to say, excepting such right, I have relinquished in your favour all the remaining other rights under this document . . . ."

Obviously the reference to "the present Hindu Law in force" is to the provisions of the Hindu Women's Rights to Property Act, and under that Act there could be no question of the nature of the estate to which the first plaintiff became entitled on the death of her husband. Reading the entire document, it is clear that no larger rights were conferred on the first plaintiff than the rights which she was entitled to under the law. Mr. Somasundaram relied upon the obligation laid on the first plaintiff to meet the marriage expenses of her four daughters from her share as supporting his contention that the parties must have intended to confer an absolute estate on her. Otherwise, the allotment of a share to her would be practically illusory in view of the large amount of money needed for the expenses of the marriage. In our opinion, this consideration cannot affect the construction of the language of Exhibit P-1. We agree with the learned Subordinate Judge that the first plaintiff is not entitled to an absolute estate in the third share of the suit properties.

It must, however, be mentioned that this finding would not prevent the first plaintiff from alienating a proper and reasonable portion of the properties allotted to her for the money required for the marriage expenses and the alienee would be entitled to the property conveyed to him absolutely. This is only in consonance with the general Hindu law under which a Hindu widow can convey full title in her husband's property by an alienation for necessary purposes.

* * * *

[His Lordship after dealing with certain matters not necessary for the purposes of this report, proceeded.]

The only question which remains relates to the first defendant's liability to account for his management for a period prior to the institution of the suit or probably prior to the issue of the notice calling for a partition. The learned Judge has directed him to render an account of his management from the date of Exhibit P-1, *i.e.*, 28th August, 1940. Apparently he is to render an account to both the plaintiffs. In his judgment, however, he held that the first plaintiff should be

deemed to be a tenant-in-common to the extent of her interest in the property, but the second plaintiff was a coparcener with the first defendant and therefore the first defendant would be liable to render an account to *her* in respect of *her share* of the properties. Mr. Rangaswami Ayyangar for the first defendant takes objection to the decree in so far as it makes the first defendant liable to render an account of his management from the date of Exhibit P-1 either to the first plaintiff or to the second plaintiff. So far as the second plaintiff is concerned, the learned trial Judge himself did not hold that the first defendant was liable to render an account, but evidently as he was directing him to render an account to the first plaintiff, he thought that the second plaintiff also might get the benefit of it. But that course is indefensible. Under the Hindu Law except in special circumstances, a coparcener has no right to call upon the manager to render an account of his management so long as the undivided status continues. He is not entitled to his share of the income for any period anterior to the date of the disruption of the joint status. The decree as drafted declares that both the plaintiffs will be entitled to get two-third share of any moneys that may be ascertained to be in the possession of the first defendant as a result of the enquiry into his management from the date of Exhibit P-1. In no event can the second plaintiff be entitled to such a relief and we did not understand Mr. Somasundaram maintaining this right. The question presents some difficulty so far as the first plaintiff is concerned. The learned Subordinate Judge held that the first plaintiff could not be deemed to be a coparcener along with the second plaintiff and the first defendant and therefore she should be regarded as a tenant-in-common. We have not been referred to any direct authority on the point. We shall therefore refer to a few decisions in which the nature and incidents of the special statutory right conferred on a Hindu widow by the Hindu Women's Rights to Property Act were discussed. In *Saradambal* v. *Subbarama Ayyar*[1], Venkataramana Rao, J., held that the property so taken by a Hindu widow is liable for the payment of her husband's debts and is liable to be attached by her husband's creditors. The learned Judge points out that except for the restrictions on her powers by clause (3) of section 3 of the Act, the widow takes the husband's interest subject to the rights and obligations to that interest and that interest was the interest of an undivided member of a joint family in the joint family property.

> "That clause leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's interest."

In *Natarajan Chettiar* v. *Perumal Ammal*[2], the widow of the payee of a promissory note endorsed the note in favour of another. It was held by Horwill, J., that the endorsee need not procure a succession certificate in favour of the widow before instituting a suit on the note. The basis of his decision was that though the widow does not obtain the right given under the Act by survivorship, she does not obtain her right by inheritance either. The effect of section 3, clauses (2) and (3), in the learned Judge's opinion, may be regarded

> "As a survival of the husband's *persona* in the wife giving her the same rights as her husband had except that she can alienate the property only under certain circumstances."

She was of course not a coparcener before her husband's death and she was not one afterwards. The next decision to which we refer has an important bearing on the question in issue. That is also a decision of Horwill, J., in *Satyanarayanacharlu* v. *Narasamma*[3]. In that case a suit was brought on a promissory note by the son of the payee. It was found that the debt sued on was a debt due to the family and not to the payee as separate property. The defence was that under the Hindu Women's Rights to Property Act, the widow became entitled to a half share of the property and the plaintiff (the son) was therefore not entitled to bring the suit without impleading her. The lower Court accepted the defence plea and passed a decree for half the amount as the plaintiff's share in the debt. The learned Judge held that the defence plea was not maintainable and passed a decree

1. (1941) 2 M.L.J. 862 : I.L.R. 1942 Mad. 630.
2. (1942) 2 M.L.J. 668.
3. (1943) 2 M.L.J. 282.

in favour of the plaintiff for the full amount claimed. The *ratio decidendi* is contained in the following observations :—

"The effect of the death of a coparcener with regard to property other than agricultural land is that the widow stands in the shoes of her deceased husband, and that although she is not a coparcener, she has the rights of her husband, who was a coparcener, she is a member of the joint family and the son is the proper person to bring a suit on behalf of the joint family of which his mother is a member."

In *Kallian Rai* v. *Kashi Nath*[1], a similar position was reached by a Division Bench of the Allahabad High Court. In that case also the suit was on a promissory note by the son of the payee who had died leaving behind him besides the son the plaintiff, two widows and a grandson. It was proved by evidence that the payee and his son and grandson were members of a joint Hindu family and that the plaintiff and his son still continued to be members of a joint family and after the death of his father the plaintiff was the *kartha* of the family. In such circumstances, the learned Judges overruled the plea of the defendants that it was not open to the plaintiff the son alone to sue on the note without impleading the widows as well. The learned Judges held that so long as a partition had not been made at the instance of the widow in exercise of the right conferred on her under sub-section (3) to section 3 of the Act, the status of the joint Hindu family continues and the widow is capable of being represented in business transactions and in suits by the *kartha* of the family. We are in entire agreement with what the learned Judges said in that case as regards the effect of the provisions of the Act. They said :—

"The Act was intended to give better rights to women in respect of property—that is the preamble to the Act—but there is no indication that the Act intended to interfere with the established law relating to joint family. Whatever inroads it may have made on the doctrine of survivorship, it does not effect a statutory severance or disruption of the joint family. The widow as a member of a joint Hindu family is to have the same interest in the joint property as the deceased husband had and this devolution does not otherwise affect the joint family status unless the widow availing herself of the provisions of sub-section (3) claims a partition. As long as she does not do so, the status of a joint Hindu family continues and although she may not be a coparcener with the other sharers as was held in In re *Hindu Women's Rights to Property Act*[2], in the sense that the principle of survivorship no longer subsists, it cannot be said that she is not a member of a joint Hindu family as long as there is no partition."

In our opinion, the status of a Hindu widow of a deceased member of a joint family governed by the Mitakshara under the provisions of the Act is not that of a coparcener, but that of a member of the joint family with certain special statutory rights. The death of a coparcener who is a member of a Hindu joint family does not effect a severance or disruption of the joint family, merely because he leaves behind him a widow who has certain statutory rights under the Act. The widow cannot be regarded in any sense as the widow of a divided member. The result is that the joint family will continue as before except that the widow would have a special limited statutory right. Because the joint family continues, its well-recognised incidents will also continue, namely, the right of the *kartha* to represent the family and to be in management of its affairs. We do not understand the effect of the Act is to confer larger rights on the widow of a deceased coparcener than the rights which the coparcener certainly would have been entitled to if he were alive. Now, a coparcener cannot demand from the *kartha* an account of the management of the joint family except in special circumstances, *e.g.*, fraud, misappropriation, etc. It does not stand to reason that though the coparcener would not have that right, his widow would have it. Some of the anomalies and difficulties which would arise by holding that the widow of a coparcener is in any sense of the term a tenant-in-common with the surviving coparceners are well described by the learned author of the 10th Edition of Mayne's Hindu Law at page 721 :—

"To hold that the widow of a coparcener who takes his interest on his death is strictly a tenant-in-common with the coparcenary body is not to give full effect to the words in section 3 (2), according to which she is to have 'in the property the same interest as he himself had' apart from the grave complications which it will involve. On that view, she will be entitled to an account and for a definite share of the income, while the others will not be; more than that, it will lead to anomalies and hardships in connection with the allotment of shares; and even before partition there would be separate management and representation and separate incurring of debt. But evidently the intention of the Act is only to interrupt survivorship and to protect the right of a widow so that she may have the same interest as if she continued the legal *persona* of her husband till partition."

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1. I.L.R. (1943) All. 307.

2. (1941) 2 M.L.J. 12 : 4 F.L.J. 1 (F.C.).

We therefore hold that the first defendant is not liable to render an account of his management for any period prior to the issue of the notices Exhibits P-2 and P-2 (*a*), *i.e.*, 21st September, 1944, either to the first plaintiff or to the second plaintiff. The decree will be modified accordingly. No other point was raised in this appeal by the first defendant.

So far as the costs of the two appeals are concerned we think the proper order to make is to direct the parties to bear their own costs, because the plaintiffs as well as the first defendant have partly failed and partly succeeded in their respective appeals.

These appeals having been set down to be mentioned this day, the Court made the following

ORDER.—In the lower Court the costs of all parties will come out of the estate.

K. S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

A. M. Mariappa Mudaliar .. *Plaintiff.**

v.

The Governor-General-in-Council owning the South Indian Railway .. *Defendant.*

Railways Act (IX of 1890), section 72—Goods placed in railway goods shed to the knowledge of the goods shed officials before booking—Loss by theft—Liability.

Anyone who places goods in a railway goods shed without taking any initial step in the matter of booking or even apprising the goods shed officials that he is doing so clearly leaves the goods at his own risk and the railway administration cannot be held responsible as there has been no delivery to them of goods for being railed.

But in cases where to the knowledge of the goods shed officials or with their permission specific goods lie in a goods shed, deposited there before the shed is locked up for the night, the railway company cannot avoid the responsibilities of bailees under section 72 of the Railways Act. Delivery in such cases cannot be made contingent on the completion of a particular stage in the process of booking. It is an inference to be drawn from the circumstances of each case.

The liability of the railway company as a bailee is governed by section 72 of the Railways Act and any rules which seek to evade this liability must be deemed to be inconsistent with the Act and therefore *ultra vires*.

There is really no difference in substance in the liability of the railway company as a bailee under section 151 of the Contract Act who is expected to take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take and in their liability as restricted in the risk note to cases of misconduct by their servants.

B. V. Viswanatha Aiyar for Plaintiff.

S. S. Ramachandra Aiyar for Defendant.

The Court delivered the following

JUDGMENT.—The plaintiff, a piecegoods merchant of Coimbatore with an office in Madras, sues the South Indian Railway for the recovery of Rs. 6,981-10-0 as the value of three bales of sarees and cloths which were stolen from the Madras Beach Station goods shed.

The admitted facts are these. On the 29th May, 1946, the plaintiff's clerk Rajagopalan (P.W. 1) consigned six bales through a cartman maistry one Pullayya P.W. 2 to be booked to Tuticorin. He placed these bales near the weighing machine in the goods shed without any formalities of booking being complied with. The next morning the forwarding note, Exhibit P-1, and the risk notes Exhibits P-2 and P-3 were numbered and entered by the railway gate clerk D.W. 1 in the gate book Exhibit D-2 in which the forwarding note Exhibit P-1 was assigned a number 294. In the meantime one of the bales kept in the goods shed was stolen

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*C. S. No. 319 of 1947. 15th December, 1949.

the previous night. Rather a belated complaint was made about this disappearance by Pullayya. Rajagopalan made a complaint (Exhibit P-4) to the Chief Commercial Superintendent with a copy to the Goods Station Master, Sankaranarayana Ayyar (D.W. 3) who has since retired, and sent a telegram to the plaintiff in Coimbatore District. The remaining five bales continued to remain in the goods shed without apparently anything being done till the 1st June when Rajagopalan went with the plaintiff's son (P.W. 4) who had come from Coimbatore and discovered another bale missing. On the advice of the goods station staff who appeared to have assumed no responsibility for unbooked goods lying in the goods shed P.W. 4 sent a letter Exhibit P-5 to Trichinopoly bringing to notice the loss of the second bale and asking for open delivery of the remaining bales lying at the Beach station. The Goods Station Master also on 1st June, 1946, sent a complaint Exhibit P-12 to the Madras Police enclosing a copy of this letter and asking for investigation. There was however neither development nor police investigation until the morning of the 3rd June, the four bales still lying in the goods shed. The senior assistant goods clerk D.W. 5 on coming to duty at about 7 A.M. found some coloured thread scattered outside the main goods shed gate way. He immediately sent word to the station master D.W. 3 who arrived and telephoned to the police. After a head constable arrived the goods shed gate, the seals of which were in tact, was opened. It was subsequently discovered that a third bale belonging to the plaintiff had been stolen obviously by thieves during the night. The Inspector of Railway Police, Egmore, A.W. Fernandez who has since retired arrived at that morning and found underneath the main corrugated iron gate which closes the railway line which admits the wagons into the goods shed a space about a foot wide which had been formed in the masonry of the floor, through which on experimentation he found that a medium sized man could squeeze without a scratch. It is not disputed that this was the *modus operandi* by which thieves entered the goods shed and made away with these bales. These investigations resulted in a case against two accused a woman (A-1) and a man (A-2) not employees of the railway who were convicted, the former under section 411, Indian Penal Code and sentenced to rigorous imprisonment for four months and the latter under section 414, Indian Penal Code, to rigorous imprisonment for only one month. They produced sarees from hiding-places on confessions they made. Twenty-eight sarees were returned by the police to the plaintiff who has in his claim given credit for their value.

A very significant piece of evidence is furnished by the Railway Police Inspector P.W. 3 who deposed that the Goods Station Master (D.W. 3) who worked in this capacity from 1944 to October 1946 told him that he had sent up a report about this depression under the main railway gate to his superiors in July 1945 and that no action had been taken. In the report D.W. 3 sent on 3rd June, 1946, to the Railway Police after his telephone message he said this :—

> "Theft might have occurred during night only through the main gate as there is a gap left even when the door is closed and secured."

D.W. 3 was not asked in his chief examination anything about the report he sent up in July 1945. The learned advocate for the plaintiff says that he did not cross-examine D.W. 3 on this point, I think well advisedly, leaving it to the railway company to rebut the evidence given by the investigating Inspector. The Assistant Engineer of the South Indian Railway examined as D.W. 4 merely filed a plan Exhibit P-4 of the Beach Station. After these thefts he inspected the main gate and found the masonry underneath it between the right hand railway line and the granite stone dismantled and dug up and he agreed that it was possible for a man to go through this when the gate was shut. He periodically inspected the goods shed every six months but found nothing wrong but said that he knew nothing of any complaint about this gate made in 1945. There is therefore no specific evidence by the railway company negativing the evidence of the Railway Police Inspector that such a complaint about the depression under this main railway gate was made even in July, 1945. I must find therefore at the commencement that

there was this defect in the gate brought to the notice of the railway authorities which they unfortunately neglected to rectify. It may be that by the use of a crowbar this depression was enlarged for purposes of these thefts and camouflaged by being filled with earth and debris to escape notice. The railway company repudiated liability for the loss of three bales in a prolix written statement mainly on two grounds : (1) that the bales had not been delivered to them to be carried by rail within the meaning of section 72 of the Railways Act and (2) that they were absolved from liability under the notes Exhibits P-1 and P-2 as there was no misconduct on the part of any of their servants. These are the two main points which arise for determination though the Master framed the following issues :—

1. Were the plaintiff's goods placed in the sole custody and possession of the defendant Railway as alleged in paragraph 3 of the plaint and did the defendant accept the same for transport on 29th May, 1946 ?

2. Did the defendant Railway become liable either as bailees or otherwise for the safe custody of the goods left in their possession ?

3. Was the theft in the goods shed occasioned by the negligence or any other defect in maintaining the goods shed and is the defendant liable for the loss caused to the plaintiff ?

4. Was not the defendant in any event liable to protect the plaintiff's interest after the first theft at the shed ?

5. To what damages is the plaintiff entitled ?

6. Is the defendant liable to pay plaintiff the damage suffered by him under the circumstances set out in the plaint ?

7. Is the defendant absolved under Risk Notes A and B in the case ?

8. To what reliefs is plaintiff entitled ?

The plaintiff has put forward an unacceptable case about the initial deposit of the six bales in the goods shed. The evidence of the cartman maistry Pullayya who was well known to the goods shed staff as a regular customer who booked goods for various clients tries to make out that he took these six bales along with the forwarding note and risk notes (Exhibits P-1—P-3) signed by P. W. 1 in his cart to the goods shed on 27th May, 1946, and was told that there was no booking of piecegoods that day and very strangely left Exhibits P-1 to P-3 in the goods shed with one of the clerks. He took the 6 bales back. He was later told by P. W. 1 that the goods could be booked on the 29th on which date he brought these six bales again to the goods shed in his cart. The evidence of Pullayya which is most unsatisfactory is that when after placing the bales near the weighing machine he asked for the railway receipt the weighing clerk told him that it was not a booking day and asked him to come the next day. In cross-examination Pullayya said that the " manager " presumably D. W. 3 and his clerk told him to take the bales on the 27th although he says that they retained Exhibits P-1 to P-3. I have no hesitation whatsoever in disbelieving Pullayya's evidence which is obviously embellished and calculated to prove from the first fact that Exhibits P-1 to P-3 were continuously in the possession of the railway company that even from the 27th May, that the mere placing of these bales in the goods shed on the 29th established delivery to the railway company for despatch.

The gate clerk D. W. 1 whom I believe says that he comes on duty at 11 A.M. and that he finds on his table a pile of forwarding notes placed there by cartmen which after check he enters in serial order in his gate books Exhibit D-2. Numbers 1 to 500 are given and then a fresh series is commenced for the forwarding notes. His evidence which is not disputed is that there were certain days nominated for booking piecegoods to Tuticorin, namely, Mondays and Thursdays. He has no recollection of the cartman Pullayya coming to him on the 27th and making any enquiries. Whether Pullayya did actually bring the 6 bales in his cart on the

27th itself along with Exhibits P-1 to P-3 is quite immaterial. As a cartman who knew the ins and outs of booking goods I gravely doubt whether he in fact took the trouble to cart these goods without first ascertaining whether they could be booked that day. What I am convinced about is that he never handed over Exhibits P-1 to P-3 to any goods shed railway clerk on the 27th May. How then were these six bales registered by the gate clerk on the morning of the 30th with descriptions taken from Exhibits P-1 to P-3 after one of the six bales placed in the goods shed the evening before had disappeared. It is in evidence that there are two goods sheds, one a larger goods shed where these were placed and the other a smaller one in which the goods station master or the chief goods clerk has his office. It is admitted on all hands by the goods railway clerks examined and also by the Railway Inspector P. W. 3 that in the larger goods shed there were lying both booked and unbooked consignments and also in a different portion of this goods shed inward packages received awaiting delivery to consignees.

The gate clerk D. W. 1 has described the procedure of booking goods in various stages, (1) numbering the forwarding notes and risk notes and entering them in the gate book, (2) their being taken to the weighing clerk, (3) marking of the bales and (4) actual loading into the wagon after which railway receipts are given. D. W. 1 asserts that unbooked goods on any day must be taken away, and not left at the goods shed during the night and the railway company point to a large placard posted that goods kept in the goods shed at consignors' risk unless the forwarding notes are tendered and accepted. It appears to be quite possible in the confusion which seems to have reigned in this goods shed for a cartman known to the goods shed staff as being a professional booking agent to have placed these bales near the weighing machine without arousing any suspicion or even apprising them of the fact that he had done so. As I have said the conduct of the cartman Pullayya quite apart from the unsatisfactory evidence he has given is most suspicious. He has failed to explain the most important piece of evidence in the case that the numbering of the forwarding notes in the gate book was only on 30th June, 1946, whereas he says he placed six bales in the goods shed the evening before. Even assuming that he had placed the bales in the goods shed intending to book them he should after having got the forwarding notes numbered have discovered the theft of t e bale much earlier that morning in the process of booking. The strong probability also is that he knew the day of the week on which the railway booked these goods to Tuticorin and why he brought these bales to the station that day before has not been satisfactorily explained. The position might have been different if the forwarding notes had been registered in the gate book on 29th May, 1946, before he took these bales to the goods shed. In the circumstances there is no satisfactory evidence at all that Pullayya did deposit six and not five bales in the goods shed on the 29th or that the railway company were even apprised of the existence of these bales in their goods shed on the night of 29th May, 1946, nor is there any evidence except that of the interested and unreliable testimony of Pullayya that any goods clerk gave him permission to keep the bales near the weighing machine for the night. Anyone who places goods in a railway goods shed without taking any initial step in the matter of booking or even apprising the goods shed officials that he is doing so clearly leaves the goods there at his own risk and the railway administration cannot be held responsible as there has been no delivery to them of such goods for being railed.

The position as regards the two remaining bales which were lost during the night of 31st May, and 2nd June, as it appears to me is quite different. As regards them the entire goods staff were apprised of the existence of these five bales which had been brought to the station for despatch for being railed. The forwarding note and risk notes had also been numbered. I do not believe the evidence of D. W. 3 that he not only disclaimed responsibility on 30th May, 1946, but asked Pullayya to take the bales away and that he refused. These five bales were therefore to the full knowlege of the railway servants in the goods shed in railway custody under somewhat peculiar circumstances, it is true, with one bale alleged to have

been stolen from their goods shed before they can be deemed to have accepted delivery. These goods were allowed to be alongside other booked articles and the railway administration retained them in their custody clearly as bailees under section 72 of the Railways Act. The learned advocate for the railway urges that their delivery is not complete unless the goods are either 'marked' or loaded in the wagon. There is a wealth of authority as regards this contention against the defendant. In *Secretary of State for India* v. *Sheo Bhagwan Chiranjilal*[1], it was held that a consignment of bales of hemp deposited in a railway goods shed with the permission of an authorised servant of the railway was delivery within the meaning of the Act, although no forwarding note was even tendered by the consignor and no receipt was granted to him. In that case the goods were destroyed by fire caused by sparks from an engine. The railway company was held to be grossly negligent in failing to make adequate and reasonable provision for the protection of these goods. Other decisions laying down the same principle are *Jalim Singh Kotary* v. *Secretary of State for India*[2], *Ramchandranath* v. *G. I. P. Railway*[3], *Narsinggirji Manfg. Co.* v. *The Great Indian Peninsula Railway*[4].

Mr. Ramachandra Ayyar has elaborated an argument for the railway administration that although the bales may have been in their goods shed to the knowledge of their servants from the 30th May, they only accepted liability after the goods are actually loaded and that under section 72 of the Railways Act read with section 54 and section 47 they can, as I understand his argument, postpone the vesting of liability by the formulation of certain rules. Under section 54 a railway company may impose conditions not inconsistent with the Act with respect to the receiving, forwarding or delivery of any animals or goods. Under section 47 (*f*) the railway company may make rules consistent with the Act for regulating the terms and conditions on which they will warehouse or retain goods at any station on behalf of the consignee or owner. He lays stress on clause (1) of the forwarding note itself which contains a condition accepted by the consignor that the railway shall not be accountable for any articles unless they are booked and a receipt for them given by their clerk or agent. He concedes that in the face of the case-law I have referred to *supra*, this condition, so far as it relates to the actual passage of the receipt is *ultra vires* but he contends that the goods must be booked before liability of the railway administration commences, and that the vesting of liability in the railway is postponed till the goods are at any rate loaded in the wagon, an act which completes the booking. The liability of the railway company as a bailee is governed by section 72 of the Act and any rule which seeks to evade this liability must be deemed to be inconsistent with the Act and therefore *ultra vires*.

Whether there has or there has not been delivery to the railway administration is an inference of fact from the circumstances of each case. If the consignor was specifically refused permission to keep his goods in the goods shed over night and directed to remove them by the officials responsible it may be possible to hold that the goods would lie there entirely at the consignor's risk without any contract of bailment. But in cases where to the knowledge of the goods shed officials or with their permission specific goods lie in a goods shed, deposited there before the shed is locked up for the night, the railway company cannot as it appears to me avoid the responsibilities of bailees under section 72. It must be remembered that the consignor in such a case is afforded no facilities for watching his goods at night. They are taken into the exclusive custody of the railway company and in this case they lay side by side in the goods shed along with booked articles and also articles awaiting delivery to consignees. Delivery in such a case cannot be made contingent on the completion of a particular stage in the process of booking. It is an inference to be drawn from the circumstances of each case. I have no hesitation in finding that in this particular case the railway administration must be deemed to have accepted delivery of the five bales which to the knowledge

1. (1935) I.L.R. 58 All. 576.
2. (1904) I.L.R. 31 Cal. 951.
3. (1915) I.L.R. 39 Bom. 485.
4. (1918) 21 Bom. L.R. 406.

of their goods shed officials were in their goods shed, when it was locked up for the night on the 30th May. A complaint had been made that one of the bales had been stolen from the goods shed the night before. A consignor who sends goods to the goods shed some of which get lost during the day before the goods shed staff accept delivery would be on an entirely different footing and cannot make the railway administration liable as bailees. It is on this principle that no liability for the first bale alleged to have been lost on the night of the 29th May can be fastened on the railway; but as regards their liabilities as bailees under section 72 of the Act as regards the second and third bales lost, there can, I think, be no doubt.

The liability of the railway company must of course be restricted to the risk note Exhibit P-2 and it is necessary for the consignor strictly to prove misconduct of the railway servants which led to his loss. Prior to 1924 the words in this risk note were "wilful negligence". In some English decisions the words used and construed in such risk notes were "wilful misconduct". The meaning of the word "misconduct" has been elaborately considered by Venkataramana Rao, J., in *Roshan Umar Karim & Co.* v. *Madras and Southern Mahratta Railway Co., Ltd.*[1] In *Bengal Nagpur Railway Co.* v. *Moolji Sikka & Co.*[2], Suhrawardy, J., took the view that the present risk note was wider and more comprehensive in enlarging the liability of the railway. The distinction between "misconduct and wilful misconduct" was considered in *Norris* v. *Great Central Ry. Co.*[3], where Lush, J., held that mere carelessness on the part of the railway servants was not sufficient and did not constitute intentional wrong conduct amounting to wilful misconduct. Venkataramana Rao, J., after a comprehensive review of all the available authority defined 'misconduct' as follows: "A mere omission to do what is expected of a person to do constitutes misconduct" whereas if such failure is directed to intentionally cause mischief or loss to any person, then it is called wilful misconduct. With great respect I am in complete agreement with the definition. There is really no difference in substance in the liability of the railway company as a bailee under section 151 of the Contract Act who is expected to take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take and in their liability as restricted in the risk note to cases of misconduct by their servants.

The facts of this case present no difficulty or nice distinction, in any event between misconduct and what is not misconduct on the part of the railway servants. In the first place there was this defect in the railway gate which had not been rectified since 1945. In the second place there was the apathy of the goods shed Station Master and staff in taking no immediate action to stop a recurrence of the astonishing thefts of these large bales. It may be that they laboured under the delusion that as the goods had not been technically booked the railway administration were in no way liable for their loss. The least the Station Master should have done was to have put special watchmen on duty at this gate or to have telephoned immediately to the police at any rate after the disappearance of the second bale.. A railway watchman has been examined as D.W. 6 who, as may be expected, swore to his being in a constant state of vigilance all through the night. In *Brabant & Co.* v. *King*[4], the House of Lords expressed the view that the obligation of a bailee included not only the duty of taking all reasonable precautions to obviate risks but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred. Finally there is the irresistible inference from he facts that the removal of the contents of these bales each weighing 4½ maunds in astonishing succession could not have been achieved without the active connivance of some of the railway servants. In *Khairati Lal* v. *B. B. & C.I. Railway*[5], Banerji, J., held that such an inference was a legitimate one in rather similar circumstances. The concentration of the culprits on this lot of unbooked

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1. (1935) 70 M.L.J. 608: I.L.R. 59 Mad. 789.
2. (1930) I.L.R 58 Cal. 585.
3. (1916) 114 Law Times 183.
4. (1895) A.C. 670.
5. A.I.R. 1929 All. 830.

bales to the exclusion of other booked articles is *prima facie* very suspicious and permits a reasonable inference that this concentration rose from a delusion which the railway servants were under that unbooked articles in the goods shed were not the subject-matter of responsibility of the railway administration but were fair game to be preyed upon with impunity. I find misconduct on the part of the railway servants clearly proved as regards the second and third bales lost.

In the result plaintiff will have a decree for two-third of the plaint claim less Rs. 280 the value of some other saris returned to him by the police subsequent to the plaint with proportionate costs against the railway administration.

K. S. *Suit decreed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

V. N. V. Devarajulu Chetty & Co., Madras .. *Applicants**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Dissolution of partnership and formation of new firm—Registration of new firm—New firm becoming assessee—Payment to the retiring members out of profits earned by new firm—Deduction—If allowable.

A firm of five partners started a wholesale business in piecegoods. After some time two of the five partners retired from the firm and the three remaining partners thereafter carried on the business under the same name and style as before, but as a new firm, which is the assessee. Each of the two outgoing partners who had a 3 anna share in the old firm was paid his share of the assets and profits of the old firm up to the date of dissolution as the result of an arbitration award. This settlement was subject to a reservation of the rights of the two retiring partners in respect of certain forward contracts for the purchase of piecegoods from abroad that had already been entered into by the old firm but the deliveries under which had not been effected, and in respect of these goods it was decided that the outgoing partners shall fix their value and allow the partners of the new firm to deal with the goods and pay the retiring partners a part of the profits. The profits of the two retired partners in respect of these goods were also paid to them by the new firm. The new firm was assessed by the Income-tax Officer for the year of account for a sum as the profits of their business, which sum included the sum paid to both the old partners in respect of goods which arrived under the forward contract entered into by the old firm but which were sold by the new firm.

It was contended by the assessee that the whole profits should be apportioned as between the five old partners and in the alternative that in computing the profits of the year of account the sum paid to the old partners by the new firm should be deducted.

Held, (i) The tribunal was right in upholding the decision of the Income-tax Officer that the profits of the firm should be apportioned only between the three present partners and not between the five old partners as claimed by the assessee.

(ii) The tribunal was not right in disallowing the sum paid to the old partners, on the ground that the payment has been made out of the profits earned by the assessee firm. In the circumstances, the payment in question was really part of the price or consideration paid for the purchase or acquisition of the stock in trade of the business and the expenditure was part of the ordinary current revenue expenditure of the business and is an admissible deduction in computing the profits of the new firm.

Case-law discussed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (VII of 1939) in 66 R.A. 12 Madras of 1946-47 on its file.

T. S. Nagaswami Aiyar for Applicants.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The following two questions have been referred to us :

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* Case Referred No. 74 of 1946. 12th January, 1950

"1. Whether in the circumstances of the case the Tribunal was right in upholding the decision of the Income-tax Officer that the profit of the firm should be apportioned between the three present partners and not between the five old partners as claimed by the applicants?

2. Whether in the alternative, the Tribunal was right in disallowing the sum of Rs. 18,911-12-0 paid to the old partners on the ground that the payment has been made out of the profits earned by the applicant firm?"

The facts which have given rise to this reference have to be briefly stated. V. N. V. Devarajulu Chetty & Co., a firm of five partners, started a wholesale business in piecegoods, Indian and foreign, in September 1940. On 31st October, 1942, two of the five partners retired from the firm and the three surviving partners thereafter carried on the business under the same name and style as before, but as a new firm. This new firm is the assessee in the case and the applicant for reference to this Court. Each of the two outgoing partners who had a three annas share in the old firm, was paid a sum of Rs. 6,399-6-8 for his share of the assets and profits of the old firm up to the date of dissolution as the result of an arbitration award. This settlement was subject, however, to a reservation of the rights of the two retiring partners in respect of certain forward contracts for the "purchase of piecegoods" from abroad that had already been entered into by the old firm, but the deliveries under which had not been effected. In respect of these goods, of the quantity of 336 bales, it was decided that the outgoing partners should fix their value and allow the partners of the new firm to deal with the goods and pay the retiring partners a part of the profits. As the deliveries under these forward contracts were problematic owing to the conditions created by the last war and the prices of foreign piecegoods were also shooting up, it was not possible at the time of the dissolution of the old partnership to settle the rights of the partners *inter se* in respect of these forward contracts. A quantity of 317 bales arrived from Manchester about September 1943 and these bales were taken delivery of and sold by the new firm and the profits on such sales were realised by the new firm. The arbitrators directed that each of the two old partners should be paid by the new firm a sum of Rs. 6,530 in respect of the interest of the old partners in the goods and their share of the profits realised by the sale of the 317 bales. A further quantity of 17 bales, arrived sometime later and these goods were also taken delivery of and sold at a profit by the new firm. A sum of Rs. 2,935-14-0 was paid to each of the two old partners by the new firm in respect of their interest in these goods and their share of the profits arising from their sale. On 16th March, 1944, the two old partners executed a deed of release in favour of the new firm consisting of the three continuing partners reciting therein the aforesaid arrangements and payments. The new firm was assessed by the Income-tax Officer for the year of account ending 31st March, 1944, the assessment year being 1944-45, in the sum of Rs. 45,088 as the profits of their business for the year. This sum of Rs. 45,088 included the sum of Rs. 18,911-12-0 paid to both of the old partners in respect of the goods which arrived under the forward contracts entered into by the old firm but which were sold by the new firm. The new firm, the assessee in this case, claimed that the sum of Rs. 45,088 should be apportioned among the five old partners and not among the three continuing partners who alone had been registered as a firm in the year of assessment. The assessee also contended, in the alternative, that in computing the profits of the year of account, the sum of Rs. 18,911-12-0 paid in that year to the old partners by the new firm, should be deducted from the sum of Rs. 45,088 and the balance alone was liable to be taxed as the profits of the new firm. Both these contentions have been negatived by the Appellate Tribunal as well as the Income-tax Officer and the Appellate Assistant Commissioner.

The first contention of the assessee is clearly untenable. The old firm consisting of five partners had been dissolved as early as 31st October, 1942 and the formal deed of release, dated 16th March, 1944, executed by the two retiring partners affirmed this fact. The profits on the sales of the 334 bales were received in the course of the business of the new firm at a time when the new firm was carrying on the business in its own right and handling and selling the goods as owner. The new firm was charged on its profits of the year of account 1943-44 without any

reference to the old partners who had retired in 1942. The new firm consisting of the three surviving partners alone had been registered as a firm in 1943-44 and 1944-45. Consequently the profits of the year of account, namely, 1943-44 whatever they were, had to be apportioned between the three partners of the new firm and not among the five partners of the dissolved firm. The decision of the Revenue authorities and the Appellate Tribunal on this point is correct and the first of the questions referred to us is therefore answered in the affirmative and against the assessee.

The second question, however, raises a more debatable point. The case of the assessee is that the sum of Rs. 18,911-12-0 paid to the old partners pursuant to the decision of the arbitrators, did not form part of the taxable profits of the new firm, though the sum was paid out of the profits of the business carried on by the new firm and therefore entered as a disbursement in its accounts. It is also claimed that the said sum represented an expenditure laid out wholly and exclusively for the purposes of the business of the new firm and for the purpose of acquiring stock in trade and earning profits by the sale of such stock and that the expenditure was therefore an admissible deduction under section 10 (2) (xv) of the Act. The contention of Mr. Rama Rao Sahib for the revenue authority is that the sum of Rs. 18,911-12-0 paid to the old partners was paid from and out of the profits of the new firm in view of their six annas share in the old firm and that a payment made from and out of profits is not exempt from liability to income-tax. His further contention was that the amount in question was paid by the new firm as part of the price payable for the purchase of the interest of the two retiring partners in the old firm's assets and goodwill and was therefore a capital expenditure whose deduction was prohibited by section 10 (2) (xv) of the Income-tax Act. Lastly he contended that even if the forward contracts had to be considered separately and in isolation from the rest of the business, as the arbitrators did, the sum of Rs. 18,911-12-0 was the price paid for the acquisition of the interest of the retiring partners in those unexecuted contracts and would still be in the nature of a capital expenditure whose deduction in computing the profits of the new firm was not permissible. The arguments on both sides were supported by reference to a large number of cases, English and Indian.

It is a familiar principle of income-tax law that the destination or application of profits, once they are made or ascertained, is immaterial and the way in which person applies his income, profits and gains does not affect his liability to tax on such income, profits and gains. Strong reliance was placed by the learned advocate for the revenue authority on the *Pondicherry Railway Co.'s case*[1], where Lord Macmillan observed :

> "Payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue authority is not concerned with the subsequent application of the profits."

These general observations were misunderstood to the prejudice of the tax-payer for sometime in later decisions both here and in England. That the above statement of the law was somewhat wide and should not be applied as a touchstone to all cases was recognised by Lord Macmillan himself in his judgment in the case of the *Union Cold Storage Co.* v. *Adamson*[2]. Romer, L.J., in the Court of Appeal in that case, held that where a company, for the purpose of enabling it to carry on its trade, placed, itself under an obligation to make money payments, the amount of which was dependent upon the profits earned, or the payment of which was contingent upon certain profits being earned, payments made in discharge of that obligation were admissible deductions in computing the taxable profits of the company. This decision of the Court of Appeal was affirmed by the House of Lords. With reference to his own earlier pronouncement Lord Macmillan said :

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1. (1913) 61 M.L.J. 251 : L.R. 58 I.A. 239 : I.L.R. 54 Mad. 691 at 705 (P.C.).
2. (1931) 16 T.C. 293 at 331.

"When therefore in the passage referred to by the Attorney-General in the *Pondicherry Railway Co.'s case*[1], I said that a 'payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits', I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner after providing for all outlays incurred in earning them, and then to divide them. Here, the question in whether or not a deduction has to be made in ascertaining the profits and the question is not one of the distribution of profits at all."

In a later case before the Judicial Committee Lord Macmillan who delivered the judgment of the Board disapproved of the interpretation put upon the *Pondicherry Railway Co.'s case*[1], by the Bombay High Court and held that Tata Sons, Ltd., a limited company could in computing the assessable profits of its managing agency, deduct 25 per cent. of those profits which it had agreed to pay over to certain financiers of the Tata Power Company, Ltd., of which Tata Sons, Ltd., was the managing agent. The deduction of a percentage of the profits earned from the taxable profits was allowed as the payment in question was made in consideration of services rendered by way of financial assistance. Lord Macmillan distinguished the *Pondicherry Railway Co.'s case*[1], as being one where the ascertained net profits had to be shared among two persons. See *Tata Hydro Electric Agencies, Ltd.* v. *Commissioner of Income-tax*[2]. In *Indian Radio Cable Communications, Ltd.* v. *Commissioner of Income-tax*[3], Lord Maugham dealt with the position in this way:

"It may be admitted that, as Mr. Latter contended, it is not universally true to say that a payment the making of which is conditional on profits being earned, cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception, is that of a payment to a director or manager of a commission on the profits of a company. It may, however, be worth pointing out that an apparent difficulty here is really caused by using the word 'profits' in more than one sense. If a company having made an apparent net profit of £10,000 has then to pay £1,000 to the directors or managers as the contractual recompense for their services during the year it is plain that the real net profit is only £9,000. A contract to pay a commission at ten per cent. on the net profits of the year must necessarily be held to mean on the net profits before the deduction of the commission, *i.e.*, in the case supposed, a commission on the £10,000."

The true scope and effect of the decision in the *Pondicherry Railway Co.'s case*[1], were clearly stated by Greene, M.R., in the *British Sugar Manufacturers, Ltd.* v. *Harris*[4]. In that case a company which was carrying on the business of sugar manufacture agreed to pay to two other bodies for a period of four years 20 per cent. of the net profits of the company, in consideration of their giving to the company the benefit of their technical and financial knowledge, experience and advice. Finlay, J., in the Court of first instance, felt bound by the *Pondicherry Railway Co.'s case*[1], to hold against the inclination of his own opinion that the 20 per cent. of the profits paid as remuneration to the two other bodies by the company was not an admissible deduction in computing the annual profits of the company. The Court of Appeal reversed the decision and Greene, M.R., who delivered the leading judgment observed as follows:

"In the present case, there are two funds of so-called profits which come into the picture. The first one is the fund which has to be ascertained for the purpose of calculating the 20 per cent. In that fund as such, the persons entitled to the profits of this company—namely, the shareholders have no concern. It is used for the purpose, and for the purpose only, of ascertaining what is to be paid to the Skoda works and to the Corporation. Now, when that amount has been ascertained, that fund ceased to have any usefulness, at all, and it then becomes necessary to ascertain what are the divisible profits, and for that purpose, to take another account and the account that is taken then would be an account which would not only bring in depreciation, but would also take into account the sum that had been paid out to the Skoda works and the Corporation upon the taking of the first account. It seems to me that the circumstances that those two accounts have to be made out throws a very clear light upon the real nature of this transaction and looking at the clause in question as a whole, it seems to me clear beyond any reasonable doubt that the agreement is merely an agreement under which before ascertaining the divisible profits of the company at all, the Skoda works and the Corporation are to receive upon a particular conventional basis a commission sum as remuneration for their services."

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1. (1931) 61 M.L.J. 251 : L.R. 58 I.A. 239 : I.L.R. 54 Mad. 691 (P.C.).
2. (1937) 2 M.L.J. 763 : L.R. 64 I.A. 215 : I.L.R. 1937 Bom. 388 (P.C.).
3. I.L.R. 1937 Bom. 591 at 599.
4. (1938) 2 K.B. 220 at 235.

The learned Master of the Rolls explained the observations of Lord Macmillan in the *Pondicherry Railway Co.'s case*[1], as referring to a division of the real net profits which had nothing to do with the rendering of any service which contributed to the making of the profits. Romer, L.J., posed the question arising for consideration and answered it thus (*British Sugar Manufacturers, Ltd.* v. *Harris*[2]) :—

"Is the payment that has to be made by the trader under the contract, which is in question, in truth a mere division of profits with another (company) party or is it in truth a payment to the other party the amount of which is ascertained by reference to the profits? Whether the particular case falls on one side of the line or the other is very often a question of extreme difficulty.......... The payment is a payment necessary for the purpose of enabling the company or the trader to earn the profits of its trade and, therefore, it is a legitimate deduction from its profits when ascertained for the purpose of assessment under Schedule D."

The fact that payments for services rendered or goods supplied are measured according to a share of the profits does not in our opinion affect their admissibility as deductions. It is the quality of the payment that is the test and not its admeasurement. The distinction is between a contract for payment of profits *simpliciter* and a payment in consideration of service using the expression in a broad sense which is deductible before the taxable profits are ascertained. There may be instances of payments conditional on profits being earned and out of the profits earned, which are yet expenditure incurred for earning such profits, the most familiar instance being that of a director or manager of a company or an expert adviser or financier being remunerated by a commission based on a percentage of the profits. The real question is, is the payment made by the trader under a contract, a mere division of the profits with another who has purchased or otherwise acquired a right to a share of the profits or is it a payment to the other party in consideration of work, service or assistance rendered or material supplied, the amount of such payment being ascertained on the basis of the profits earned. The distinction is well brought out in the judgment of Lord Macmillan in the *Tata Hydro Electric Power Co.'s case*[3], where 25 per cent. of the profits of the managing agency paid to the financiers of the Tata Power Company, Ltd., was held to be a permissible deduction in computing the profits of Tata Sons & Co., Ltd., the managing agents of the Tata Power Co., Ltd., but not in computing the profits of the Tata Hydro Electric Co., Ltd., who took an assignment of the managing agents' rights from the Tata Sons, Ltd., undertaking to pay, as part of the consideration for the assignment, the 25 per cent. of the profits payable by the Tata Sons, Ltd., to the financiers. As observed in *Robert Addie & Sons, Ltd.* v. *Commissioner of Inland Revenue*[4].

"It is necessary to ascertain the true nature of the expenditure and to ask first the question : is it a part of the company's working expenses, is it expenditure laid out as part of the process of profits earning?"

To apply the above principles to the present case, the two old partners had each a three annas share in the old firm. They had certain "valuable rights" in respect of the forward contracts for the purchase of piecegoods as the market was rising owing to war conditions. Their rights in respect of these contracts were isolated and reserved at the time of the dissolution on 31st October, 1932, when all other matters were settled. The goods arrived and were taken delivery of and sold by the new firm at a considerable profit. Under section 37 of the Partnership Act, the retiring partners had a right to a share of these profits which were made by the new firm with the assets of the old firm. Consequently that part of the profits payable to the old partners by the new firm under an obligation imposed by law was not in truth, the income, profits and gains of the new firm. See *Bejoy Singh Dudhuria* v. *Commissioner of Income-tax Calcutta*[5].

The matter may also be looked at in this way. The arbitrators decided that the sum of Rs. 18,911-12-0 should be paid to the retiring partners by the new firm in respect of the rights of the former under these forward contracts and in consi-

1. (1931) 61 M.L.J. 251 : L.R. 58 I.A. 239 : I.L.R. 54 Mad. 691 (P.C.).
2. (1938) 2 K.B. 220 at 239.
3. (1937) 2 M.L.J. 763 : L.R. 64 I.A. 215 : I.L.R. 1937 Bom. 388 (P.C.).
4. (1924) I.R. 8 T.C. 671.
5. (1933) 65 M.L.J. 285 : L.R. 60 I.A. 196 : I.L.R. 60 Cal. 1029 (P.C.).

deration of the new firm handling and disposing of the entire 334 bales as part of their stock-in-trade. This sum was paid out of the profits made by the new firm and was paid because the new firm had made profits out of the sale of the 334 bales delivered under the contracts entered into by the old firm. This sum was really part of the price paid by the new firm to acquire full exclusive title to the goods from the old partners and it must be remembered that the goods so acquired were the stock-in-trade of the new firm which sold the goods and thereby made a large profit. If instead of taking cash the two old partners who had themselves started their own piecegoods business, had taken delivery each of the 3/16th share of the goods delivered under the forward contracts and sold the goods on their own account, they would well have been within their rights and made a profit directly. In such an event the new firm could only have sold 10/16th of the total number of bales and their profits would have been proportionately less. Instead, the new firm acquired the entire quantity of the goods by paying the retiring partners the sum of Rs. 18,911, which, according to the award of the arbitrators, represented the percentage of the profits payable to the old partners for their having parted with the goods or their right in the goods in favour of the new firm. The sum though paid as representing the old partners' share of the profits was really the price paid by the new firm for the acquisition of an exclusive right to the goods which formed the stock-in-trade and is therefore a revenue expenditure laid out solely and exclusively for the business of the new firm.

Mr. Rama Rao Sahib argues that the sum of Rs. 18,911-12-0 is a capital and not a revenue expenditure of the new firm, because, according to him, the substance of the transaction was that the amount in question was paid as part of the consideration for the acquisition by the new firm of the interest of the partners in the old firm. Sums paid to retiring partners in lieu of their share of the assets and profits of the firm by the continuing partners who acquire the interest of the former and run the business as before, but as a new firm would only be capital expenditure and not a revenue expenditure and its deduction is not permissible in computing the profits of the new firm. The position would be the same whether the stipulation is for payment of the consideration for the acquisition in a lump sum or in annual or other instalments, *Delage* v. *Nugget Polish Co., Ltd.*[1] *United Steel Co., Ltd.* v. *Cullington*[2], *City of London Contract Corporation, Ltd.* v. *Styles*[3], *I.R.* v. *British Salmson Aero Engines, Ltd.*[4], *Constantinesco* v. *Rex*[5], *Tata Hydro Electric Agencies, Ltd.* v. *Commissioner of Income-tax*[6], *Royal Insurance Co.* v. *Watson*[7]. In the present case the sum of Rs. 6,399-6-8 paid to each of the retiring partners at the time of the dissolution of the partnership as the price of their releasing all interest in the partnership assets including goodwill would be in the nature of a capital expenditure. But the two other payments aggregating to Rs. 18,911-12-0 made to the retiring partners in respect of the forward contracts pursuant to the decision of the arbitrator stands on a different footing. It may be observed that in income-tax cases the same result in a business sense may be reached by means of transactions clothed in two different legal forms one of which may attract tax or exemption from tax while the other may not. It has been said on high authority that a person is entitled to so arrange his affairs as not to attract taxes imposed by statute provided he acts within the law ; if he succeeds in ordering them so as to secure this result, he cannot be taxed, however unappreciative the revenue authority may be of his ingenuity. *Inland Revenue Commissioners* v. *Duke of Westminster*[8], *I. R.* v. *Fisheries Executors*[9]. If a partnership is dissolved, it is open to the partners to isolate and keep in common an asset of the partnership and if that asset is realised thereafter, it ought to be divided between the partners in proportion to their shares in the original partnerships, *Gopala Chetti* v. *Vijayaraghavachariar*[10]. In the present case, the sum of

1. (1905) 92 L.T. 682.
2. (1939) 23 T.C. 71.
3. (1887) 2 T.C. 239.
4. (1938) 2 K.B. 482.
5. (1927) 11 T.C. 730, 742.
6. (1937) 2 M.L.J. 763 : L.R. 64 I.A. 215 : I.L.R. 1937 Bom. 388 (P.C.).
7. (1897) A.C. 1 (P.C.).
8. (1936) A.C. 1, 19.
9. (1926) A.C. 395, 412.
10. (1922) 43 M.L.J. 305 : L.R. 49 I.A. 181 : I.L.R. 45 Mad. 378, 389 (P.C.).

Rs. 18,911-12-0 was not paid as consideration for the acquisition of the interest of the old partners in the firm including its goodwill and other assets, but was paid statedly as the consideration for the acquisition of an exclusive right to the stock-in-trade of the new firm.

Even so, Mr. Rama Rao Sahib contends that moneys laid out in acquiring rights under unexecuted contracts *which* might be of value to a trader or businessman are in the nature of a capital expenditure and he cited the case of *John Smith & Son* v. *Moore*[1], and the *City of London Contract Corporation, Ltd.* v. *Styles*[2], in support of his contention. The following observations of Lord Macmillan in the *Tata Hydro Electric Agencies, Ltd.* v. *Commissioner of Income-tax*[3], are pertinent in this connection :

"Their Lordships recognise, and the decided cases show how difficult it is to discriminate between expenditure which is, and expenditure which is not incurred solely for the purpose of acquiring profits or gains. In the present case, their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants. They were certainly not made in the process of earning their profits ; they were not payments to creditors for goods supplied or services rendered to the appellants in their business, they did not arise out of any transactions in the conduct of their business . . . . In short the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the rights and opportunity to earn profits, *i.e.*, of the right to conduct the business and not for the purpose of producing profits in the conduct of the business."

For the purpose of the rule permitting deduction of a revenue expenditure and prohibiting deductions of capital expenditure, it is necessary to differentiate between fixed capital and circulating or floating capital. Fixed capital is property which a trader retains in his possession and use in the carrying on or conduct of his business ; *e.g.*, land, buildings, plant, machinery, fixtures, good-will, etc. Circulating or floating capital consist of property which a trader deals in, buys and sells in the ordinary course of business with the object of making profits, *e.g.*, stock-in-trade of every description. Circulating capital is capital which is turned over and in the process of being turned over, yields profits or loss. Fixed capital is not involved directly in that process and remains, unaffected by it. *Vanden Bergha, Ltd.* v. *Clark*[4], *Inland Revenue Commissioner* v. *Res Rowthers Development Syndicate*[5]. Floating or circulating capital consists of raw materials to be worked up and of the manufactured articles to be sold in the case of a business of manufacture and sale and of goods which are merely bought and sold in the case of a selling business as in this case. With these goods the business is carried on and it is on the turnover of these and their replacement by further goods bought that the trader makes his profit or loss. Consequently expenses incurred for the purchase of acquisition of goods which form the stock-in-trade or the circulating or floating capital of a business are proper and necessary deductions in computing the profits of the business. Such expenses are treated differently from expenditure on the fixed capital of a trade or business which is an inadmissible deduction in computing the profits of the trader. The very case cited by Mr. Rama Rao Saheb *John Smith and Son* v. *Moore*[6], illustrates the difficulty of drawing a line between fixed and circulating capital. There the assesse acquired as part of a running business of coal exporters certain unexecuted contracts for the supply of coal at favourable prices running over a particular period and the price paid for the acquisition of those contracts, was as estimated by accountants a sum of £30,000. The assessee claimed to deduct the sum of £30,000 as part of the purchase price of his stock in trade, namely, coal. There was a difference of opinion among the learned Lords both as to the result and as regards the grounds of decision. Viscount Haldane (who was in the majority), disallowed the claim of the assessee on the following grounds :

"The appellant of course made profit with a circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of 14 shillings and reselling it for more ; but he was able to do this simply because he had acquired, among other assets of his

1. (1921) 2 A.C. 13.
2. (1887) 2 T.C. 239.
3. (1937) 2 M.L.J. 763 : L.R. 64 I.A. 215 : I.L.R. 1937 Bom. 388 at 400 (P.C.).
4. (1935) A.C. 431.
5. (1928) A.C. 132.
6. (1921) 2 A.C. 13 at 20.

business, including the goodwill, the contracts in question, It was not by selling these contracts of limited duration though they were, it was not by parting with them to other masters, but by retaining them that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that, although they may have been of short duration, they were nonetheless part of his fixed capital."

Different tests have been laid down by learned Judges of the Courts in England to distinguish between capital and revenue expenditure. In *Vallambrosa Rubber Co., Ltd.* v. *Farmer*[1], Lord Dunedin drew a distinction between expenditure which is paid once and for all and expenditure which will recur year after year and suggested that the former would normally be capital expenditure and the latter expenditure, on revenue account. This was however only a rough and ready test. In the *British Insulated and Helsby Cables* v. *Atherton*[2], Viscount Cave suggested the following test:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such as an expenditure as properly attributable not to revenue but to capital."

The same test was suggested by Rowlatt, J., in *Ounsworth* v. *Vickers, Ltd.*[3], namely, the distinction between expenditure which is to meet a continuous demand and expenditure which is made once and for all. The most common instance of sums paid in respect of a continuous demand would be moneys paid for acquiring stock. Having considered the tests propounded by learned Judges in various cases, we are of the opinion that no one test is conclusive in any particular case. The question has to be considered in a reasonable manner and according to the ordinary principles of commercial accountancy.

The present case is clearly distinguishable on its facts from the decision of the House of Lords in *John Smith & Son* v. *Moor*[4]. There was no acquisition here of rights under contracts which related to the whole structure of the business or which formed the framework within which the circulating capital operated.

Nothing more was purchased or acquired than a certain quantity of piece-goods which the new firm acquired and paid for. There was here no transfer of rights under unexecuted contracts which provided the means of making profits by the retiring partners to the continuing partners. In order to acquire an exclusive title to the goods which formed their stock-in-trade the new firm had to pay the price actually stipulated as payable to the manufacturers and in addition a sum of Rs. 18,911-12-0 to the quondam partners. In other words the cost of the goods to the new firm was the invoice price of the goods plus the sum of Rs. 18,911-12-0 paid to the partners. Without such payment, the goods could not have been acquired or sold by the new firm as their goods and the profits could not have been made by them. The payment in question was really part of the price or consideration paid for the purchase or acquisition of the stock-in-trade of the business and the expenditure was part of the ordinary current revenue expenditure of the business. The goods in question were of the kind which the new firm bought and sold as part of its business and they remained the circulating capital of the new firm. The goods were brought for resale and were in fact resold for profit. We do not think that there is anything in the nature of capital expenditure in the purchase of stock required for immediate resale during the year.

The other cases referred to by Mr. Rama Rao Sahib do not call for detailed notice. Payments made for the exclusive privilegs of excavating shells or chanks for the purpose of a business as distinct from payments made for the purchase of the raw materials themselves have been held to be inadmissible deductions. *Commissioner of Income-tax* v. *Chengalraya Mudaliar*[5], *Commissioner of Income-tax* v. *Chengalraya Chetty*[6], *Abdul Kayam Sahib Husain* v. *Commissioner of Income-tax*[7]. These cases are clearly

1. (1910) 5 T.C. 529.
2. (1926) A.C. 205 at 213.
3. (1915) 3 K.B. 267 at 274.
4. (1921) 2 A.C. 13.
5. (1934) 67 M.L.J. 350 : I.L.R. 58 Mad. 1.
6. (1937) 1 M.L.J. 182 : I.L.R. 1937 Mad. 792 (S.B.).
7. (1939) I.T.R. 652.

distinguishable from the present case and would require to be reconsidered in the light of the decision of the Judicial Committee in *Mohanlal Hargovind* v. *Commissioner of Income-tax*[1], that a current expenditure does not become a capital expenditure merely because the material is provided by something like a forward contract under which a person, for the payment of a lump sum down, secures to himself the exclusive supply of raw material for a period of over a year. The present case has reference only to two consignments of goods consisting of 334 bales and the contracts themselves did not provide for any "supply of goods" for a continuous period of time ahead. There was here no payment for the assignment of rights under contracts whose object was to ensure a handy supply of goods for a considerable time for the benefit of the business.

Section 10, sub-section 2, clause (xv) of the Income-tax Act authorises the deduction of any expenditure not being in the nature of capital expenditure laid out or expended wholly or exclusively for the purposes of a business when computing its profits and gains. This clause would cover the bulk of the outgoings of a business and authorises the deduction of what would, in most cases, be the main expenditure of a trade or business such as the purchase of raw materials or the stock-in-trade. The decisions of the House of Lords on the corresponding but more stringent provisions of the English Income-tax Act, have established the principle that if a deduction, though not specifically allowed, is necessary or proper to be made in order to ascertain the profits and gains of a business according to ordinary commercial practice, it ought to be allowed, provided there is no prohibition against such allowance in the statute. The deduction of expenditure incurred for the trade or business is indeed involved in the very idea of profits and the profits and gains of a business have to be ascertained according to ordinary methods of commercial trading, subject to the provisions of the Act as require a departure therefrom by way of prohibition of certain deductions. The classical authority for these propositions would be found in the judgments of Lords Parker and Sumner in *Usher's case*: *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*[2] and in the judgment of Viscount Cave in the *British Insulated and Helsby Cables* v. *Atherton*[3]. These principles have been applied to cases under the Indian Income-tax Act by the Judicial Committee in the *Commissioner of Income-tax* v. *Chitnavis*[4] and in the recent case of *Mohanlal Hargovind* v. *Commissioner of Income-tax*[1]. In the last case Lord Greene stated the posititon quite concisely in these terms :

> "There is no definition of that expression (capital expenditure) which must, in their Lordships' opinion, be construed in a business sense save in so far as there may be rules of construction applicable to it. Their Lordships feel no doubt that in a business sense this expenditure is expenditure on revenue account and not on capital account . . . . . ."

Applying the test laid down in that case we are of the opinion that the sum of Rs. 18,911-12-0 paid to the old partners by the new firm was an item of revenue expenditure and an admissible deduction in computing the profits of the new firm, the applicant in this referenee.

The second question referred to us is answered in the negative and in favour of the assessee. The assessee having succeeded in this reference would be entitled to his costs which we fix at Rs. 250.

V. P. S. *Second question in reference answered in favour of the assessee.*

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1. (1949) 2 M.L.J. 571 at 573 : L.R. 76 I.A. 235 : I.L.R. 1949 Nag. 892 (P.C.).
2. (1915) A.C. 433 at 458 and 467.
3. (1926) A.C. 205 at 211.
4. (1932) 63 M.L.J. 361 : L.R. 59 I.A. 290 (P.C.).

[THE SUPREME COURT OF INDIA.]

(Original Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND S. R. DAS, JJ.

[Under Article 32 of the Constitution of India for a Writ of *Habeas Corpus*.]

A. K. Gopalan .. *Petitioner*.*

v.

The State of Madras .. *Opposite Party*.

Union of India .. *Intervener*.

Preventive Detention Act (IV of 1950), sections 3, 7, 12 and 14 and the Constitution, Articles 12, 13, 14, 19, 21, 22 and 32 (1)—Validity of the Preventive Detention Act—Tests to be applied for determination of question—Preventive detention—If covered by Article 19—" Law " in Article 21—Meaning—Article 22, if to be construed as a complete code.

In an application under section 32 (1) of the Constitution for a writ of *Habeas Corpus* against the detention of the applicant by the Madras Government under section 3 (1) of the Preventive Detention Act (IV of 1950), the legality of the order was challenged on the ground that the Act contravened the provision of Articles 13, 19 and 21 of the Constitution and that the provisions of the Act were not in accordance with Article 22 of the Constitution. The contention was that the impugned legislation abridges or infringes the rights given by Articles 19-21 and is also not in accordance with the permissive legislation on preventive detention allowed under Article 22 (4) and (7) and in particular is an infringement of the provisions of Article 22 (5).

Held (Fazl Ali and Mahajan dissenting) : The Preventive Detention Act is not invalid as in anyway affecting the Articles of the Constitution.

By the Full Court.—The provisions of section 14 of the impugned Act when it prohibits the disclosure of the grounds of detention contravenes or abridges the right given under Article 22 (5) and are therefore invalid. But this decision would not affect the validity of the rest of the Act as the section can be severed from the rest of the Act.

Per *Kania, C.J.*—If there is a legislation directly attempting to control a citizen's freedom of speech of expression or his right to assemble peacefully and without arms, etc. the question whether the legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of the sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life.

On a true construction of Article 19, both preventive and punitive detention are outside the scope of Article 19.

There is no justification to give the meaning of " jus " to " law " in Article 21. The deliberate omission of the word " due " from Article 21 lends strength to the contention that the justiciable aspect of " law ", *i.e.*, to consider whether it is reasonable or not by the Court does not form part of the Indian Constitution.

It cannot be said that Article 22 is a complete Code in itself. Article 21 has to be read as supplemented by Article 22.

Bearing in mind the provisions of Article 22 read with Article 246, and Schedule VII, List I, Entry 9 and List III, Entry 3, it is clear that Parliament is empowered to enact a law of preventive detention.

Section 3 of the Preventive Detention Act is no delegation of legislative power to make laws. It only confers discretion on the officer to enforce the law made by the Legislature. It cannot be said to be *ultra vires*.

Section 7 of the Act runs on the same lines as Article 22 (5) and (6) and infringes no provision of the Constitution. Clause (5) of Article 22 cannot be read as giving a fundamental right to be heard by an independent tribunal.

Section 12 of the Act cannot be challenged on the ground hat it does not conform to the provisions of Article 22 (7).

Section 14 of the impugned Act appears to be a drastic provision which requires considerable support to sustain it in a Preventive Detention Act. Its provisions abridge the right given under Article 22 (5) and are therefore *ultra vires*.

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* Petition No. 13 of 1950. 19th May, 1950.

Fazl Ali, J.—"Freedom of movement" is the essence of personal liberty and any restraint on freedom of movement must be held to amount to abridgment or deprivation of personal liberty, as the case may be, according to the nature of the restraint. Freedom of movement is in the last analysis the essence of personal liberty. Preventive detention amounts to a complete deprivation of the right guaranteed by Article 19 (1) (*d*). The proper juristic conception is that personal liberty and freedom of movement connote the same thing and the words used in Article 19 (1) (*d*) must be construed according to this conception. Article 19 (1) (*d*) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the Article is really a right to personal liberty and preventive detention is a deprivation of that right. The law of preventive detention is subject to such limited judicial review as is permitted under Article 19 (5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions.

It cannot be said that the word "law" in Article 21 means only State-made law.

The authors of the Constitution have made it necessary that the Parliament should put certain specifications into the Act which it is empowered to pass under Article 22 (7) (*a*), so that by means of these specifications, the necessity for enacting so drastic a law should be apparent on the face of it and its application should be confined to the classes and circumstances specified.

Section 12 of the inpugned Act takes away a most important safeguard conferred on the subject by the Constitution and is not a valid provision, since it contravenes the very provision in the Constitution under which Parliament derived its competence to enact it.

There is nothing wrong or unconstitutional in either section 3 or 7 of the Act.

The real sections which offend the Constitution are sections 12 and 14 of the impugned Act. Though section 14 may be severable from the rest of the Act, section 12 goes to the very root of the legislation in as much as it deprives a detenu of an essential safeguard.

Per *Patanjali Sastri, J.*—Article 19 guarantees protection for the more important civil liberties of citizens who are in the enjoyment of their freedom, while at the same time laying down restrictions which the Legislature may properly impose on the exercise of such rights and it has nothing to do with the deprivation of personal liberty or imprisonment which is dealt with by the succeeding three Articles.

It cannot be said that the word "Law" in Article 21 means the immutable and universal principles of natural justice. It means "positive or State-made law".

The language of Article 21 is perfectly general and covers deprivation of personal liberty or incarceration and would therefore be applicable to preventive detention as well.

It cannot be said that section 12 of the impugned Act does not comply with the requirements of clause (7) of section 22.

Section 14 of the Act contravenes the provisions of Article 22 (5) and Article 32 in so far as it prohibits the person detained from disclosing to the Court the grounds of his detention communicated to him by the detaining authority or the representation made by him against the order of detention, and prevents the Court from examining them for the purposes aforesaid and to that extent it must be held under Article 13 (2) to be void. This does not however affect the rest of the Act which is severable.

Per *Mahajan, J.*—Preventive detention in substance is a negation of the freedom of locomotion guaranteed under Article 19 (1) (*d*) and it cannot be said that it merely restricts it. Be that as it may, the question for consideration is whether it was intended that Article 19 would govern a law made under Article 22. On all important points that could arise in connection with the subject of preventive detention provision has been made in Article 22, and that being so, the only correct approach in examining the validity of a law on the subject of preventive detention is by considering whether the law made satisfied the requirements of Article 22 or in anyway abridges or contravenes them and if the answer is in the affirmative, then the law will be valid, but if the answer is in the negative, the law would be void.

It cannot be said that in making "satisfaction of the Government" as the standard for judging prejudicial acts of persons who are subject to the law of preventive detention, section 3 of the impugned Act in anyway contravenes Article 22 of the Constitution.

Section 7 of the Act gives full effect to the provisions of Article 22 (5).

No circumstances as required by Article 22 (7) has been stated in section 12 of the impugned Act and it does not fulfil the requirements of clause (7) of Article 22 and is not a law which falls within the ambit of that clause and so it is void.

Section 14 of the Act when it prohibits the disclosure of the grounds contravenes or abridges the right given by Part III of the Constitution to a citizen and is *ultra vires* the powers of the Parliament to that extent.

Per *Mukherjea, J.*—The question that has to be considered is whether a law relating to preventive detention is justiciable in a Court of law on the ground of reasonableness under Article 19 (6) of the Constitution inasmuch as it takes away or abridges the right to free movement in the territory of India guaranteed by clause 1 (*d*) of the Article.

What clause (1) (*d*) of Article 19 contemplates is not freedom from detention, either punitive or preventive; it relates to and speaks of a different aspect or phase of civil liberty.

The Court is not entitled to examine the reasonableness or otherwise of the Preventive Detention Act and see whether it is within the permissive bounds specified in clause (5) of Article 19.

The contention that the Preventive Detention Act is invalid, by reason of the fact that the procedure it lays down is not in conformity with the rules of natural justice does not fall for consideration. It is enough if the law is a valid law which the Legislature is competent to pass and which does not transgress any of the fundamental rights declared in Part III of the Constitution.

Though section 12 of the Preventive Detention Act has not been framed with due regard to the object which the Constitution had in view, it cannot be said that the section is invalid as being *ultra vires* the Constitution. It is not obligatory on Parliament to prescribe both the circumstances and the classes of cases.

Section 14 of the Act does materially affect the fundamental rights declared under Part III of the Constitution and for this reason it must be held to be illegal and *ultra vires*, but as it can be severed from the rest, the whole Act is not affected.

Per *Das, J.*—The purpose of Article 19 (1) (*d*) is to guarantee that there shall be no State barrier. It has nothing to do with the freedom of the person as such.

A lawful detention, whether punitive or preventive, does not offend against the protection conferred by Article 19 (1) (*a*) to (*e*) and (*g*) for those rights must necessarily cease when the freedom of the person is lawfully taken away. In short, those rights end where the lawful detention begins. The validity or otherwise of preventive detention does not depend on and is not dealt with by Article 19.

There is no scope for the introduction into Article 21 of the Constitution of the doctrine of "due process of law" even as regards procedure.

If some procedure is provided as envisaged by Article 21 and the compulsory requirements of Article 22 are obeyed and carried out nobody can under our Constitution complain of the law providing for preventive detention. Therefore, a preventive detention law which provides some procedure and complies with the requirements of Article 22 (4) to (7) must be held to be a good law, however odious it may appear to the Court to be.

M. K. Nambyar, Senior Advocate, Supreme Court (*S. K. Aiyar* and *V. G. Rao*, Advocates, Supreme Court, with him), instructed by *S. Subramaniam*, Agent for Petitioner.

K. Rajah Aiyar, Advocate-General of Madras (*C. R. Pattabhi Raman* and *R. Ganapathi*, Advocates, Supreme Court, with him), instructed by *P. A. Mehta*, Agent, for State of Madras.

M. C. Setalvad, Attorney-General for India (*Jindialal*, Advocate, Supreme Court, with him), instructed by *P. A. Mehta*, Agent, for Intervener.

The Court delivered the following

JUDGMENTS : *Kania C.J.*:—This is a petition by the applicant under Article 32 (1) of the Constitution of India for a writ of *habeas corpus* against his detention in the Madras Jail. In the petition he has given various dates showing how he has been under detention since December, 1947. Under the ordinary Criminal Law he was sentenced to terms of imprisonment but those convictions were set aside. While he was thus under detention under one of the orders of the Madras State Government, on the 1st of March, 1950, he was served with an order made under section 3 (1) of the Preventive Detention Act (IV of 1950). He challenges the legality of the order as it is contended that Act IV of 1950 contravenes the provisions of Articles 13, 19 and 21 and the provisions of that Act are not in accordance with Article 22 of the Constitution. He has also challenged the validity of the order on the ground that it is issued *mala fide*. The burden of proving that allegation is on the applicant. Because of the penal provisions of section 14 of the impugned Act the applicant has not disclosed the grounds, supplied to him, for his detention and the question of *mala fides* of the order therefore cannot be gone into under this petition.

The question of the validity of Act IV of 1950 was argued before us at great length. This is the first case in which the different Articles of the Constitution of India contained in the Chapter on Fundamental Rights has come for discussion before us. The Court is indebted to the learned counsel for the applicant and the Attorney-General for their assistance in interpreting the true meaning of the relevant clauses of the Constitution.

In order to appreciate the rival contentions it is useful first to bear in mind the general scheme of the Constitution. Under Article 53 of the Constitution the executive power of the Union is vested in the President and is to be exercised by him in accordance with the Constitution either directly or through officers subordinate to him. The legislative powers of the Union are divided between the Parliament and Legislatures of the States. The ambit and limitations on their respective powers are found in Article 246 read with Article 245, Schedule VII, Lists 1, 2 and 3 of the Constitution. For the Union of India the Supreme Court is established and its powers and jurisdiction are set out in Articles 124 to 147. This follows the pattern of the Government of India Act, 1935, which was the previous Constitution of the Government of India. Unlike the American Constitution, there is no Article vesting the judicial power of the Union of India in the Supreme Court. The material points substantially altering the edifice are first in the Preamble which declares India a Sovereign Democratic Republic to secure to all its citizens justice, liberty and equality and to promote among them all fraternity. Part III of the Constitution is an important innovation. It is headed " Fundamental Rights ". In that Part the word " State " includes both the Government of the Union and the Government of the States. By Article 13 it is expressly provided that all laws in force in the territory of India, immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this Part, to the extent of such inconsistency, are void. Therefore, all laws in operation in India on the day the Constitution came into force, unless otherwise saved, to the extent they are inconsistent with this Chapter on Fundamental Rights, become automatically void. Under Article 13 (2) provision is made for legislation after the Constitution comes into operation. It is there provided that the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention, be void. Therefore as regards future legislation also the Fundamental Rights in Part III have to be respected and, unless otherwise saved by the provisions of the Constitution, they will be void to the extent they contravene the provisions of Part III. Under Article 245 (1) the legislative powers conferred under Article 246 are also made " subject to the provisions of this Constitution," which of course includes Part III dealing with the Fundamental Rights. The term law in Article 13, is expressed to be wide enough to include Acts, Ordinances, Orders, Bye-laws, Rules, Regulations and even custom or usage having, in the territory of India, the force of law. The rest of this Part is divided in seven divisions. " Right to Equality " is found in Articles 14-18, " Right to Freedom " in Articles 19-22, " Right against Exploitation " in Articles 23 and 24, " Right to Freedom of Religion " in Articles 25-28, " Cultural and Educational Rights " in Articles 29 and 30, " Right to Property " in Article 31 and " Right to Constitutional Remedies " in Articles 32-35. In this case we are directly concerned only with the Articles under the caption " Right to Freedom " (19-22) and Article 32 which gives a remedy to enforce the rights conferred by this Part. The rest of the Articles may have to be referred to only to assist in the interpretation of the abovementioned Articles.

It is obvious that by the insertion of this Part the powers of the Legislature and the Executive, both of the Union and the States, are further curtailed and the right to enforce the Fundamental Rights found in Part III by a direct application to the Supreme Court is removed from the legislative control. The wording of Article 32 shows that the Supreme Court can be moved to grant a suitable relief, mentioned in Article 32 (2), only in respect of the Fundamental Rights mentioned in Part III of the Constitution.

The petitioner is detained under a Preventive Detention Order, made under Act IV of 1950, which has been passed by the Parliament of India. In the Seventh Schedule of the Constitution, List I contains entries specifying items in respect of which the Parliament has exclusive legislative powers. Entry 9 is in these terms :

" Preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India ; persons subjected to such detention."

List III of that Schedule enumerates topics on which both the Union and the States have concurrent legislative powers. Entry 3 of that List is in these terms:

"Preventive detention for reasons connected with the security of a State, the maintenance of public order or the maintenance of supplies and services essential to the community; persons subjected to such detention."

It is not disputed that Act IV of 1950 is covered by these two Entries in List I and List III of the Seventh Schedule. The contention of the petitioner is that the impugned legislation abridges or infringes the rights given by Articles 19-21 and is also not in accordance with the permissive legislation on preventive detention allowed under Articles 22 (4) and (7) and in particular is an infringement of the provisions of Article 22 (5). It is therefore necessary to consider in detail each of these Articles and the arguments advanced in respect thereof.

Article 19 is for the protection of certain rights of freedom to citizens. It runs as follows:—

"19. (1) All citizens shall have the right—

(*a*) to freedom of speech and expression;

(*b*) to assemble peaceably and without arms;

(*c*) to form associations or unions;

(*d*) to move freely throughout the territory of India;

(*e*) to reside and settle in any part of the territory of India;

(*f*) to acquire, hold and dispose of property; and

(*g*) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

(3) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

Clause (2) specifies the limits up to which the abridgment of the right contained in 19 (1) (*a*) may be permitted. It is an exception. Similarly clause (3) sets out the limit of abridgment of the right in 19 (1) (*b*) and clause (4) specifies such limits in respect of the right in 19 (1) (*c*). Clause (5) is in respect of the rights mentioned in 19 (1) (*d*), (*e*) and (*f*), and clause (6) is in respect of the rights contained in 19 (1) (*g*). It cannot be disputed that the Articles collected under the caption "Right to Freedom" have to be considered together to appreciate the extent of the Fundamental Rights. In the first place it is necessary to notice that there is a distinction between rights given to citizens and persons. This is clear on a perusal of the provisions of Article 19 on the one hand and Articles 20, 21 and 22 on the other. In order to determine whether a right is abridged or infringed it is first necessary to determine the extent of the right given by the Articles and the limitations prescribed in the Articles themselves permitting its curtailment. The inclusion of Article 13 (1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enact-

ment, to the extent it transgresses the limits, invalid. The existence of Article 13 (1) and (2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself.

As the preventive detention order results in the detention of the applicant in a cell it was contended on his behalf that the rights specified in Article 19 (1) (*a*), (*b*), (*c*), (*d*), (*e*) and (*g*) have been infringed. It was argued that because of his detention he cannot have a free right to speech as and where he desired and the same argument was urged in respect of the rest of the rights mentioned in sub-clauses (*b*), (*c*), (*d*), (*e*) and (*g*). Although this argument is advanced in a case which deals with preventive detention, if correct, it should be applicable in the case of punitive detention also to any one sentenced to a term of imprisonment under the relevant section of the Indian Penal Code. So considered, the argument must clearly be rejected. In spite of the saving clauses (2) to (6), permitting abridgment of the rights connected with each of them, punitive detention under several sections of the Penal Code, *e.g.*, for theft, cheating, forgery and even ordinary assault, will be illegal. Unless such conclusion necessarily follows from the Article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution. The Article has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in Article 19 (1) generally must fail. Any other construction put on the Article, it seems to me, will be unreasonable.

It was next urged that while this interpretation may meet the contention in respect of rights under Article 19 (1) (*a*), (*b*), (*c*), (*e*) and (*g*), the right given by Article 19 (1) (*d*) is left untouched. That sub-clause expressly gives the right "to move freely throughout the territory of India." It was argued that by the confinement of the petitioner under the preventive detention order his right to move freely throughout the territory of India is directly abridged and therefore the State must show that the impugned legislation imposes only reasonable restrictions on the exercise of that right in the interests of the general public or for the protection of the interests of any Scheduled Tribe, under Article 19 (5). The Court is thus enjoined to inquire whether the restrictions imposed on the detained person are reasonable in the interests of the general public. Article 14 of the Constitution gives the right to equality in these terms :

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It was argued that the words "within the territory of India" are unnecessary in that Article because the Parliament is supreme to make laws operative only within the territory of India. Without those words also the Article will bear the same meaning. Similarly, it was urged that the words "territory of India" in Article 19 (1) (*d*) may be treated as superfluous, and preventive detention would thus be an abridgment of the right to move freely. In my opinion, this rule of construction itself is faulty. Because certain words may be considered superfluous (assuming them to be so in Article 14 for the present discussion) it is quite improper to assume that they are superfluous wherever found in the rest of the

Constitution. On the contrary, in my opinion, reading sub-clause (*d*) as a whole the words "territory of India" are very important. What is sought to be protected by that sub-clause is the right to freedom of movement, *i.e.*, without restriction, throughout the territory of India. Read with their natural grammatical meaning the sub-clause only means that if restrictions are sought to be put upon movement of a citizen from State to State or even within a State such restrictions will have to be tested by the permissive limits prescribed in clause (5) of that Article. Sub-clause (*d*) has nothing to do with detention, preventive or punitive. The Constitution mentions a right to freedom of movement throughout the territory of India. Every word of that clause must be given its true and legitimate meaning and in the construction of a Statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning. This position is made quite clear when clause (5) is read along with this sub-clause. It permits the imposition of reasonable restrictions on the exercise of such right either in the interest of general public or the protection of the interest of any Scheduled Tribe. It is difficult to conceive of a reasonable restriction necessary in the interests of the *general* public for confining a person in a cell. Such restriction may be appropriate to prevent a person from going from one Province to another or one area to another, having regard to local conditions prevailing in particular areas. The point however is made abundantly clear by the alternative, *viz.*, for the protection of the interests of any Scheduled Tribe. What protection of the interests of a Scheduled Tribe requires the confinement of a man in a cell? On the other hand, preventing the movement of a person from one part of the territory of India to another and the question of reasonable restriction imposed to protect the interests of a Scheduled Tribe is clearly intelligible and often noticed in the course of the administration of the country. Scheduled Tribes have certain rights, privileges and also disabilities. They have their own civilization, customs and mode of life and prevention of contact with persons or groups with a particular Scheduled Tribe may be considered undesirable during a certain time or in certain conditions. The legislative history of India shows that Scheduled Tribes have been given a separate place on these grounds. Reading Article 19 as a whole, therefore, it seems to me that it has no application to a legislation dealing with preventive or punitive detention as its direct object. I may point out that the acceptance of the petitioner's argument on the interpretation of this clause will result in the Court being called upon to decide upon the reasonableness of several provisions of the Indian Penal Code and several other penal legislations as abridging this right. Even under clause (5), the Court is permitted to apply the test of reasonableness of the restrictions or limits not generally, but only to the extent they are either in the interests of the general public, *e.g.*, in case of an epidemic, riot, etc., or for the protection of the interests of any Scheduled Tribe. In my opinion, this is not the intention of the Constitution. Therefore the contention urged in respect of Article 19 fails.

It was argued that Article 19 and Article 21 should be read together as implementing each other. Article 19 gave substantive rights to citizens while Article 21 prescribed that no person can be deprived of his life and personal liberty except by procedure established by law. Even so, on a true construction of Article 19, it seems to me that both preventive and punitive detention are outside the scope of Article 19.

In order to appreciate the true scope of Article 19 it is useful to read it by itself and then to consider how far the other Articles in Part III affect or control its meaning. It is the first Article under the caption "Right to Freedom". It gives the rights mentioned in 19 (1) (*a*) to (*g*) to all citizens of India. These rights read by themselves and apart from the controls found in clauses (2) to (6) of the same Article, specify the different general rights which a free citizen in a democratic country ordinarily has. Having specified those rights, each of them is considered separately from the point of view of a similar right in the other

citizens, and also after taking into consideration the principle that individual liberty must give way, to the extent it is necessary, when the good or safety of the people generally is concerned. Thus the right to freedom of speech and expression is given by 19 (1) (*a*). But clause (2) provides that such right shall not prevent the operation of a law which relates to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Clause (2) thus only emphasizes that while the individual citizen has a free right of speech or expression, he cannot be permitted to use the same to the detriment of a similar right in another citizen or to the detriment of the State. Thus, all laws of libel, slander, contempt of court or laws in respect of matters which offend against decency or morality are re-affirmed to be operative in spite of this individual right of the citizen to freedom of speech and expression. Similarly, that right is also subject to laws which prevent undermining the security of the State or against activities which tend to overthrow the State. A similar analysis of clauses (3) and (4) shows similar restrictions imposed on similar grounds. In the same way clause (5) also permits reasonable restrictions in the exercise of the right to freedom of movement throughout the territory of India, the right to reside and settle in any part of the territory of India or the right to acquire, hold and dispose of property, being imposed by law provided such reasonable restrictions on the exercise of such right are in the interest of the general public. The Constitution further provides by the same clause that similar reasonable restrictions could be put on the exercise of those rights for the protection of the interests of a Scheduled Tribe. This is obviously to prevent an argument being advanced that while such restriction could be put in the interest of general public, the Constitution did not provide for the imposition of such restriction to protect the interest, of a smaller group of people only. Reading Article 19 in that way as a whole the only concept appears to be that the specified rights of a free citizen are thus controlled by what the framers of the Constitution thought were necessary restrictions in the interest of the rest of the citizens.

Reading Article 19 in that way it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to "personal liberty" contemplated by Article 21. "Personal liberty" covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression "personal liberty" the right to freedom of speech [mentioned in Article 19 (1) (*a*)] or the right to acquire, hold or dispose of property [mentioned in 19 (1) (*f*)] cannot be considered a part of the *personal* liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression personal liberty. So read there is no conflict between Articles 19 and 21. The contents and subject matters of Articles 19 and 21 are thus not the same and they proceed to deal with the rights covered by their respective words from totally different angles. As already mentioned in respect of each of the rights specified in the sub-clauses of Article 19 (1) specific limitations in respect of each is provided, while the expression "personal liberty" in Article 21 is generally controlled by the general expression "procedure established by law." The Constitution, in Article 19, and also in other Articles in Part III, thus attempts to strike a balance between individual liberty and the general interest of the society. The restraints provided by the Constitution on the legislative powers or the executive authority of the State thus operate as guarantees of life and personal liberty of the individuals.

Deprivation (total loss) of personal liberty, which *inter alia* includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression "personal liberty" in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19 (1) (*d*). Deprivation of personal liberty has not the same

meaning as restriction of free movement in the territory of India. This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to security of peace or maintenance of public order are read. Therefore Article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word "deprivation" includes within its scope 'restriction' when interpreting Article 21. Article 22 envisages the law of preventive detention. So does Article 246 read with Schedule Seven, List I, Entry 9 and List III, Entry 3. Therefore, when the subject of preventive detention is specifically dealt with in the Chapter on Fundamental Rights I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in Article 19 (1). Article 19 (1) does not purport to cover all aspects of liberty or of personal liberty. In that Article only certain phases of liberty are dealt with. "Personal liberty" would primarily mean liberty of the physical body. The rights given under Article 19 (1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If Article 19 is considered to be the only Article safeguarding personal liberty several well-recognized rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read Article 19 as dealing with the same subject as Article 21. Article 19 gives the rights specified therein only to the citizens of India while Article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by Article 21 is very general. It is of "law"—whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the Legislature are not here prescribed in detail as in the case of the rights specified in Article 19. In my opinion therefore Article 19 should be read as a separate complete Article.

Article 21 which is also in Part III under the caption "Right to Freedom" runs as follows :—

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

This Article has been strongly relied upon by the petitioner in support of his contention that the impugned Act is *ultra vires* the Parliament as it abridges the right given by this Article to every person. It was argued that under the Constitution of the United States of America the corresponding provision is found in the 5th and 14th Amendments where the provision, *inter alia*, is :

> "That no person shall be deprived of his life or liberty or property except *by due process of law*."

It was contended for the petitioner that the Indian Constitution gives the same protection to every person in India, except that in the United States "due process of law" has been construed by its Supreme Court to cover both substantive and procedural law, while in India only the protection of procedural law is guaranteed. It was contended that the omission of the word 'due' made no difference to the interpretation of the words in Article 21. The word 'established' was not equivalent to 'prescribed.' It had a wider meaning. The word 'law' did not mean enacted law because that will be no legislative protection at all. If so construed, any Act passed by the Parliament or the State Legislature, which was otherwise within its legislative power, can destroy or abridge this right. On the same line of reasoning, it was argued that if that was the intention there was no necessity to put this as a fundamental right in Part III at all. As to the meaning of the word 'law' it was argued that it meant principles of natural justice. It meant "just," *i.e.*, law in the abstract sense of the principles of natural justice, as mentioned in standard works of Jurisprudence, and not "lex," *i.e.*, enacted law. Against the contention that such construction will leave the meaning vague, it was argued that four principles of natural justice recognised in all civilised countries were covered,

in any event, by the word 'law.' They are: (1) An objective test, *i.e.*, a certain, definite and ascertainable rule of human conduct for the violation of which one can be detained; (2) Notice of the grounds of such detention; (3) An impartial tribunal, administrative, judicial or advisory, to decide whether the detention is justified; and (4) orderly course of procedure, including an opportunity to be heard orally (not merely by making a written representation) with a right to lead evidence and call witnesses.

In my opinion, this line of approach is not proper and indeed is misleading. As regards the American Constitution its general structure is noticed in these words in "The Government of the United States" by Munro (5th Edition), at page 53:

> "The architects of 1787 built only the basement. Their descendants have kept adding walls and windows, wings and gables, pillars, and porches to make a rambling structure which is not yet finished. Or, to change the metaphor, it has a fabric which, to use the words of James Russell Lowell, is still being 'woven on the roaring loom of time'. That is what the framers of the original Constitution intended it to be. Never was it in their mind to work out a final scheme for the government of the country and stereotype it for all time. They sought merely to provide a starting point."

The same aspect is emphasised in Professor Willis's book on Constitutional Law and Cooley's Constitutional Limitations. In contrast to the American Constitution, the Indian Constitution is a very detailed one. The Constitution itself provides in minute details the legislative powers of the Parliament and the State Legislatures. The same feature is noticeable in the case of the judiciary, finance, trade, commerce and services. It is thus quite detailed and the whole of it has to be read with the same sanctity, without giving undue weight to Part III or Article 246, except to the extent one is legitimately and clearly limited by the other.

Four marked points of distinction between the clause in the American Constitution and Article 21 of the Constitution of India may be noticed at this stage. The first is that in U. S. A. Constitution the word 'liberty' is used *simpliciter* while in India it is restricted to personal liberty. (2) In U. S. A. Constitution the same protection is given to property, while in India the fundamental right in respect of property is contained in Article 31. (3) The word 'due' is omitted altogether and the expression 'due process of law' is not used deliberately. (4) The word 'established' is used and is limited to 'Procedure' in our Article 21.

The whole argument of the petitioner is founded on the meaning of the word 'law' given to it by the Supreme Court of America. It seems unnecessary to embark on a discussion of the powers and jurisdiction of the Supreme Court of the U. S. A. and how they came to enlarge or abridge the meaning of law in the expression "due process of law." Without going into details, I think, there is no justification to adopt the meaning of the word 'law' as interpreted by the Supreme Court of U. S. A. in the expression "due process of law" merely because the word 'law' is used in Article 21. The discussion of the meaning of "due process of law" found in Willis on Constitutional Law and in Cooley's Constitutional Limitations shows the diverse meanings given to that expression at different times and under different circumstances by the Supreme Court of U. S. A., so much so that the conclusion reached by these authors is that the expression means reasonable law, according to the view of the majority of the judges of the Supreme Court at a particular time holding office. It also shows how the meaning of the expression was widened or abridged in certain decades. Moreover, to control the meaning so given to that expression from time to time the doctrine of police powers was brought into play. That doctrine, shortly put, is that legislation meant for the good of the people generally, and in which the individual has to surrender his freedom to a certain extent because it is for the benefit of the people at large, has not to be tested by the touchstone of the "due process of law" formula.

Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the wording of this clause. The report may be read not to control the meaning of the Article, but may be seen in case

of ambiguity. In *The Municipal Council of Sydney* v. *The Commonwealth*[1], it was thought that individual opinion of members of the Convention expressed in the debate cannot be referred to for the purpose of construing the Constitution. The same opinion was expressed in *United States* v. *Wong Kim Ark*[2]. The result appears to be that while it is not proper to take into consideration the individual opinions of members of Parliament or Convention to construe the meaning of the particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. In the present case the debates were referred to to show that the expression "due process of law" was known to exist in the American Constitution and after a discussion was not adopted by the Constituent Assembly in our Constitution. In *Administrator-General of Bengal* v. *Premlal Mullick*[3], a reference to the proceedings of the Legislature which resulted in the passing of the Act was not considered legitimate aid in the construction of a particular section. The same reasons were held as cogent for excluding a reference to such debates in construing an Indian Statute. Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved. See Craies' Statute Law (4th Edition), page 122, Maxwell on Interpretation of Statutes (9th Edition), pages 28-29 and Crawfod on Statutory Construction (1940 Edition), p. 379, Article 214. A perusal of the report of the drafting committee to which our attention was drawn shows clearly that the Constituent Assembly had before it the American Article and the expression "due process of law" but they deliberately dropped the use of that expression from our Constitution.

No extrinsic aid is needed to interpret the words of Article 21, which, in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or if they wanted to limit the same to procedure only, to adopt that expression with only the word 'procedural' prefixed to 'law'. However, the correct question is what is the right given by Article 21 ? The only right is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the Court ; it is the function of the Constitution. To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard. This is particularly so when in omitting to adopt "due process of law" it was considered that the expression "procedure established by law" made the standard specific. It cannot be specific except by reading the expression as meaning procedure prescribed by the Legislature. The word 'law' as used in this Part has different shades of meaning but in no other Article it appears to bear the indefinite meaning of natural justice. If so, there appears no reason why in this Article it should receive this peculiar meaning. Article 31 which is also in Part III and relates to the fundamental rights in respect of property runs as follows :—

"No person shall be deprived of his property save by authority of law."

It is obvious that in that clause 'law' must mean enacted law. The object of dealing with property under a different Article appears more to provide the exceptions found in Article 31 (2) to (6), rather than to give the word 'law' a different meaning than the one given in Article 21. The word 'established' according to the Oxford Dictionary means 'to fix, settle, institute or ordain by enactment or agreement'. The word 'established' itself suggests an agency which fixes

1. (1904) 1 Com. L.R. 208.
2. 169 U.S. 649 at 699.
3. (1895) L.R. 22 I.A. 107 : I.L.R. 22 Cal. 788 (P.C.).

the limits. According to the dictionary this agency can be either the Legislature or an agreement between the parties. There is therefore no justification to give the meaning of 'jus' to 'law' in Article 21.

The phrase "procedure established by law" seems to be borrowed from Article 31 of the Japanese Constitution. But other Articles of that Constitution which expressly preserve other personal liberties in different clauses have to be read together to determine the meaning of 'law' in the expression "procedure established by law". These Articles of the Japanese Constitution have not been incorporated in the Constitution of India in the same language. It is not shown that the word 'law' means 'jus' in the Japanese Constitution. In the Japanese Constitution these rights claimed under the rules of natural justice are not given by the interpretation of the words "procedure established by law" in their Article 31. The word 'due' in the expression "due process of law" in the American Constitution is interpreted to mean "just", according to the opinion of the Supreme Court of U.S.A. That word imparts jurisdiction to the Courts to pronounce what is "due" from otherwise, according to law. The deliberate omission of the word "due" from Article 21 lends strength to the contention that the justiciable aspect of 'law', *i.e.*, to consider whether it is reasonable or not by the Court, does not form part of the Indian Constitution. The omission of the word 'due', the limitation imposed by the word 'procedure' and the insertion of the word 'established' thus brings out more clearly the idea of legislative prescription in the expression used in Article 21. By adopting the phrase "procedure established by law" the Constitution gave the Legislature the final word to determine the law.

Our attention was drawn to *The King* v. *The Military Governor of the Hair Park Camp*[1], where Articles 6 and 70 of the Irish Constitution are discussed. Under Article 6 it is provided that the liberty of the person is inviolable and no person shall be deprived of such except "in accordance with law" . . . .
In Article 70 it is provided that no one shall be tried "save in due course of law" and extraordinary courts were not permitted to be established except the Military Courts to try military offences. The expression "in accordance with law" was interpreted to mean not rules of natural justice but as the law in force at the time. The Irish Court gave the expression "due course of law" the meaning given to it according to the English law and not the American law. It was observed by Lord Atkin in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[2], that in accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a court of justice. In *The King* v. *Secretary of State for Home Affairs*[3], Scrutton, L.J., observed :

"A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction."

It seems very arguable that in the whole set-up of Part III of our Constitution these principles only remain guaranteed by Article 21.

A detailed discussion of the true limits of Article 21 will not be necessary if Article 22 is considered a code to the extent there are provisions therein for preventive detention. In this connection it may be noticed that the Articles in Part III deal with different and separate rights. Under the caption "Right to Freedom" Articles 19-22 are grouped but each with a separate marginal note. It is obvious that Article 22 (1) and (2) prescribe limitations on the right given by Article 21. If the procedure mentioned in those Articles is followed the arrest and detention contemplated by Article 22 (1) and (2), although they infringe the personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention. Article 22 is for protection against arrest and detention in certain cases, and runs as follows :—

1. (1924) 2 Irish Reports K.B. 104.
2. (1931) A.C. 662 at 670.
3. (1923) 2 K.B. 361 at 382.

"22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(*a*) to any person who for the time being is an enemy alien; or

(*b*) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—

(*a*) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as judges of a High Court, has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (*b*) of clause (7); or

(*b*) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (*a*) and (*b*) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(*a*) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (*a*) of clause (4);

(*b*) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(*c*) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (*a*) of clause (4)."

The learned Attorney-General contended that the subject of preventive detention does not fall under Article 21 at all and is covered wholly by Article 22. According to him, Article 22 is a complete code. I am unable to accept that contention. It is obvious that in respect of arrest and detention Article 22 (1) and (2) provide safeguards. These safeguards are excluded in the case of preventive detention by Article 22 (3), but safeguards in connection with such detention are provided by clauses (4) to (7) of the same Article. It is therefore clear that Article 21 has to be read as supplemented by Article 22. Reading in that way the proper mode of construction will be that to the extent the procedure is prescribed by Article 22 the same is to be observed; otherwise Article 21 will apply. But if certain procedural safeguards are expressly stated as not required, or specific rules on certain points of procedure are prescribed, it seems improper to interpret these points as not covered by Article 22 and left open for consideration under Article 21. To the extent the points are dealt with, and included or excluded, Article 22 is a complete code. On the points of procedure which expressly or by necessary implication are not dealt with by Article 22, the operation of Article 21 will remain unaffected. It is thus necessary first to look at Article 22 (4) to (7) and next at the provisions of the impugned Act to determine if the Act or any of its provisions are *ultra vires*. It may be noticed that neither the American nor the Japanese Constitution contain provisions permitting preventive detention, much less laying down limita-

tions on such right of detention, in normal times, *i.e.*, without a declaration of emergency. Preventive detention in normal times, *i.e.*, without the existence of an emergency like war, is recognised as a normal topic of legislation in List I, Entry 9, and List III, Entry 3, of the Seventh Schedule. Even in the Chapter on Fundamental Rights Article 22 envisages legislation in respect of preventive detention in normal times. The provisions of Article 22 (4) to (7) by their very wording leave unaffected the large powers of legislation on this point and emphasize particularly by Article 22 (7), the power of the Parliament to deprive a person of a right to have his case considered by an Advisory Board. Part III and Article 22 in particular are the only restrictions on that power and but for those provisions the power to legislate on this subject would have been quite unrestricted. Parliament could have made a law without any safeguard or any procedure for preventive detention. Such an autocratic supremacy of the Legislature is certainly cut down by Article 21. Therefore, if the Legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III or Article 22 (4) to (7), the Preventive Detention Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed under such Act.

Article 22 (4) opens with a double negative. Put in a positive form it will mean that a law which provides for preventive detention for a period longer than three months shall contain a provision establishing an advisory board [consisting of persons with the qualifications mentioned in sub-clause (*a*)] and which has to report before the expiration of three months if in its opinion there was sufficient cause for such detention. This clause, if it stood by itself and without the remaining provisions of Article 22, will apply both to the Parliament and the State Legislatures. The proviso to this clause further enjoins that even though the advisory board may be of the opinion that there was sufficient cause for such detention, *i.e.*, detention beyond the period of three months, still the detention is not to be permitted beyond the maximum period, if any, prescribed by Parliament under Article 22 (7) (*b*). Again the whole of this sub-clause is made inoperative by Article 22 (4) (*b*) in respect of an Act of preventive detention passed by Parliament under clause (7) (*a*) and (*b*). Inasmuch as the impugned Act is an Act of the Parliament purported to be so made, clause 22 (4) has no operation and may for the present discussion be kept aside. Article 22 (5) prescribes that when any person under a preventive detention law is detained, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. This clause is of general operation in respect of every detention order made under any law permitting detention. Article 22 (6) permits the authority making the order to withhold disclosure of facts which such authority considers against the public interest to disclose. It may be noticed that this clause only permits the non-disclosure of facts, and reading clauses (5) and (6) together a distinction is drawn between facts and grounds of detention. Article 22 (4) and (7) deal not with the period of detention only but with other requirements in the case of preventive detention also. They provide for the establishment of an advisory board, and the necessity of furnishing grounds to the detenu and also to give him a right to make a representation. Reading Article 22, clauses (4) and (7) together it appears to be implied that preventive detention for less than three months, without an advisory board, is permitted under the Chapter on Fundamental Rights, provided such legislation is within the legislative competence of the Parliament or the State Legislature, as the case may be.

Article 22 (5) permits the detained person to make a representation. The Constitution is silent as to the person to whom it has to be made, or how it has to be dealt with. But that is the procedure laid down by the Constitution. It does not therefore mean that if a law made by the Parliament in respect of preventive detention does not make provision on those two points it is invalid. Silence on

these points does not make the impugned Act in contravention of the Constitution because the first question is what are the rights given by the Constitution in the case of preventive detention. The contention that the representation should be to an outside body has no support in law. Even in the *Liversidge* case[1] the representation had to be made to the Secretary of State and not to another body. After such representation was made, another advisory board had to consider it, but it was not necessary to make the representation itself to a third party. Article 22 (4) and (7) permit the non-establishment of an advisory board expressly in a parliamentary legislation providing for preventive detention beyond three months. If so, how can it be urged that the non-establishment of an advisory board is a fundamental right violated by the procedure prescribed in the Act passed by the Parliament?

The important clause to be considered is Article 22 (7). Sub-clause (*a*) is important for this case. In the case of an Act of preventive detention passed by the Parliament this clause contained in the Chapter on Fundamental Rights, thus permits detention beyond a period of three months and excludes the necessity of consulting an advisory board, if the opening words of the sub-clause are complied with. Sub-clause (*b*) is permissive. It is not obligatory on the Parliament to prescribe any maximum period. It was argued that this gives the Parliament a right to allow a person to be detained indefinitely. If that construction is correct, it springs out of the words of sub-clause (7) itself and the Court cannot help in the matter. Sub-clause (*c*) permits the Parliament to lay down the procedure to be followed by the advisory board in an inquiry under sub-clause (*a*) of clause (4). I am unable to accept the contention that Article 22 (4) (*a*) is the rule and Article 22 (7) the exception. I read them as two alternatives provided by the Constitution for making laws on preventive detention.

Bearing in mind the provisions of Article 22 read with Article 246 and Schedule 7, List I, Entry 9 and List III, Entry 3, it is thus clear that the Parliament is empowered to enact a law of preventive detention (*a*) for reasons connected with defence, (*b*) for reasons connected with foreign affairs, (*c*) for reasons connected with the security of India, and (under List III), (*d*) for reasons connected with the security of a State, (*e*) for reasons connected with the maintenance of public order, or (*f*) for reasons connected with the maintenance of supplies and services essential to the community. Counsel for the petitioner has challenged the validity of several provisions of the Act. In respect of the construction of a Constitution, Lord Wright in *James* v. *The Commonwealth of Australia*[2] observed :

"That a Constitution must not be construed in any narrow and pedantic sense."

Mr. Justice Higgins in *Attorney-General of New South Wales* v. *Brewery Employees Union*[3] observed :

"Although we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be."

In In re *The Central Provinces and Berar Act XIV of* 1938[4], Sir Maurice Gwyer, C.J., after adopting these observations said :

"Especially is this true of a Federal Constitution with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it ; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors."

There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental

1. (1942) A.C. 206.
2. (1936) A.C. 578 at 614.
3. (1908) 6 Com. L.R. 469 at 611-12.
4. (1939) 2 F.L.J. 6 : (1939) M.L.J. (Supp.) 1 : (1939) F.C.R. 18 at 37 (F.C.).

law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights.

It was first argued that by section 3 the Parliament had delegated its legislative power to the executive officer in detaining a person on his being satisfied of its necessity. It was urged that the satisfaction must be of the legislative body. This contention of delegation of the legislative power in such cases has been considered and rejected in numerous cases by our Federal Court and by the English Courts. It is unnecessary to refer to all those cases. A reading of the various speeches in *Liversidge* v. *Anderson*[1], clearly negatives this contention. Section 3 of the impugned Act is no delegation of legislative power to make laws. It only confers discretion on the officer to enforce the law made by the Legislature. Section 3 is also impugned on the ground that it does not provide an objective standard which the court can utilize for determining whether the requirements of law have been complied with. It is clear that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. As observed by Lord Finlay in *The King* v. *Halliday*[2], a court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint on a person. The contention is urged in respect of preventive detention and not punitive detention. Before a person can be held liable for an offence it is obvious that he should be in a position to know what he may do or not do and an omission to do or not to do will result in the State considering him guilty according to the penal enactment. When it comes however to preventive detention, the very purpose is to prevent the individual not merely from acting in a particular way but, as the sub-heads summarized above, show, from achieving a particular object. It will not be humanly possible to tabulate exhaustively all actions which may lead to a particular object. It has therefore been considered that a punitive detention Act which sufficiently prescribes the objects which the Legislature considers have not to be worked upto is a sufficient standard to prevent the legislation being vague. In my opinion, therefore, the argument of the petitioner against section 3 of the impugned Act fails. It was also contended that section 3 prescribes no limit of time for detention and therefore the legislation is *ultra vires*. The answer is found in Article 22 (7) (*b*). A perusal of the provisions of the impugned Act moreover shows that in section 12 provision is made for detention for a period longer than three months but not exceeding one year in respect of clauses (*a*) and (*b*) of that section. It appears therefore that in respect of the rest of the clauses mentioned in section 3 (1) (*a*) the detention is not contemplated to be for a period longer than three months, and in such cases a reference to the advisory board under section 9 is contemplated.

Section 7 of the Act which is next challenged, runs on the same lines as Article 22 (5) and (6) and in my opinion infringes no provision of the Constitution.

1. (1942) A.C. 206. 2. (1917) A.C. 260 at 269.

It was argued that this gave only the right of making a representation without being heard orally or without affording an opportunity to lead evidence and therefore was not an orderly course of procedure, as required by the rules of natural justice. The Parliament by the Act has expressly given a right to the person detained under a preventive detention order to receive the grounds for detention and also has given him a right to make a representation. The Act has thus complied with the requirements of Article 22 (5). That clause, which prescribes what procedure has to be followed as a matter of fundamental right, is silent about the person detained having a right to be heard orally or by a lawyer. The Constituent Assembly had before them the provisions of clause (1) of the same Article. The Assembly having dealt with the requirements of receiving grounds and giving an opportunity to make a representation has deliberately refrained from providing a right to be heard orally. If so, I do not read the clause as guaranteeing such right under Article 22 (5). An "orderly course of procedure" is not limited to procedure which has been sanctioned by settled usage. New forms of procedure are as much, held even by the Supreme Court of America, due process of law as old forms, provided they give a person a fair opportunity to present his case. It was contended that the right to make a representation in Article 22 (5) must carry with it a right to be heard by an independent tribunal; otherwise the making of a representation has no substance because it is not an effective remedy. I am unable to read clause (5) of Article 22 as giving a fundamental right to be heard by an independent tribunal. The Constitution deliberately stops at giving the right of representation. This is natural because under Article 22 (7), in terms, the Constitution permits the making of a law by Parliament in which a reference to an advisory board may be omitted. To consider the right to make a representation as necessarily including a right to be heard by an independent judicial, administrative or advisory tribunal will thus be directly in conflict with the express words of Article 22 (7).

Even according to the Supreme Court of United States of America a right to a judicial trial is not absolute. In the *United States* v. *Ju Toy*[1], a question arose about the exclusion from entry into the States, of a Chinese who claimed to be a citizen of the United States. At page 263 the majority judgment contains the following passage:

> "If for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial: That is the result of the cases which we have cited, and the almost necessary result of the power of the Congress to pass exclusion laws. That the decision may be entrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in several cases. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole Court, in *Den Ex den Murray* v. *Hoboken Land and Improvement Company*[2], to show that the requirement of a judicial trial does not prevail in every case."

Again, I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory. In the *Local Government Board* v. *Arlidge*[3], the respondent applied to the Board constituted under the Housing Act to state a special case for the opinion of the High Court, contending that the order was invalid because (1) the report of the Inspector had been treated as a confidential document and had not been disclosed to the respondent, and (2) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided. The Board rejected the application. Both the points were urged before the House of Lords on appeal. Viscount Haldane, L.C., in his speech rejected the contention about the necessity of an oral hearing by observing

> "But it does not follow that the procedure of every tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which, in the main,

1. 198 U.S. 253 at 263.
2. 18 H.O.W. 272 at 280.
3. (1915) A.C. 120.

the procedure must conform. But what that procedure is to be in detail must depend on the nature of a tribunal."

In rejecting the contention about the disclosure of the report of the Inspector, the Lord Chancellor stated :

"It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to. . . . . . What appears to me to have been the fallacy of the judgment of the majority in the court of appeal is that it begs the question at the beginning by setting up the test of the procedure of a court of justice instead of the other standard which was laid down for such cases in *Board of Education* v. *Rice*[1]. I do not think the Board was bound to hear the respondent orally provided it gave him the opportunities he actually had."

In spite of the fact that in England the Parliament is supreme I am unable to accept the view that the Parliament in making laws, legislates against the well-recognised principles of natural justice accepted as such in all civilized countries. The same view is accepted in the United States in *Federal Communications Commission* v. *WJR. The Goodwill Station*[2].

A right to lead evidence against facts suspected to exist is also not essential in the case of preventive detention. Article 22 (6) permits the non-disclosure of facts. That is one of the clauses of the Constitution dealing with fundamental rights. If even the non-disclosure of facts is permitted, I fail to see how there can exist a right to contest facts by evidence and the non-inclusion of such procedural right could make this Act invalid.

Section 10 (3) was challenged on the ground that it excludes the right to appear in person or by any lawyer before the advisory board and it was argued that this was an infringement of a fundamental right. It must be noticed that Article 22 (1) which gives a detained person a right to consult or be defended by his own legal practitioner is specifically excluded by Article 22 (3) in the case of legislation dealing with preventive detention. Moreover, the Parliament is expressly given power under Article 22 (7) (*c*) to lay down the procedure in an inquiry by an advisory board. This is also a part of Article 22 itself. If so, how can the omission to give a right to audience be considered against the constitutional right? It was pointed out that section 10 (3) prevents even the disclosure of a portion of the report and opinion of the advisory board. It was argued that if so how can the detained person put forth his case before a court and challenge the conclusions? This argument was similarly advanced in *Local Government Board* v. *Arlidge*[3] and rejected, as mentioned above. In my opinion, the answer is in the provision found in Article 22 (7) (*c*) of the Constitution of India.

It was argued that section 11 of the impugned Act was invalid as it permitted the continuance of the detention for such period as the Central Government or the State Government thought fit. This may mean an indefinite period. In my opinion this argument has no substance because the Act has to be read as a whole. The whole life of the Act is for a year and therefore the argument that the detention may be for an indefinite period is unsound. Again, by virtue of Article 22 (7) (*b*), the Parliament is not obliged to fix the maximum term of such detention. It has not so fixed it, except under section 12, and therefore it cannot be stated that Section 11 is in contravention of Article 22 (7).

Section 12 of the impugned Act is challenged on the ground that it does not conform to the provisions of Article 22 (7). It is argued that Article 22 (7) permits preventive detention beyond three months, when the Parliament prescribes "the circumstances in which and the class or classes of cases in which", a person may be detained. It was argued that both these conditions must be fulfilled. In my opinion, this argument is unsound, because the words used in Article 22 (7) themselves are against such interpretation. The use of the word "which" twice in the first part of the sub-clause, read with the comma put after each, shows that

1. (1911) A.C. 179.
2. 337 U.S. 265 at 276.
3. (1915) A.C. 120.

the Legislature wanted these to be read as disjunctive and not conjunctive. Such argument might have been possible (though not necessarily accepted) if the Article in the Constitution was " the circumstances and the class or classes of cases in which . . . ." I have no doubt that by the clause, as worded, the Legislature intended that the power of preventive detention beyond three months may be exercised either if the circumstances in which *or* the class or classes of cases in which, a person is suspected or apprehended to be doing the objectionable things mentioned in the section. This contention therefore fails.

It was next contended that by section 12 the Parliament had provided that a person might be detained for a period longer than three months but not exceeding one year from the date of his detention, without obtaining the opinion of an advisory board, with a view to prevent him from acting in any manner prejudicial to (*a*) the defence of India, relations of India with foreign powers or the security of India ; or (*b*) the security of a State or the maintenance of public order. It must be noticed that the contingency provided in section 3 (1) (*a*) (iii), *viz.*, the maintenance of supplies and services essential to the community is omitted in section 12. Relying on the wording of these two sub-sections in section 12, it was argued that in the impugned Act the wording of Schedule 7, List I, Entry 9 and List III, Entry 3, except the last part, are only copied. This did not comply with the requirement to specify either the circumstances or the class or classes of cases as is necessary to be done under Article 22 (7) of the Constitution. Circumstances ordinarily mean events or situation extraneous to the actions of the individual concerned, while a class of cases mean determinable groups based on the actions of the individuals with a common aim or idea. Determinable may be according to the nature of the object also. It is obvious that the classification can be by grouping the activities of people or by specifying the objectives to be attained or avoided. The argument advanced on behalf of the petitioner on this point does not appeal to me because it assumes that the words of Schedule 7, List I, Entry 9 and List III, Entry 3 are never capable of being considered as circumstances or classes of cases. In my opinion, that assumption is not justified, particularly when we have to take into consideration cases of preventive detention and not of conviction and punitive detention. Each of the expressions used in those entries is capable of complying with the requirement of mentioning circumstances or classes of cases. The classification of cases, having regard to an object, may itself amount to a description of the circumstances. It is not disputed that each of the entries in the Legislative Lists in the Seventh Schedule has a specific connotation well understood and ascertainable in law. If so, there appears no reason why the same expression when used in section 12 (1) (*a*) and (*b*) of the impugned Act should not be held to have such specific meaning and thus comply with the requirement of prescribing circumstances or classes of cases. This argument therefore must be rejected.

Section 13 (2) was attacked on the ground that even if a detention order was revoked, another detention order under section 3 might be made against the same person on the same grounds. This clause appears to be inserted to prevent a man being released if a detention order was held invalid on some technical ground. There is nothing in the Chapter on Fundamental Rights and in Article 21 or 22 to prevent the inclusion of such a clause in a parliamentary legislation, permitting preventive detention. Article 20 (2) may be read as a contrast on this point.

Dealing with the four fundamental principles of natural justice in procedure claimed by the petitioner, it is thus clear that in respect of preventive detention no question of an objective standard of human conduct can be laid down. It is conceded that no notice before detention can be claimed by the very nature of such detention. The argument that after detention intimation of the grounds should be given has been recognised in Article 22 (5) and incorporated in the impugned Act. As regards an impartial tribunal, Article 22 (4) and (7) read together give the Parliament ample discretion. When in specified circumstances and classes of cases the preventive detention exceeds three months, the absence of an advisory board is expressly permitted by Article 22 (7). Under Article 22 (4) it appears

implied that a provision for such tribunal is not necessary if the detention is for less than three months. As regards an opportunity to be heard, there is no absolute natural right recognised in respect of oral representation. It has been held to depend on the nature of the tribunal. The right to make a representation is affirmed by the Constitution in Article 22 (5) and finds a place in the impugned Act. The right to an orderly course of procedure to the extent it is guaranteed by Article 22 (4) read with Article 22 (7) (*c*) and by Article 22 (7) (*a*) and (*b*), has also been thus provided in the Act. It seems to me therefore that the petitioner's contentions even on these points fail.

Section 14 was strongly attacked on the ground that it violated all principles of natural justice and even infringed the right given by Article 22 (5) of the Constitution. It runs as follows :—

14. " (1) No Court shall, except for the purposes of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order ; and, notwithstanding anything contained in any other law, no court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an advisory board or that part of the report of an advisory board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1) :

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

By that section the court is prevented (except for the purpose of punishment for such disclosure) from being informed, either by a statement or by leading evidence, of the substance of the grounds conveyed to the detained person under section 7 on which the order was made, or of any representation made by him against such order. It also prevents the court from calling upon any public officer to disclose the substance of those grounds or from the production of the proceedings or report of the advisory board which may be declared confidential. It is clear that if this provision is permitted to stand the court can have no material before it to determine whether the detention is proper or not. I do not mean whether the grounds are sufficient or not. It even prevents the court from ascertaining whether the alleged grounds of detention have anything to do with the circumstances or class or classes of cases mentioned in section 12 (1) (*a*) or (*b*). In *Machindar Shivaji Mahar* v. *The King*[1], the Federal Court held that the court can examine the grounds given by the Government to see if they are relevant to the object which the legislation has in view. The provisions of Article 22 (5) do not exclude that right of the court. Section 14 of the impugned Act appears to be a drastic provision which requires considerable support to sustain it in a preventive detention Act. The learned Attorney-General urged that the whole object of the section was to prevent ventilation in public of the grounds and the representations, and that it was a rule of evidence only which the Parliament could prescribe. I do not agree. This argument is clearly not sustainable on the words of Article 22, clauses (5) and (6). The Government has the right under Article 22 (6) not to disclose facts which it considers undesirable to disclose in the public interest. It does not permit the Government to refrain from disclosing grounds which fall under clause (5). Therefore, it cannot successfully be contended that the disclosure of grounds may be withheld from the court in public interest, as a rule of evidence. Moreover, the position is made clear by the words of Article 22 (5). It provides that the detaining authority shall communicate to such detained person the grounds *on which the order has been made*. It is therefore essential that the grounds must be connected with the order of preventive detention. If they are not so connected

1. (1949-50) F.C.R. 827.

the requirements of Article 22 (5) are not complied with and the detention order will be invalid. Therefore, it is open to a detained person to contend before a court that the grounds on which the order has been made have no connection at all with the order, or have no connection with the circumstances or class or classes of cases under which a preventive detention order could be supported under section 12. To urge this argument the aggrieved party must have a right to intimate to the court the grounds given for the alleged detention and the representation made by him. For instance, a person is served with a paper on which there are written three stanzas of a poem or three alphabets written in three different ways. For the validity of the detention order it is necessary that the grounds should be those on which the order has been made. If the detained person is not in a position to put before the court this paper, the court will be prevented from considering whether the requirements of Article 22 (5) are complied with and that is a right which is guaranteed to every person. It seems to me therefore that the provisions of section 14 abridge the right given under Article 22 (5) and are therefore *ultra vires*.

It next remains to be considered how far the invalidity of this section affects the rest of the impugned Act. The impugned Act minus this section can remain unaffected. The omission of this section will not change the nature or the structure or the object of the legislation. Therefore the decision that section 14 is *ultra vires* does not affect the validity of the rest of the Act. In my opinion therefore Act IV of 1950, except section 14, is not *ultra vires*. It does not infringe any provisions of Part III of the Constitution and the contention of the applicant against the validity of that Act, except to the extent of section 14, fails. The petition therefore fails and is dismissed.

Fazl Ali, J.—The question to be decided in this case is whether the Preventive Detention Act, 1950 (Act IV of 1950), is wholly or in part invalid and whether the petitioner who has been detained under that Act is entitled to a writ in the nature of *habeas corpus* on the ground that his detention is illegal. The question being a pure question of law can be decided without referring to a long chain of facts which are narrated in the petitioner's application to this court and which have a more direct bearing on the alleged *mala fides* of the authorities who have detained him than on the validity of the Act.

The Act which is impugned was enacted by the Parliament on the 26th February, 1950, and will cease to have effect on the 1st April, 1951, save as respects things done or omitted to be done before that date. The main provisions of the Act are set out in sections 3, 7, 8, 9, 10, 11, 12 and 14. Section 3 (1) provides that

"The Central Government or the State Government may—

(*a*) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(*b*) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained."

Sub-sections (2) and (3) of this section empower a District Magistrate, Sub-Divisional Magistrate or the Commissioner of Police in a Presidency Town to exercise the power conferred by and make the order contemplated in sub-section (1), but with the qualification that any order made thereunder must be reported forthwith to the government of the State to which the officer in question is subordinate with the grounds on which the order has been made and such other

particulars as in his opinion have a bearing on the necessity for the order. Section 7 of the Act provides that the authority making an order of detention shall as soon as may be communicate to the person detained the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order, in a case where such order has been made by the Central Government, to that Government, and in a case where it has been made by a State Government or an officer subordinate thereto, to the State Government. Section 8 provides that the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of the Act, and state the qualifications of persons of which the Board should consist. Section 9 provides that when a detention order has been made with a view to preventing a person from acting in any manner prejudicial to the maintenance of supplies and services essential to the community or if it is made in regard to a person who is a foreigner within the meaning of the Foreigners Act with a view to regulating his continued presence in India or making arrangements for his expulsion from India, the grounds on which the order has been made and the representation, if any, of the person detained shall, within six weeks from the date of detention, be placed before an Advisory Board. It will be noticed that this section does not provide that the cases of persons who are detained under section 3 (1) (a) (i) and (ii) will also be placed before the Advisory Board. Section 10 lays down the procedure to be followed by the Advisory Board and section 11 provides that in any case where the Advisory Board has reported that there is sufficient cause for the detention of the person concerned, the detention order may be confirmed and the detention of the person concerned may be continued for such period as the Central Government or the State Government, as the case may be, thinks fit. Section 12, which is a very important section, as we shall presently see, runs as follows :—

"12. (1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(a) the defence of India, relations of India with foreign powers or the security of India or

(b) the security of a State or the maintenance of public order.

(2) The case of every person detained under a detention order to which the provisions of sub-section (1) apply shall, within a period of six months from the date of his detention, be reviewed where the order was made by the Central Government or a State Government by such Government, and where the order was made by any officer specified in sub-section (2) of section 3, by the State Government to which such officer is subordinate, in consultation with a person who is or has been or is qualified to be appointed as Judge of a High Court nominated in that behalf by the Central Government or the State Government, as the case may be."

Section 14, which is also a material section for the purpose of this case, is to the following effect :—

"(1) No Court shall, except for the purposes of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order ; and, notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an Advisory Board or that part of the report of an Advisory Board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be the contents of any such communication or representation as is referred to in sub-section (1) :

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

The point which has been pressed before us is that the Act is invalid, as it takes away or abridges certain fundamental rights conferred by Part III of the

Constitution of India, and in support of this general proposition, reliance is placed on Article 13 (2) which runs as follows :—

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

The rights guaranteed under Part III of the Constitution are classified under seven broad heads, as follows :—

(1) Right to equality :
(2) Right to freedom ;
(3) Right against exploitation ;
(4) Right to freedom of religion ;
(5) Cultural and educational rights ;
(6) Right to property ; and
(7) Right to constitutional remedies.

Most of the articles which are said to have been disregarded occur under the heading "Right to freedom", these articles being Articles 19 (1) (*d*), 21 and 22. Another article which is also said to have been violated is Article 32, under which the present application for a writ of *habeas corpus* purports to have been made.

Article 19 (1) is divided into seven sub-clauses and runs as follows :—

"All citizens shall have the right—

(*a*) to freedom of speech and expression ;
(*b*) to assemble peaceably and without arms ;
(*c*) to form associations or unions ;
(*d*) to move freely throughout the territory of India ;
(*e*) to reside and settle in any part of the territory of India ;
(*f*) to acquire, hold and dispose of property, and
(*g*) to practise any profession, or to carry on any occupation, trade or business."

Clauses (2), (3), (4), (5) and (6) of this article provide that nothing in clause (1) shall affect the operation of any existing law in regard to the rights under that clause, under certain conditions which are mentioned therein. Clause (5), with which we are directly concerned and which will serve as a specimen to show the nature of these provisions, is to the following effect :—

"Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

The contentions advanced on behalf of the petitioner with reference to this article are :—(1) that the Act under which he has been detained deprives him who is a citizen of the Republic of India of the right to move freely throughout the territory of India, which is guaranteed under article 19 (1) (*d*) and (2) that under clause (5) of Article 19, it is open to this court to judge whether the restrictions imposed by the Act on the exercise of the right conferred by Article 19 (1) (*d*) are reasonable or otherwise. Before dealing with this argument, it is necessary to understand the meaning of the words used in Article 19 (1) (*d*) and to have a clear comprehension as to the true nature of the right conferred thereunder. The contention put forward on behalf of the petitioner is that freedom of movement is the essence of personal liberty and any restraint on freedom of movement must be held to amount to abridgment or deprivation of personal liberty, as the case may be according to the nature of the restraint. After very careful consideration, I have come to the conclusion that this contention is well-founded in law. Blackstone in his "Commentaries on the Laws of England" (4th Edition, volume 1, page 134) states that

"Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due course of law."

The authority of this statement has never been questioned, and it has been bodily incorporated by H. J. Stephen in his "Commentaries on the Laws of England" and has been reproduced by Cooley in his well-known treatise on "Constitutional Limitations" (8th Edition, volume I, page 710), which was extensively quoted by both parties in the course of their arguments. The view that freedom of movement is the essence of personal liberty will also be confirmed by reference to any book on the criminal law of England dealing with the offence of false imprisonment or any commentary on the Indian Penal Code dealing with the offences of wrongful restraint or confinement. Russel in his book on "Crimes and Misdemeanors" (8th Edition, volume I, page 861), dealing with the offence of false imprisonment states as follows :—

"False imprisonment is unlawful and total restraint of the personal liberty of another, whether by constraining him or compelling him to go to a particular place or by confining him in a prison or police-station or private place, or by detaining him against his will in a public place . . . . . the essential element in the offence is the unlawful detention of the person or the unlawful restraint on his liberty. Such interference with the liberty of another's movements is unlawful, unless it may be justified . . . . . ."

Again, Dr. Gour in dealing with the offence of wrongful restraint in his book on "The Penal Law of British India" (5th Edition, page 1144) observes as follows :—

"Following the principle that every man's person is sacred and that it is free, law visits with its penalties those who abridge his personal liberty, though he may have no design upon his person. But the fact that he controls its movements for ever so short a time is an offence against the King's peace, for no one has the right to molest another in his free movements."

Dealing with the offence of wrongful confinement, the same learned author observes as follows at page 1148 of his book :—

"'Wrongful confinement' is a species of 'wrongful restraint' as defined in the last section. In wrongful restraint, there is only a partial suspension of one's liberty of locomotion, while in wrongful confinement there is a total suspension of liberty 'beyond certain circumscribing limits'."

Both these authors speak of restraint on personal liberty and interference with the liberty of one's movements or suspension of liberty or locomotion as interchangeable terms. In *Bird* v. *Jones*[1], Coleridge, J., said that

"it is one part of the definition of freedom to be able to go whithersoever one pleases."

A similar opinion has been expressed by several authors including Sir Alfred Denning in his book entitled "Freedom under the Law." There can therefore be no doubt that freedom of movement is in the last analysis the essence of personal liberty, and just as a man's wealth is generally measured in this country in terms of rupees, annas and pies, one's personal liberty depends upon the extent of his freedom of movement. But it is contended on behalf of the State that freedom of movement to which reference has been made in Article 19 (1) (*d*) is not the freedom of movement to which Blackstone and other authors have referred, but is a different species of freedom which is qualified by the words "throughout the territory of India." How the use of the expression "throughout the territory of India" can qualify the meaning of the rest of the words used in the article is a matter beyond my comprehension. In my opinion, the words "throughout the territory of India" were used to stretch the ambit of the freedom of movement to the utmost extent to which it could be guaranteed by our Constitution. The Constitution could not guarantee freedom of movement outside the territorial limits of India, and so has used those words to show that a citizen was entitled to move from one corner of the country to another freely and without any obstruction. "Throughout" is an amplifying and not a limiting expression, and I am surprised to find that the expression "throughout the territory of India", which was used to give the widest possible scope to the freedom of movement, is sought to be construed as an expression limiting the scope and nature of the freedom. In my opinion, the words "throughout the territory of India", having regard to the context in which they have been used here, have the same force and meaning as the expression "to whatsoever place one's own inclination may direct" used by Blackstone, or the expression "freedom to be able to go whithersoever one

1. 7 Q.B. 742.

pleases" used by Coleridge, J., in *Bird* v. *Jones*[1]. I am certain that neither of these authorities contemplated that the freedom of movement which is vouchsafed to a British citizen, is guaranteed beyond the territorial limits of British territories.

The question as to whether preventive detention is an encroachment on the right guaranteed by Article 19 (1) (*d*) has been considered by the Nagpur, Patna and Calcutta High Courts. The view which has been ultimately adopted by these High Courts is that preventive detention is not a violation of the right guaranteed by Article 19 (1) (*d*), but in the Calcutta High Court, where the matter has been elaborately discussed, at least five judges have held that it does, and in the ultimate analysis the number of judges who have held the contrary view appears to be the same. Having regard to the fact that the view expressed by so many learned judges is opposed to the view I am inclined to take, I consider it necessary to deal briefly with the main objections which have been raised in support of the narrow meaning sought to be attached to the words in Article 19 (1) (*d*). I have already dealt with one of them which is based on the expression "throughout the territory of India." And I shall now proceed to deal with the others *seriatim*.

I. It will be recalled that clause (5) of Article 19, which I have already quoted in full, provides among other things that nothing in clause (1) (*d*) shall affect the operation of any law, present or future, imposing reasonable restrictions on the exercise of the right of freedom of movement either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. It has been argued that the use of the words "interests of any Scheduled Tribe" in this clause shows that the right guaranteed by Article 19 (1) (*d*) is a limited right of movement, such as the right to visit different localities and to go from one place to another and is different from the expression "freedom of movement" which has been stated by Blackstone to be another name for personal liberty. It is pointed out that the restrictions in contemplation here are mainly restrictions preventing undesirable outsiders from visiting Scheduled Areas and exploiting Scheduled Tribes, and if the words "freedom of movement" had been used in the larger sense, such a small matter would not have found a place in clause (5) of Article 19.

I must frankly confess that I am unable to appreciate this argument and to hold that a mere reference to Scheduled Tribes affects the plain meaning of the words used in clause (1) (*d*) of Article 19. The words used in Article 19 (1) (*d*) are very wide and mean that a person can go at his will in any direction to any locality and to any distance. Restraint on a freedom so wide in scope and extent may assume a variety of forms and may include internment or externment of a person, his confinement to a particular locality or within the walls of a prison, his being prevented from visiting or staying in any particular area, etc. The framers of the Constitution wanted to save all restrictive legislation affecting freedom of movement made in the interests of the general public (which expression means the same thing as "public interests") and I think that the law in regard to preventive detention is fully covered by the expression "restrictions imposed in the public interests". But they also remembered that there were restrictive laws made in the interests of an important community and that similar laws may have to be made in future and hence they added the words "for the protection of the interests of any Scheduled Tribe". A reference to the Fifth Schedule of the Constitution and the corresponding provisions of the Government of India Act, 1935, as well as to certain laws made for Chota Nagpur, Santhal Parganas and other localities will show that great importance has been attached in this country to the protection and preservation of the members of the scheduled tribes and maintenance of order in tribal areas, and this, in my opinion, is sufficient to account for the special mention of the scheduled tribes in clause (5). It may, at first sight, appear to be a relatively small matter, but in their anxiety to cover the whole field of restrictive laws made whether in the public interest or in the interests of a particular community and not to leave the smallest loophole, the framers

1. 7 Q.B. 742.

of the Constitution apparently decided to draft the clause in the present form. As far as I am aware, there are no restrictive laws made in the interests of a community other than the scheduled tribes, and I think clause (5) is sufficiently comprehensive to include the smallest as well as the most complete restrictions on freedom of movement. I am also satisfied that the mere mention of scheduled tribes in clause (5) cannot change the plain meaning of the words of the main provision which we find in Article 19 (1) (*d*) and confine it to some kind of peculiar and truncated freedom of movement which is unconnected with personal liberty and which is unknown to any Constitution with which we are familiar.

It will perhaps be not out of place to refer in this connection to Ordinance XIV of 1943, which is one of the ordinances by which the Defence of India Act, 1939, was partly amended. This ordinance provides for—

> " the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing any thing ".

The points to be noted in connection with the ordinance are :—

(1) that it is an ordinance specifically providing for apprehension and detention ;

(2) that notwithstanding the fact that there is a general reference in it to acts prejudicial to public safety or interests and maintenance of public order there is also a specific reference to maintenance of peaceful conditions in tribal areas ;

(3) that tribal areas and scheduled tribes are kindred subjects as would appear from the Fifth Schedule appended to the Constitution ; and

(4) that maintenance of peaceful conditions in tribal areas may be as much in the public interest as in the interests of persons living in those areas.

This ordinance shows at least this much that sometimes the law of preventive detention can also be made in the interests of scheduled tribes or scheduled areas and consequently the mere mention of scheduled tribes in clause (5) does not necessarily exclude laws relating to preventive detention from the scope of Article 19 (5). The same remarks apply to the ordinance called " The Restriction and Detention Ordinance, 1944 " (Ordinance No. III of 1944) which empowered the Central Government or the Provincial Government to detain and make orders restricting the movements of certain persons in the interest of public safety, maintenance of public order as well as maintenance of peaceful conditions in tribal areas, etc.

II. It is also argued that since preventive detention amounts to a total deprivation of freedom of movement, it is not a violation of the right granted under Article 19 (1) (*d*) in regard to which the word " restriction " and not ' deprivation ' has been used in clause (5). This argument also does not appeal to me. There are really two questions which fall to be decided in this case, *viz.*, (*a*) Does preventive detention take away the right guaranteed by Article 19 (1) (*d*) ?; and (*b*) if so, what are the consequences, if any ?

It seems obvious to me that preventive detention amounts to a complete deprivation of the right guaranteed by Article 19 (1) (*d*). The meaning of the word ' restriction ' is to be considered with reference to the second question and I think that it will be highly technical to argue that deprivation of a right cannot be said to involve restriction on the exercise of the right. In my opinion, having regard to the context in which the word ' restriction ' has been used, there is no

thesis between that word and the word 'deprivation'. As I have already ed, restraint on the right to move can assume a variety of forms and restricon would be the most appropriate expression to be used in clause (5) so as to cover all those forms ranging from total to various kinds of partial deprivation of freedom of movement. I will however have to advert to this subject later and will try to show that the construction I have suggested is supported by good authority.

III. It appears that some of the Judges who had to deal with the question which we have before us were greatly influenced by the argument that if the deprivation of personal liberty amounts to deprivation of the right granted under Article 19 (1) (*d*), any conviction for an offence under the Indian Penal Code involving a sentence of imprisonment will be subject to judicial review on the ground of reasonableness of the provisions of the Code under which the conviction is recorded. Meredith, C.J., of the Patna High Court has given expression to his concern for the situation which will thereby arise, in these words :—

"It will be seen that the claim made is very sweeping indeed. It would mean that every law under which a person may be imprisoned, including all the provisions of the Penal Code, is open to examination by the Courts on the ground of reasonableness. It makes the Courts supreme arbiters in regard to any such legislation, and they can reject it or accept it in accordance with their ideas of whether it appeals to their reason. But ideas of reasonableness or otherwise are apt to vary widely. Take for example, laws relating to prohibition or take such a matter as adultery which the Indian law regards as a crime punishable with imprisonment but the English law does not. It is difficult to believe the framers of the Constitution ever intended to place so enormous a power in the hands of the Courts . . . . " [*Rattan Roy* v. *The State of Bihar*].

The obvious and strictly legal reply to this argument is that the consideration, which has so greatly weighed with the learned Chief Justice, is not enough to cut down the plain meaning of the general words used in Article 19 (5) of the Constitution. As has been pointed out in a number of cases,

"in construing enacted words, we are not concerned with the policy involved or with the results injurious or otherwise which may follow by giving effect to the language used" [*King-Emperor* v. *Benoari Lal Sarma and others*[1]].

Apart from this aspect of the matter, I agree with one of the learned Judges of the Calcutta High Court in his remark that

"no calamitous or untoward result will follow even if the provisions of the Penal Code become justiciable".

I am certain that no court would interfere with a Code which has been the law of the land for nearly a century and the provisions of which are not in conflict with the basic principles of any system of law. It seems to me that this court should not be deterred from giving effect to a fundamental right granted under the Constitution, merely because of a vague and unfounded fear that something catastrophic may happen.

I have so far proceeded on the assumption that the basis of the objection raised by Meredith, C.J., is correct in law, but, in my opinion, it is not. Crime has been defined to consist in those acts or omissions involving breach of a duty to which a sanction is attached by law by way of punishment or pecuniary penalty in the public interests (*See* Russell's "Crimes and Misdemeanors"). Section 2 of the Indian Penal Code, 1860, provides that

"every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within British India."

The Indian Penal Code does not primarily or necessarily impose restrictions on the freedom of movement, and it is not correct to say that it is a law imposing restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement. The punishment may consist in imprisonment or a pecuniary penalty. If it consists in a pecuniary penalty, it obviously involves no restriction on movement ; but if it consists in imprisonment, there is a restriction on movement. This restraint is imposed not under a law imposing restrictions on

1. (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : 1945 F.L.J. 1 : 1945 F.C.R. 161 at 177 (P.C.).

movement but under a law defining crime and making it punishable. The punishment is correlated directly with the violation of some other person's right and not with the right of movement possessed by the offender himself. In my opinion, therefore the Indian Penal Code does not come within the ambit of the words "law imposing restriction on the right to move freely".

In the course of the arguments, the expression "punitive detention" was frequently used and the tendency was to put it on the same footing as preventive detention for the purpose of certain arguments. Punitive detention is however essentially different from preventive detention. A person is punitively detained only after a trial for committing a crime and after his guilt has been established in a competent court of justice. A person so convicted can take his case to the State High Court and sometimes bring it to this court also ; and he can in the course of the proceedings connected with his trial take all pleas available to him including the plea of want of jurisdiction of the court of trial and the invalidity of the law under which he has been prosecuted. The final judgment in the criminal trial will thus constitute a serious obstacle in his way if he chooses to assert even after his conviction that his right under Article 19 (1) (*d*) has been violated. But a person who is preventively detained has not to face such an obstacle whatever other obstacle may be in his way.

IV. It was pointed out that Article 19 being confined to citizens, the anomalous situation will follow that in cases of preventive detention, a citizen will be placed in a better position than a non-citizen, because if a citizen is detained his detention will be open to some kind of judicial review under Article 19 (5), but if a non-citizen has been detained his case will not be open to such review. In this view, it is said that the whole Act relating to preventive detention may be declared to be void if it is unreasonable, though it concerns citizens as well as persons other than citizens. I must frankly state that I am not at all perturbed by this argument. It is a patent fact that the Constitution has confined all the rights mentioned in Article 19 (1) to citizens. It is equally clear that restrictions on those rights are to a limited extent at least open to judicial review. The very same question which is raised in regard to Article 19 (1) (*d*) will arise with regard to most of the other sub-clauses. A citizen has the right to assemble peaceably and without arms, to form associations or unions and so on. If there is any law imposing unreasonable restrictions on any of these rights, that law will not be good law so far as citizens are concerned, but it may be good law so far as non-citizens are concerned. I do not see why a similar situation arising with regard to the right granted under sub-clause (*d*) should be stated to be anomalous. So far as the right of free movement is concerned, a non-citizen has been granted certain protections in Articles 21 and 22. If a citizen has been granted certain other additional protections under Article 19 (1) (*d*), there is no anomaly involved in the discrimination. I think that it is conceivable that a certain law may be declared to be void as against a citizen but not against a non-citizen. Such a result however should not affect our mind if it is found to have been clearly within the contemplation of the framers of the Constitution.

V. It was contended that the rights declared by Article 19 are the rights of a free citizen and if he has already been deprived of his liberty in the circumstances referred to in Articles 20, 21 and 22, then it would be idle to say that he still enjoys the right referred to in Article 19. After giving my fullest consideration to this argument, I have not been able to appreciate how it arises in this case. There is nothing in Article 19 to suggest that it applies only to those cases which do not fall under Articles 20, 21 and 22. Confining ourselves to preventive detention, it is enough to point out that a person who is preventively detained must have been, before he lost his liberty, a free man. Why can't he say to those who detained him :

"As a citizen I have the right to move freely and you cannot curtail or take away my right beyond the limits imposed by clause (5) of Article 19."

This is the only question which arises in the case and it should not be obscured by any abstruse or metaphysical considerations. It is true that if you put a man under detention, he cannot move and therefore he is not in a position to exercise the right guaranteed under Article 19 (1) (*d*), but this is only the physical aspect of the matter and a person who is bed-ridden on account of disease suffers from a similar disability. In law, however, physical duress does not deprive a person of the right to freedom of movement. If he has been detained under some provision of law imposing restrictions on the freedom of movement, then the question will arise whether the restrictions are reasonable. If he has been detained under no provision of law or under some law which is invalid, he must be set at liberty.

To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19 (1) (*d*). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to Article 19 (1) (*f*) and Article 31 both of which deal with the right to property and to some extent overlap each other. It appears that some learned High Court Judges, who had to deal with the very question before us, were greatly impressed by the statement in the report of the Drafting Committee of the Constituent Assembly on Article 15 (corresponding to the present Article 21), that the word 'liberty' should be qualified by the insertion of the word 'personal' before it for otherwise it may be construed very widely so as to include the freedoms dealt with in Article 13 (corresponding to the present Article 19). I am not however prepared to hold that this statement is decisive on the question of the construction of the words used in Article 19 (1) (*d*) which are quite plain and can be construed without any extraneous help. Whether the report of the Drafting Committee and the debates on the floor of the House should be used at all in construing the words of a statute, which are words of ordinary and common use and are not used in any technical or peculiar sense, is a debatable question; and whether they can be used in aid of a construction which is a strain upon the language used in the clause to be interpreted is a still more doubtful matter. But, apart from these legal considerations, it is, I think, open to us to analyse the statement and see whether it goes beyond adding a somewhat plausible reason—a superficially plausible reason—for a slight verbal change in Article 21. It seems clear that the addition of the word 'personal' before 'liberty' in Article 21 cannot change the meaning of the words used in Article 19, nor can it put a matter which is inseparably bound up with personal liberty beyond its place. Personal liberty and personal freedom, in spite of the use of the word 'personal', are, as we find in several books, sometimes used in a wide sense and embrace freedom of speech, freedom of association, etc. These rights are some of the most valuable phases or elements of liberty and they do not cease to be so by the addition of the word 'personal.' A general statement by the Drafting Committee referring to freedom in plural cannot take the place of an authoritative exposition of the meaning of the words used in Article 19 (1) (*d*), which has not been specifically referred to and cannot be such an overriding consideration as to compel us to put a meaning opposed to reason and authority. The words used in Article 19 (1) (*d*) must be construed as they stand, and we have to decide upon the words themselves whether in the case of preventive detention the right under Article 19 (1) (*d*) is or is not infringed. But, as I shall point out later, however literally we may construe the words used in Article 19 (1) (*d*) and however restricted may be the meaning we may attribute to those words, there can be no escape from the conclusion that preventive detention is a direct infringement of the right guaranteed in Article 19 (1) (*d*).

Having dealt with the principal objections, I wish to revert once again to the main topic. The expressions 'personal liberty' and 'personal freedom' have, as we find in several books, a wider meaning and also a narrower meaning. In the wider sense, they include not only immunity from arrest and detention but also freedom of speech, freedom of association, etc. In the narrower sense, they mean immunity from arrest and detention. I have shown that the juristic conception of 'personal liberty', when these words are used in the sense of immunity from arrest, is that it consists in freedom of movement and locomotion. I have also pointed out that this conception is at the root of the criminal law of England and of this country, so far as the offences of false imprisonment and wrongful confinement are concerned. The gravamen of these offences is restraint on freedom of movement. With these facts in view, I have tried to find out whether there is any freedom of movement known in England apart from personal liberty used in the sense of immunity from arrest and detention, but I find no trace of any such freedom. In Halsbury's Laws of England (2nd Edition, volume 6, page 391), the freedoms mentioned are the right to personal freedom (or immunity from detention or confinement), the right to property, the right to freedom of speech, the right of public meeting, the right of association, etc. Similar classifications will be found in Dicey's "Introduction to the Study of the Law of the Constitution" and Keith's "Constitutional Law" and other books on constitutional subjects, but there is no reference anywhere to any freedom or right of movement in the sense in which we are asked to construe the words used in Article 19 (1) (*d*). In the Constitutions of America, Ireland and many other countries where freedom is prized, there is no reference to freedom or right of movement as something distinct from personal liberty used in the sense of immunity from arrest and confinement. The obvious explanation is that in legal conception no freedom or right of movement exists apart from what personal liberty connotes and therefore a separate treatment of this freedom was not necessary. It is only in the Constitution of the Free City of Danzig, which covers an area of 791 square miles, that we find these words in Article 75 :—

> "All nationals shall enjoy freedom of movement within the City."

There is however no authoritative opinion available to support the view that this freedom is anything different from what is otherwise called personal liberty. The problem of construction in regard to this particular right in the Constitution of Danzig is the same as in our Constitution. Such being the general position, I am confirmed in my view that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in Article 19 (1) (*d*) must be construed according to this universally accepted legal conception.

This conclusion is further supported by reference to the war legislation in England and in India, upon which the law of preventive detention, which has been in force in this country since the war, is based. In the first world war, the British Parliament passed the Defence of the Realm Consolidation Act, in 1914, and a number of regulations were made under it including regulation 14-B, which permitted the Secretary of State to subject any person "to such obligations and *restrictions* as hereinafter mentioned in view of his hostile origin or associations". Lord Atkin in referring to this regulation said in *Liversidge* v. *Sir John Anderson*[1],

> "that the regulation undisputedly gave to a Secretary of State unrestricted power to detain a suspected person."

Apparently, Lord Atkin meant that the restriction referred to in the Act included preventive detention. Under this regulation, one Arthur Zadig was interned, and he applied to the King's Bench for a writ of *habeas corpus* which was refused. The matter ultimately came up before the House of Lords in *Rex* v. *Halliday*[2], and the noble Lords in dealing with the case proceeded on the assumption that there was no difference between internment and incarceration or imprisonment. Lord Shaw in narrating the facts of the case stated :—

1. (1942) A.C. 238.   2. (1917) A.C. 260.

"His person was seized, he has been interned . . . . . The appellant lost his liberty and was interned . . . ."

He then proceeded to state that there was no difference between internment and imprisonment and quoted the following passage from Blackstone :—

"The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment."

Proceeding on this footing (which I find to be the common basis in all other speeches delivered in the case, though Lord Shaw had given a dissenting judgment), Lord Finlay while dealing with the provisions of the regulations observed :—

"One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy". [*Rex* v. *Halliday*[1].]

Again, Lord Atkinson while dealing with the merits of the case made the following observations :—

"If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it if *intra vires* do not infringe upon the Habeas Corpus Acts or take away any right conferred by Magna Charta . . . . . ".[2]

This passage read with the previous passage quoted by me will show that both internment and incarceration were regarded as "restrictions on the freedom of movement" and that deprivation of liberty and restriction on freedom of movement were used as alternative expressions bearing the same meaning.

The same conclusion is to be drawn by reference to the regulations made in the last world war under the Emergency Powers (Defence) Act, 1939. The regulation which directly dealt with detention orders was 18-B. This regulation and a number of other regulations have been placed in Part I under the heading "Restrictions on movements and activities of persons". The classification is important, because it meets two principal arguments advanced in this case. It shows firstly that detention is a form of restriction and secondly that it is a restriction on movement. I have noticed that "movement" is used in plural, and the heading also refers to restrictions on activities, but, having regard to the subjects, classified under this head, movement undoubtedly refers to physical movement and includes such movements as entering a particular locality, going from one place to another, etc., *i.e.*, the very things to which Article 19 (1) (*d*) is said to have reference. In *Liversidge's case*[3], in construing the provisions of the Act of 1939, Viscount Maugham observed as follows :—

"The language of the Act of 1939 (above cited) shows beyond doubt that Defence Regulations may be made which must deprive the subject 'whose detention appears to the Secretary of State to be expedient in the interests of public safety' of all his liberty of movement while the regulations remain in force."

Thus Viscount Maugham also considered detention to be synonymous with deprivation of liberty of movement.

The classification that we find in the Defence of the Realm Regulations was with a little verbal modification adopted in the Defence of India Rules, and we find that here also rule 26, which dealt with preventive detention, has been placed under the heading "Restriction of movements and activities of persons." A somewhat similar classification has also been adopted in a series of Provincial Acts and Ordinances relating to maintenance of order [*see* section 2 of the Bihar Maintenance of Public Order Act, 1949; section 16 of the West Bengal Security Act, 1948; section 4 of the East Punjab Public Safety Act, 1949; section 2 of the Madras Maintenance of Public Order Act, 1947; section 3 of the U. P. Maintenance of Public Order Temporary Act, 1947 and section 2 of the Bombay Public Security Measures Act, 1947]. In these Acts and Ordinances, preventive detention and certain other forms of restriction on movement such as

1. (1917) A.C. 260 at 269.
2. Ibid. at 272.
3. (1942) A.C. 206 at 219.

internment, externment, etc., have been classed together and dealt with more or less on the same footing, and sometimes they have been dealt with in different clauses of the same section. In one of the Acts, the same advisory board is to deal with the case of a detenu as well as that of an externed person, and there are also similar provisions giving them the right to represent their case to the Government.

I will now assume for the sake of argument that the freedom of movement to which reference is made in Article 19 (1) (*d*) has nothing to do with personal liberty and that the words which occur in the article bear the restricted meaning attributed to them by the learned Attorney-General and some of my colleagues. It seems to me that even on this assumption, it is difficult to arrive at any conclusion other than what I have already arrived at. There can be no doubt that preventive detention does take away even this limited freedom of movement directly and substantially, and, if so, I do not see how it can be argued that the right under Article 19 (1) (*d*) is not infringed if the alternative interpretation is accepted. We have only to ask ourselves : " Does a person who is detained retain even a fraction of his freedom of movement in howsoever restricted sense the term may be used and does he not lose his right to move *freely* from one place to another or visit any locality he likes as a necessary result of his detention ? " I think I should refer here once more to the fact that in the Defence of the Realm Regulations and Defence of India Rules, preventive detention is classed under the heading " Restriction of movements and activities ". " Movement " is here used in plural and refers to that very type of movement which is said to be protected by Article 19 (1) (*d*) moving from one State or place to another, visiting different localities, etc. One of the objects of preventive detention is to restrain the person detained from moving from place to place so that he may not spread disaffection or indulge in dangerous activities in the places he visits. The same consideration applies to the cases of persons who are interned or externed. Hence, externment, internment and certain other forms of restriction on movement have always been treated as kindred matters belonging to the same group or family and the rule which applies to one must necessarily apply to the other. It is difficult to hold that the case of externment can possibly be dealt with on a different footing from the case of preventive detention. I am however interested to find that the Patna and Bombay High Courts have held that a person who is externed can successfully assert that the right granted to him under Article 19 (1) (*d*) has been violated. This view has not been seriously challenged before us, and, if it is correct, I really do not see how it can be held that preventive detention is also not a direct invasion of the right guaranteed in Article 19 (1) (*d*). Perhaps, one may pause here to ask what kind of laws were in contemplation of the framers of the Constitution when they referred to laws imposing restrictions in the public interest in Article 19 (5). I think the War Laws and the Provincial Acts and Ordinances to which I have already referred must have been among them, these being laws which expressly purport to impose restrictions on movements. If so, we should not overlook the fact that preventive detention was an inseparable part of these laws and was treated as a form of restriction on movement and classified as such. It seems to me that when the matter is seriously considered, it would be found that the interpretation of the learned Attorney-General attracts the operation of Article 13 (2) no less strongly and directly than the interpretation I have suggested, and I prefer the latter only because I consider that it is legally unsound to treat what is inseparably bound up with and is the essential element in the legal concept of personal liberty as a wholly separate and unconnected entity. But, as I have already indicated, it will be enough for the purpose of this case if we forget all about personal liberty and remember only that detention is, as is self-evident and as has been pointed out by Viscount Maugham and other eminent judges, another name for depriving a person of all his 'liberty of movement'.

It was pointed out in the course of the arguments that preventive detention not only takes away the right in Article 19 (1) (*d*) but also takes away all the other rights guaranteed by Article 19 (1), except the right to hold, acquire and dispose of property. Where exactly this argument is intended to lead us to, I

cannot fully understand, but it seems to me that it involves an obvious fallacy, because it overlooks the difference in the modes in which preventive detention operates on the right referred to in sub-clause (*d*) and other sub-clauses of Article 19 (1). The difference is that while preventive detention operates on freedom of movement directly and inevitably, its operation on the other rights is indirect and consequential and is often only notional. One who is preventively detained is straightaway deprived of his right of movement as a direct result of his detention, but he loses the other rights only in consequence of his losing freedom of movement. Besides while freedom of movement is lost by him in all reality and substance, some of the other rights may not be lost until he wishes to exercise them or is interested in exercising them. A person who is detained may not be interested in freedom of association or may not pursue any profession, occupation, trade or business. In such a case, the rights referred to are lost only in theory and not as a matter of substance. I wish only to add that when I said that I was not able to understand the full force of the argument which I have tried to deal with, what I had in mind was that if preventive detention sweeps away or affects almost all the rights guaranteed in Article 19 (1), the matter deserves very serious consideration and we cannot lightly lay down that Article 13 (2) does not come into operation.

Being fully alive to the fact that it is a serious matter to be asked to declare a law enacted by Parliament to be unconstitutional, I have again and again asked myself the question :—What are we to put in the scales against the construction which I am inclined to adopt and in favour of the view that preventive detention does not take away the freedom of movement guaranteed in Article 19 (1) (*d*) ? The inevitable answer has always been that while in one of the scales we have plain and unambiguous language, the opinion of eminent jurists, judicial dicta of high authority, constitutional practice in the sense that no Constitution refers to any freedom of movement apart from personal liberty, and the manner in which preventive detention has been treated in the very laws on which our law on this subject is based, all that we can put in the opposite scale is a vague and ill-founded apprehension that some fearful object such as the revision of the Penal Code is looming obscurely in the distant horizon, the peculiar objection that the mere mention of the scheduled tribes will alter the meaning of certain plain words, the highly technical and unreal distinction between restriction and deprivation and the assumption not warranted by any express provision that a person who is preventively detained cannot claim the right of freedom of movement because he is not a free man and certain other things which, whether taken singly or collectively, are too unsubstantial to carry any weight. In these circumstances, I am strongly of the view that Article 19 (1) (*d*) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the article is really a right to personal liberty and that preventive detention is a deprivation of that right. I am also of the view that even on the interpretation suggested by the learned Attorney-General, preventive detention cannot but be held to be a violation of the right conferred by Article 19 (1) (*d*). In either view, therefore, the law of preventive detention is subject to such limited judicial review as is permitted under Article 19 (5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions. Considering that the restrictions are imposed on a most valuable right, there is nothing revolutionary in the Legislature trusting the Supreme Court to examine whether an Act which infringes upon that right is within the limits of reason.

I will now pass on to the consideration of Article 21, which runs as follows :—

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

Here again, our first step must be to arrive at a clear meaning of the provision. The only words which cause some difficulty in the proper construction of the article are "procedure established by law."

The learned Attorney-General contended before us that the word 'law' which is used in Article 21 means State-made law or law enacted by the State. On the other hand, the learned counsel for the petitioner strongly contended that the expression "procedure established by law" is used in a much wider sense and approximates in meaning to the expression "due process of law" as interpreted by the Supreme Court of America, in the earliest times, and, if that is so, it means exactly what some of the American writers mean to convey by the expression "procedural due process."

In the course of the arguments, the learned Attorney-General referred us to the proceedings in the Constituent Assembly for the purpose of showing that the article as originally drafted contained the words "without due process of law" but these words were subsequently replaced by the words "except according to procedure established by law". In my opinion, though the proceedings or discussions in the Assembly are not relevant for the purpose of construing the meaning of the expressions used in Article 21, especially when they are plain and unambiguous, they are relevant to show that the Assembly intended to avoid the use of the expression "without due process of law". That expression had its roots in the expression "*per legem terræ*" (law of the land) used in Magna Charta in 1215. In the reign of Edward III, however, the words "due process of law" were used in a statute guaranteeing that no person will be deprived of his property or imprisoned or indicted or put to death without being brought in to answer by due process of law (28, Edward III, Ch. III). The expression was afterwards adopted in the American Constitution and also in the Constitutions of some of the constituent States, though some of the States preferred to use the words "in due course of law" or "according to the law of the land." [*See* Cooley on "Constitutional Limitations," 8th Edn., Vol. II, pages 734-5]. In the earliest times, the American Supreme Court construed "due process of law" to cover matters of procedure only, but gradually the meaning of the expression was widened as so to cover substantive law also, by laying emphasis on the word 'due.' The expression was used in such a wide sense that the judges found it difficult to define it and in one of the cases it was observed as follows :—

"It would be difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. This difficulty and perhaps impossibility was referred to by Mr. Justice Miller in *Davidson* v. *New Orleans*, where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion', as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." [*Missouri Pacific Railway Co.* v. *Humes*[1].]

It seems plain that the Constituent Assembly did not adopt this expression on account of the very elastic meaning given to it, but preferred to use the words "according to procedure established by law" which occur in the Japanese Constitution framed in 1946.

It will not be out of place to state here in a few words how the Japanese Constitution came into existence. It appears that on the 11th October, 1945, General McArthur directed the Japanese Cabinet to initiate measures for the preparation of the Japanese Constitution, but, as no progress was made, it was decided in February, 1946, that the problem of constitutional reform should be taken over by the Government Section of the Supreme Commander's-Headquarters. Subsequently the Chief of this section and the staff drafted the Constitution with the help of American constitutional lawyers who were called to assist the Government Section in the task. This Constitution, as a learned writer has remarked, bore on almost every page evidences of its essentially Western origin, and this characteristic was especially evident in the preamble :

"particularly reminiscent of the American Declaration of Independence, a preamble which, it has been observed, no Japanese could possibly have conceived or written and which few could even understand." [*See* Ogg and Zink's "Modern Foreign Governments."]

1. 115 U.S. 512 at 518.

One of the characteristics of the Constitution which undoubtedly bespeaks of direct American influence is to be found in a lengthy chapter, consisting of 31 articles, entitled "Rights and Duties of the People," which provided for the first time an effective 'Bill of Rights' for the Japanese people. The usual safeguards have been provided there against apprehension without a warrant and against arrest or detention without being informed of the charges or without adequate cause (Articles 33 and 34).

Now there are two matters which deserve to be noticed :—(1) that the Japanese Constitution was framed wholly under American influence; and (2) that at the time it was framed the trend of judicial opinion in America was in favour of confining the meaning of the expression "due process of law" to what is expressed by certain American writers by the somewhat-quaint but useful expression "procedural due process." That there was such a trend would be clear from the following passage which I quote from Carl Brent Swisher's "The Growth of Constitutional Power in the United States" (page 107) :—

"The American history of its interpretation falls into three periods. During the first period, covering roughly the first century of Government under the Constitution, due process was interpreted principally as a restriction upon procedure—and largely the judicial procedure—by which the Government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, due process was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the Government might engage. During the third period, extending from 1936 to date, the use of due process as a substantive restricion has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure."

In the circumstances mentioned, it seems permissible to surmise that the expression "procedure established by law" as used in the Japanese Constitution represented the current trend of American judicial opinion with regard to "due process of law", and, if that is so, the expression as used in our Constitution means all that the American writers have read into the words 'procedural due process.' But I do not wish to base any conclusions upon mere surmise and will try to examine the whole question on its merits.

The word "law" may be used in an abstract or concrete sense. Sometimes it is preceded by an article such as 'a' or 'the' or by such words as 'any,' 'all,' etc., and sometimes it is used without any such prefix. But, generally, the word 'law' has a wider meaning when used in the abstract sense without being preceded by an article. The question to be decided is whether the word 'law' means nothing more than statute law.

Now whatever may be the meaning of the expression "due process of law", the word "law" is common to that expression as well as "procedure established by law" and though we are not bound to adopt the construction put on "law" or "due process of law" in America, yet since a number of eminent American Judges have devoted much thought to the subject, I am not prepared to hold that we can derive no help from their opinions and we should completely ignore them. I will therefore in the first instance set out certain quotations from a few of the decisions of the American Supreme Court construing the word "law" as used in the expression "due process of law," in so far as it bears on the question of legal procedure.

(1) "Although the Legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient land-marks, or take away certain fundamental rights which have been always recognized and observed in judicial procedures." (*Bardwell* v. *Collins*[1].)

(2) "By the law of the land is most clearly intended the general law: a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society." (*Dartmouth College Case*[2].)

(3) "Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the Government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution. If this be true, as it undoubtedly is, how can

1. 44 Minn. 97 : 9 L.R.A. 152. 2. 17 U.S. 4.

it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the Government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent." (*Hovey* v. *Elliott*[1].)

(4) "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his say in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." (*Galpin* v. *Page*[2].)

Thus, in America, the word 'law' does not mean merely State-made law or law enacted by the State and does not exclude certain fundamental principles of justice which inhere in every civilised system of law and which are at the root of it. The result of the numerous decisions in America has been summed up by Professor Willis in his book on "Constitutional Law" at page 662, in the statement that the essentials of due process are: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) orderly course of procedure. It is pointed out by the learned author that these essentials may assume different forms in different circumstances, and so long as they are conceded in principle, the requirement of law will be fulfilled. For example, a person cannot require any particular form or method of hearing, but all that he can require is a reasonable opportunity to be heard. Similarly, an impartial tribunal does not necessarily mean a judicial tribunal in every case. So far as orderly course of procedure is concerned, he explains that it does not require a court to strictly weigh the evidence but it does require it to examine the entire record to ascertain the issues, to discover whether there are facts not reported and to see whether or not the law has been correctly applied to facts. The view expressed by other writers is practically the same as that expressed by Professor Willis, though some of them do not expressly refer to the fourth element, *viz.*, orderly course of procedure. The real point however is that these four elements are really different aspects of the same right, *viz.*, the right to be heard before one is condemned.

So far as this right is concerned, judicial opinion in England appears to be the same as that in America. In England, it would shock one to be told that a man can be deprived of his personal liberty without a fair trial or hearing. Such a case can happen only if the Parliament expressly takes away the right in question in an emergency as the British Parliament did during the last two world wars in a limited number of cases. I will refer here to a few cases which show that the fundamental principle that a person whose right is affected must be heard has been observed not only in cases involving personal liberty but also in proceedings affecting other rights, even though they may have come before administrative or quasi-judicial tribunals. *Cooper* v. *The Wadsworth Board of Works*[3] was a case under an Act which empowered the District Board to alter or demolish a house where the builder had neglected to give notice of his intention seven days before proceeding to lay or dig the foundation. Acting upon this power, the Board directed the demolition of a building without notice to the builder, but this was held to be illegal. Byles, J., in dealing with the matter observed as follows :—

"I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case, and ending with some very recent cases, establish that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr. Justice Fortescue, in Dr. Bentley's case, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any.'"

In the same case Erle, C.J., observed :—

1. 167 U.S. 409 at 417.
2. 85 U S. 18.
3. (1863) 14 C.B. (N.S.) 180 : 143 E.R. 414.

"It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding . . . . . I do not quite agree with that ; . . . . . . the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down."

The observations made by Erle, C.J., were quoted and applied by Sir Robert Collier in *Smith* v. *The Queen*[1], and the observations of Lord Campbell in *Regina* v. *The Archbishop of Canterbury*[2], were to the same effect.

A similar opinion was expressed by Sir George Jessel in *Fisher* v. *Keane*[3], *Labouchere* v. *Earl of Wharncliffe*[4], and *Russell* v. *Russell*[5]. In the last-mentioned case, he observed as follows :

"It [*Wood* v. *Wood*[6]] contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform which I should have been very glad to have had before me on both those club cases that I recently heard, namely, the case of *Fisher* v. *Keane*[3]; and the case of *Labouchere* v. *Earl of Wharncliffe*[4]. The passage I mean is this, referring to a committee : "They are bound in the exercise of their functions by the rule expressed in the maxim '*Audi alteram partem*', that no man should be condemned to consequences without having the opportunity of making his defence.' This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

This opinion was quoted with approval by Lord Macnaghten in *Lapointe* v. *L'Association, etc., de Montreal*[7]. In that case, on an application for pension by the appellant, who had been obliged to resign, the Board of Directors, without any judicial inquiry into the circumstances, resolved to refuse the claim on the ground that he was obliged to tender his resignation. This procedure was condemned by Lord Macnaghten as being " contrary to rules of society and above all contrary to the elementary principles of justice." These observations of Lord Macnaghten were referred to and relied on in *The King* v. *Tribunal of Appeal under the Housing Act*, 1919[8]. In that case, a company proposed to build a picture house and the local authority having prohibited the building, the company appealed under the Housing (Additional Powers) Act, 1919, which contained a provision that an appeal could in certain cases be properly determined without a hearing and that the appellate court could dispense with the hearing and determine the appeal summarily. It was held that the meaning of rule 7 was that the tribunal on appeal might dispense with an oral hearing, not that they might diepense with a hearing of any kind, and that they were bound to give the appellants a hearing in the sense of an opportunity to make out a case. The Earl of Reading in delivering the judgment observed :

" The principle of law applicable to such a case is well stated by Kelly, C.B., in *Wood* v. *Wood*[6] in a passage which is cited with approval by Lord Macnaghten in *Lapointe* v. *L'Association, etc., de Montreal*[7] . . . ."

In *Local Government Board* v. *Arlidge*[9], the local government dismissed an appeal by a person against whom a closing order had been made under Housing, Town Planning, etc., Act, without an oral hearing and without being allowed to see the report made by the Board's Inspector upon public local inquiry. The House of Lords did not interfere with the order on the ground that the appeal had been dealt with by an administrative authority whose duty was to enforce obligations on the individual in the interests of the community and whose character was that of an organization with executive functions. The principle however was conceded and lucidly set forth that when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially, and they must deal with the question referred to them without bias and must give to each of the parties an opportunity of presenting its case, and that the decision must be come to in the

1. (1878) 3 A.C. 614.
2. (1859) 1 E. and E. 545 : 120 E.R. 1014.
3. (1878) 11 Ch. D. 353.
4. (1879) 13 Ch. D. 346.
5. (1880) 14 Ch. D. 471.
6. (1874) L.R. 9 Ex. 190.
7. (1906) A.C. 535.
8. (1920) I.B. 334.
9. (1915) A.C. 120.

spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. Commenting upon this case, which is generally regarded as an extreme case, Mr. Gavin Simonds, who afterwards became a member of the House of Lords observes :—

"I think you would agree that if the subject-matter of such proceedings as are here indicated was the liberty of the subject, or indeed his life, you would regard such a judicial procedure as outrageous." (*See* C. K. Allen's "Law and Orders", page 167).

I have particularly referred to cases which were before administrative tribunals, because I have to deal in this case with preventive detention which is said to be an executive act and because I wish to point out that even before executive authorities and administrative tribunals an order cannot generally be passed affecting one's rights without giving one such hearing as may be appropriate to the circumstances of the case. I have only to add that Halsbury after enumerating the most important liberties which are recognized in England, such as right of personal freedom, right to freedom of speech, right of public meeting, etc., adds :—

"It seems to me that there should be added to this list the following rights which appear to have become well-established—the right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a judge in his own cause, and that no party ought to be condemned unheard, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case . . . ." (Halsbury's Laws of England, 2nd Edition, volume 6, page 392.)

The question is whether the principle that no person can be condemned without a hearing by an impartial tribunal which is well-recognized in all modern civilized systems of law and which Halsbury puts on a par with well-recognized fundamental rights cannot be regarded as part of the law of this country. I must confess that I find it difficult to give a negative answer to this question. The principle being part of the British system of law and procedure which we have inherited, has been observed in this country for a very long time and is also deeply rooted in our ancient history, being the basis of the panchayat system from the earliest times. The whole of the Criminal Procedure Code, whether it deals with trial of offences or with preventive or quasi-administrative measures such as are contemplated in sections 107, 108, 109, 110 and 145, is based upon the foundation of this principle, and it is difficult to see that it has not become part of the "law of the land" and does not inhere in our system of law. If that is so, then "procedure established by law" must include this principle, whatever else it may or may not include. That the word 'law' used in Article 21 does not mean only State-made law is clear from the fact that though there is no statute laying down the complete procedure to be adopted in contempt of court cases, when the contempt is not within the view of the court, yet such procedure as now prevails in these cases is part of our law. The statute-law which regulates the procedure of trials and enquiries in criminal cases does not specifically provide for arguments in certain cases, but it has always been held that no decision should be pronounced without hearing arguments. In a number of cases, it has been held that though there may be no specific provision for notice in the statute, the provision must be read into the law. I am aware that some judges have expressed a strong dislike for the expression "natural justice" on the ground that it is too vague and elastic, but where there are well-known principles with no vagueness about them, which all systems of law have respected and recognized, they cannot be discarded merely because they are in the ultimate analysis found to be based on natural justice. That the expression "natural justice" is not unknown to our law is apparent from the fact that the Privy Council has in many criminal appeals from this country laid down that it shall exercise its power of interference with the course of criminal justice in this country when there has been a breach of principles of natural justice or departure from the requirements of justice. [See In re *Abraham Mallory Dillet*[1], *Taba Singh* v. *King-Emperor*[2], *George Gfeller* v. *The King*[3], and *Bugga and others* v. *Emperor*[4]]. In the present case, there is no vagueness about the right claimed

1. (1887) 12 A.C. 459.
2. (1924) I.L.R. 48 Bom. 515 (P.C.).
3. A.I.R. 1943 P.C. 211.
4. A.I.R. 1919 P.C. 108 (1).

which is the right to have one's guilt or innocence considered by an impartial body and that right must be read into the words of Article 21. Article 21 purports to protect life and personal liberty, and it would be a precarious protection and a protection not worth having, if the elementary principle of law under discussion, which, according to Halsbury, is on a par with fundamental rights, is to be ignored and excluded. In the course of his arguments, the learned counsel for the petitioner repeatedly asked whether the Constitution would permit a law being enacted, abolishing the mode of trial permitted by the existing law and establishing the procedure of trial by battle or trial by ordeal which was in vogue in olden times in England. The question envisages something which is not likely to happen, but it does raise a legal problem which can perhaps be met only in this way that if the expression "procedure established by law" simply means any procedure established or enacted by statute it will be difficult to give a negative answer to the question, but if the word 'law' includes what I have endeavoured to show it does, such an answer may be justified. It seems to me that there is nothing revolutionary in the doctrine that the words "procedure established by law" must include the four principles set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles, as the learned author points out and as the authorities show, are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add that it has not been seriously controverted that "law" in this article means valid law and "procedure" means certain definite rules of proceeding and not something which is a mere pretence for procedure.

I will now proceed to examine Article 22 of the Constitution which specifically deals with the subject of preventive detention. The first point to be noted in regard to this article is that it does not exclude the operation of Articles 19 and 21, and it must be read subject to those two articles, in the same way as Articles 19 and 21 must be read subject to Article 22. The correct position is that Article 22 must prevail in so far as there are specific provisions therein regarding preventive detention, but, where there are no such provisions in that article, the operation of Articles 19 and 21 cannot be excluded. The mere fact that different aspects of the same right have been dealt with in three different articles will not make them mutually exclusive except to the extent I have indicated.

I will now proceed to analyse the article and deal with its main provisions. In my opinion, the main provisions of this article rare :—(1) that no person can be detained beyond three months without the report of an advisory board (clause 4 (*a*)] : (2) that Parliament may prescribe the circumstances and the class or classes of cases in which a person may be detained for more than three months without obtaining the opinion of an advisory board [clause 7 (*a*)] ; (3) that when a person is preventively detained, the authority making the order of detention shall communicate to such person the grounds on which the order is made and shall afford him the earliest opportunity of making a representation against the order [clause (5)] ; and (4) that the Parliament may prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention [clause (7) (*b*)]. The last point does not require any consideration in this case, but the first three points do require consideration.

In connection with the first point, the question arises as to the exact meaning of the words "such detention" occurring in the end of clause (4) (*a*). Two alternative interpretations were put forward : (1) 'such detention' means preventive detention ; (2) 'such detention' means detention for a period longer than three months. If the first interpretation is correct, then the function of the advisory board would be to go into the merits of the case of each person and simply report whether there was sufficient cause for his detention. According to the other interpretation, the function of the advisory board will be to report to the government whether there is sufficient cause for the person being detained for more

than three months. On the whole, I am inclined to agree with the second interpretation. *Prima facie*, it is a serious matter to detain a person for a long period (more than three months) without any enquiry or trial. But Article 22 (4) (*a*) provides that such detention may be ordered on the report of the advisory board. Since the report must be directly connected with the object for which it is required, the safeguard provided by the article, *viz.*, calling for a report from the advisory board, loses its value, if the advisory board is not to apply its mind to the vital question before the government, namely, whether prolonged detention (detention for more than three months) is justified or not. Under Article 22 (4) (*a*), the advisory board has to submit its report before the expiry of three months and may therefore do so on the eighty-ninth day. It would be somewhat farcical to provide, that after a man has been detained for eighty-nine days, an advisory board is to say whether his initial detention was justified. On the other hand, the determination of the question whether prolonged detention (detention for more than three months) is justified must necessarily involve the determination of the question whether the detention was justified at all, and such an interpretation only can give real meaning and effectiveness to the provision. The provision being in the nature of a protection or safeguard, I must naturally lean towards the interpretation which is favourable to the subject and which is also in accord with the object in view.

The next question which we have to discuss relates to the meaning and scope of Article 22 (7) (*a*) which runs as follows :—

"Parliament may by law prescribe—

(*a*) the circumstances under which, and the class or classes in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (*a*) of clause (4)."

The question is what is meant by "circumstances" and "class or classes of cases" used in this provision. This question has arisen because of the way in which these expressions appear to have been interpreted and applied in the Act of Parliament with which we are concerned. As the matter is important and somewhat complicated, I shall try to express my meaning as clearly as possible even at the risk of some repetition, and, in doing so, I must necessarily refer to the impugned Act as well as Lists I and III of the Seventh Schedule of the Constitution, under which Parliament had jurisdiction to enact it. Item 9 of List I—Union List—shows that the Parliament has power to legislate on preventive detention for reasons connected with (1) defence, (2) foreign affairs, and (3) security of India. Under List III—Concurrent List—the appropriate item is item 3 which shows that law as to preventive detention can be made for reasons connected with (1) the security of the State, (2) the maintenance of public order, and (3) the maintenance of supplies and services essential to the community. The impugned Act refers to all the subjects mentioned in Lists I and III in regard to which law of preventive detention can be made. Section 3 (1) of the Act, the substance of which has already been mentioned, is important, and I shall reproduce it in verbatim.

"The Central Government or the State Government may—

(*a*) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(*b*) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained."

It will be noticed that all the subjects of legislation concerning preventive detention occurring in item 9 of List I are grouped in sub-clause (i) of clause (*a*). The subjects in this group are three in number and, for convenience of reference, I shall hereafter refer to them as A, B and C. In sub-clause (ii), we find grouped

two of the matters referred to in item 3 of List III, these being security of the State and the maintenance of public order. These two subjects, I shall refer to as D and E. In sub-clause (iii), reference has been made to the third matter in item 3 of List III, and I shall refer to this subject as F. With this classification, let us now turn to the Constitution itself.

On reading Articles 22 (4) and 22 (7) together, it would be clear that so long as Article 22 (4) (*a*) holds the field and Parliament does not act under clause (7) (*a*) of Article 22, there must be an advisory board in every case, *i.e.*, if the legislation relates to groups A to F, as it does here, there must be an advisory board for all these groups.

Article 22 (7) however practically engrafts an exception. It states in substance that the Parliament may by an Act provide for preventive detention for more than three months without reference to an advisory board, but in such cases it shall be incumbent on the Parliament to prescribe (1) the circumstances and (2) the class or classes of cases in which such course is found to be necessary. If the case contemplated in clause (4) (*a*) is the rule and that contemplated in clause (7) (*a*) is the exception, then the circumstances and the class or classes of casses must be of a special or extraordinary nature, so as to take the case out of the rule and bring it within the exception. It is always possible to draw the line between the normal or ordinary and the abnormal or extraordinary cases, and this is what, in my opinion, the Parliament was expected to do under clause (7) (*a*). I do not think that it was ever intended that Parliament could at its will treat the normal as the abnormal or the rule as the exception. But this is precisely what has been done in this case. All the items on which preventive legislation is possible excepting one, *i.e.*, A to E, have been put within the exception, and only one, F, which relates to maintenance of supplies and services essential to the community, has been allowed to remain under the rule. In other words, it is provided that there shall be an advisory board only for the last category, F, but no provision having been made for the other categories, A to E, it may be assumed that the advisory board has been dispensed with in those cases. The learned Attorney-General maintained that it would have been open to the Parliament to dispense with the advisory board even for the category F, and if such a course had been adopted it would not have affected the validity of the Act. This is undoubtedly a logical position in the sense that it was necessary for him to go as far as this to justify his stand; but, in my opinion, the course adopted by the Parliament in enacting section 12 of the impugned Act is not what is contemplated under Article 22 (7) (*a*) or is permitted by it. The circumstances to be prescribed must be special and extraordinary circumstances and the class or classes of cases must be of the same nature. In my opinion, the Constitution never contemplated that the Parliament should mechanically reproduce all or most of the categories A to F, almost verbatim and not apply its mind to decide in what circumstances and in what class or classes of cases the safeguard of an advisory board is to be dispensed with.

I may state here that two views are put forward before us as to how clauses (4) (*a*) and 7 (*a*) of Article 22 are to be read :—(1) that clause (4) (*a*) lays down the rule that in all cases where detention for more than three months is ordered, it should be done in consultation with and on the report of the advisory board, and clause (7) (*a*) lays down an exception to this rule by providing that Parliament may pass an Act permitting detention for more than three months without reference to an advisory board; (2) that clauses (4) (*a*) and (7) (*a*) are independent clauses making two separate and alternative provisions regarding detention for more than three months, in one case on the report of an advisory board and in the other case without reference to an advisory board. Looking at the substance and not merely at the words, I am inclined to hold that clause (7) (*a*) practically engrafts an exception on the rule that preventive detention for more than three months can be ordered only on the report of an advisory board, and so far I have proceeded on that footing. But it seems to me that it will make no difference to the ultimate conclusion, whichever of the two views we may adopt. Even on the latter

view, it must be recognized that the law which the Constitution enables the Parliament to make under Article 22 (7) (*a*) would be an exceptionally drastic law, and, on the principle that an exceptionally drastic law must be intended for an exceptional situation, every word of what I have said so far must stand. Clause (7) (*a*) is only an enabling provision, and it takes care to provide that the Parliament cannot go to the extreme limit to which it is permitted to go without prescribing the class or classes of cases and the circumstances to which the extreme law would be applicable. It follows that the class or classes of cases and the circumstances must be of a special nature to require such legislation.

It was urged that the word 'and' which occurs between 'circumstances' and 'class or classes of cases' is used in a disjunctive sense and should be read as 'or', and by way of illustration it was mentioned that when it is said that a person may do this and that, it means that he is at liberty to do either this or that. I do not think that this argument is sound. I think that clause (7) (*a*) can be accurately paraphrased somewhat as follows :—" Parliament may dispense with an advisory board, but in that case it shall prescribe the circumstances and the class or classes of cases......" If this is the meaning then 'and' must be read as 'and' and not as 'or'; and 'may' must be read as 'shall.' Supposing it was said that Parliament may prescribe the time and place for the doing of a thing, then can it be suggested that both time and place should not be prescribed? It seems obvious to me that the class or classes of cases must have some reference to the persons to be detained or to their activities and movements or to both. 'Circumstances' on the other hand refer to something extraneous, such as surroundings, background, prevailing conditions, etc., which might prove a fertile field for the dangerous activities of dangerous persons. Therefore the provision clearly means that both the circumstances and the class or classes of cases (which are two different expressions with different meanings and connotations and cannot be regarded as synonymous) should be prescribed, and prescription of one without prescribing the other will not be enough. As I have already stated, such law as can be enacted under Article 22 (7) (*a*) must involve, by reason of the extreme limit to which it can go, serious consequences to the persons detained. It will mean (1) prolonged detention, *i.e.*, detention for a period longer than three months, and (2) deprivation of the safeguard of an advisory board. Hence Article 22 (7) (*a*) which purports to be a protective provision will cease to serve its object unless it is given a reasonable interpretation. To my mind, what it contemplates is that the law in question must not be too general but its scope should be limited by prescribing both the class or classes of cases and the circumstances.

It was contended that the expression 'class or classes of cases' is wide enough to enable the Parliament to treat any of the categories mentioned in Lists I and and III, items 9 and 3 respectively, (*i.e.*, any of the categories A to F) as constituting a class. At first sight, it seemed to me to be a plausible argument, but the more I think about it the more unsound it appears to me. The chief thing to be remembered is what I have already emphasised more than once, *viz.*, that a special or extreme type of law must be limited to special classes of cases and circumstances. Under the Constitution, the Parliament has to prescribe " the class or classes ", acting within the limits of the power granted to it under Lists I and III. The class or classes must be its own prescription and must be so conceived as to justify by their contents the removal of an important safeguard provided by the Constitution. Prescribing is more than a mere mechanical process. It involves a mental effort to select and adapt the thing prescribed to the object for which it has to be prescribed. We find here that what is to be prescribed is " class or classes " (and also " circumstances "). We also find that what the law intends to provide is prolonged detention (by which words I shall hereafter mean detention for more than three months) and elimination of the advisory board. The class or classes to be prescribed must therefore have a direct bearing on these matters and must be so selected and stated that any one by looking at them may say :—" That is the reason why the law has prescribed prolonged detention without reference to an

advisory board." In other words, there must be something to make the class or classes prescribed fit in with an extreme type of legislation—some element of exceptional gravity or menace which cannot be easily and immediately overcome and therefore necessitates prolonged detention; and there must be something to show that reference to an advisory board would be an undesirable and cumbersome process and wholly unsuitable for the exceptional situation to which the law applies. Perhaps a simple illustration may make the position still clearer. Under the Lists, one of the subjects on which Parliament may make a law of preventive detention is 'matter connected with the maintenance of public order.' The Act simply repeats this phraseology and states in section 3: "with a view to preventing him (the person to be detained) from acting in a manner prejudicial to the maintenance of public order." This may be all right for section 3, but section 12 must go further. An act prejudicial to the maintenance of public order may be an ordinary act or it may be an act of special gravity. I think that Article 22 (7) (*a*) contemplates that the graver and more heinous types of acts falling within the category of acts prejudicial to the maintenance of public order (or other heads) should be prescribed so as to define and circumscribe the area of an exceptional piece of legislation.

That some kind of sub-classification (if I may be permitted to use this word) of the categories A to F was possible can be illustrated by reference to regulation 18-B of the British Defence of the Realm Regulations. This regulation was made under an Act of 1939 which authorised "the making of regulations for the detention of persons whose detention appears to the Secretary of State to be expedient in the interest of public safety or the defence of the realm." The two matters "public safety" and "defence of the realm" are analogous to some of the heads stated in Lists I and III. It will be instructive to note that under these two heads, regulation 18-B has set forth several sub-heads or class or classes of cases in which preventive detention could be ordered. These classes are much more specific than what we find in section 3 of the impugned Act and therefore there is less chance of misuse by the executive of the power to order preventive detention. The classes set out are these:—(1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, (2) if the Secretary of State has reasonable cause to believe any person to have been *recently concerned* in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts, (3) if the Secretary of State has reasonable cause to believe any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of, any such organization as is hereinafter mentioned.......... (*a*) the organization is subject to foreign influence or control, (*b*) the persons in control of the organization have or have had associations with persons concerned in the government of, or sympathies with the system of government of, any power with which His Majesty is at war, and in either case there is danger of the utilization of the organization for purposes prejudicial to the public safety, etc., (4) if the Secretary of State has reasonable cause to believe that the recent conduct of any person for the time being in an area or any words recently written or spoken by such a person expressing sympathy with the enemy, indicates or indicate that that person is likely to assist the enemy. I have only to point out that the scope within which preventive detention can be legislated upon in this country is much larger than the scope indicated in the British Act under which Regulation 18-B was framed, and therefore there is more scope for specification of the circumstances as well as the class or classes of cases under the impugned Act. But all that has been done is that words which occur in the Legislative Lists have been taken and transferred into the Act.

What I have stated with regard to class or classes of cases also applies to the circumstances which are also to be prescribed under Article 22 (7) (*a*). These circumstances are intended to supply the background or setting in which the dangerous activities of dangerous persons might prove specially harmful. They must be special circumstances which demand a specially drastic measure and under which reference to an advisory board might defeat the very object of preventive

action. The evident meaning of Article 22 (7) (*a*) seems to be that the picture will not be complete without mentioning both the classes and the circumstances. There was some discussion at the Bar as to what kind of circumstances might have been specified. It is not for me to answer this question, but I apprehend that an impending rebellion or war, serious disorder in a particular area such as has induced the Punjab Government to declare certain areas as 'disturbed areas,' tense communal situation, prevalence of sabotage or widespread political dacoities and a variety of other matters might answer the purpose the Constitution had in view.

I will now try to sum up the result of a somewhat protracted discussion into which I had to enter merely to clarify the meaning of a very important provision of the Constitution which has, in my opinion, been completely misunderstood by the framers of the impugned Act. It appears to me that Article 22 deals with three classes of preventive detention :—

(1) preventive detention for three months ;

(2) preventive detention for more than three months on the report of the advisory board ; and

(3) preventive detention for more than three months without reference to the advisory board.

If one has to find some kind of a label for these classes for a clear understanding of the subject, one may label them as 'dangerous', 'more dangerous' and 'most dangerous.' Now so far as the first two classes are concerned, there is nothing to be prescribed under the Constitution. Apparently, the authors of the Constitution were not much concerned about class No. (1), and they thought that in so far as class No. (2) was concerned, the provision that a reference to the advisory board was necessary coupled with the provision that detention was not to exceed the maximum period which may be fixed by the Parliament was enough. But they did take care to make a special provision for class No. (3) and it is extremely important for the liberty of the subject as well as for the smooth working of the Constitution that this provision should not be lightly treated but should receive a well-considered and reasonable construction. It is elementary that the rigour of a law should correspond to or fit the gravity of the evil or danger it aims at combating, and it is also evident that the law which the Parliament has been permitted to enact under Article 22 (7) (*a*) can, so far as rigour is concerned, go to the farthest limit. It follows that the law must have been intended for exceptionally grave situations and exigencies. Hence the authors of the Constitution have made it necessary that the Parliament should put certain specifications into the Act which it is empowered to pass under Article 22 (7) (*a*), so that by means of these specifications the necessity for enacting so drastic a law should be apparent on the face of it, and its application should be confined to the classes and circumstances specified. The Act must prescribe (1) "class or classes of cases" which are to have reference to the persons against whom the law is to operate and their activities and movements and (2) "circumstances" which would bring into prominence the conditions and the backgrounds against which dangerous activities should call for special measures. By means of such twofold prescription, the sphere for the application of the law will be confined only to a special type of cases—it will be less vague, less open to abuse and enable those who have to administer it to determine objectively when a condition has arisen to justify the use of the power vested in them by the law. This, in my opinion, is the true meaning and significance of Article 22 (7) (*a*) and any attempt to whittle it down will lead to deplorable results.

Having stated my views as to the construction of Article 22 (7) (*a*), I propose to consider at once whether section 12 of the impugned Act conforms to the requirements of that provision. In my opinion, it does not, because it fails to prescribe either the circumstances or the class or classes of cases in the manner required by the Constitution. It does not prescribe circumstances at all, and, though

it purports to prescribe the class or classes, it does so in a manner showing that the true meaning of the provision from which the Parliament derived its power has not been grasped. I have sufficiently dwelt on this part of the case and shall not repeat what I have already said. But I must point out that even if it be assumed that the view advanced by the learned Attorney-General is correct and it was within the competence of Parliament to treat any of the categories mentioned in items 9 and 3 of Lists I and III as constituting a class and to include it without any qualification or change, the impugned section cannot be saved on account of a twofold error :—(1) the word 'and' which links 'class or classes' with 'circumstances' in Article 22 (7) (a) has been wrongly construed to mean 'or'; and (2) the distinction between 'circumstances' and 'class or classes' has been completely ignored and they are used as interchangeable terms. The first error appears to me to be quite a serious one, because though the Constitution lays down two requirements and insists on the prescription of circumstances as well as class or classes, it has been assumed in enacting section 12 that prescription of one of them only will be enough. The other error is still more serious and goes to the root of the matter. There can be no doubt that circumstances and class or classes are two different expressions and have different meanings, but the Act proceeds on the assumption that circumstances are identical with class or classes, as will appear from the words, "any person detained in any of the following classes of cases or under any of the following circumstances" used in the section. I have already shown how important the specification of circumstances is in legislation of such an extreme and drastic character. Therefore, to confuse "classes" with "circumstances" and to omit to mention "circumstances" at all are in my opinion grave errors. There can, in my opinion, be no escape from the conclusion that section 12 of the Act by which a most important protection or safeguard conferred on the subject by the Constitution has been taken away, is not a valid provision, since it contravenes the very provision in the Constitution under which the Parliament derived its competence to enact it.

I will now briefly deal with Article 22 (5) which makes it incumbent on the authority ordering preventive detention to communicate to the person detained the grounds on which the order has been made and to give him the earliest opportunity of making a representation against the order. It must be remembered that this provision is intended to afford protection to and be a safeguard in favour of a detained person, and it cannot be read as limiting any rights which he has under the law or any other provisions of the Constitution. If Article 21 guarantees that before a person is deprived of his liberty he must be allowed an opportunity of establishing his innocence before an impartial tribunal, that right still remains. In point of fact, there is no express exclusion of that right in the Constitution and no prohibition against constituting an impartial tribunal. On the other hand, the right to make a representation which has been granted under the Constitution, must carry with it the right to the representation being properly considered by an impartial person or persons. There must therefore be some machinery for properly examining the cases of the detenus and coming to the conclusion that they have not been detained without reason. If this right had been expressly taken away by the Constitution, there would have been an end of the matter, but it has not been expressly taken away, and I am not prepared to read any implicit deprivation of such a valuable right. The mere reference to an advisory board in Article 22 (4) (a) does not, if my interpretation of the provision is correct, exclude the constitution of a proper machinery for the purpose of examining the cases of detenus on merits. The constitution of an advisory board for the purpose of reporting whether a person should be detained for more than three months or not is a very different thing from constituting a board for the purpose of reporting whether a man should be detained for a single day. In the view I take, all that Parliament could do under clause (7) (a) of Article 22 was to dispense with an advisory board for the purpose contemplated in clause (4) (a) of that Article and not to dispense with the proper machinery, by whichever name it may be called, for the purpose of examining the merits of the case of a detained person.

It was argued that Article 22 is a code by itself and the whole law of preventive detention is to be found within its four corners. I cannot however easily subscribe to this sweeping statement. The article does provide for some matters of procedure, but it does not exhaustively provide for them. It is said that it provides for notice, an opportunity to the detenu to represent his case, an advisory board which may deal with his case, and for the maximum period beyond which a person cannot be detained. These points have undoubtedly been touched, but it cannot be said that they have been exhaustively treated. The right to represent is given, but it is left to the Legislature to provide the machinery for dealing with the representation. The advisory board has been mentioned, but it is only to safeguard detention for a period longer than three months. There is ample latitude still left to the Parliament, and if the Parliament makes use of that latitude unreasonably, Article 19 (5) may enable the Court to see whether it has transgressed the limits of reasonableness.

I will now proceed to deal with the Act in the light of the conclusions I have arrived at. So far as section 3 of the Act is concerned, it was contended that it is most unreasonable, because it throws a citizen at the mercy of certain authorities, who may at their own will order his detention and into whose minds we cannot probe to see whether there is any foundation for the subjective satisfaction upon which their action is to rest. I am however unable to accept this argument. The administrative authorities who have to discharge their responsibilities have to come to quick decisions and must necessarily be left to act on their own judgment. This principle is by no means unreasonable and it underlies all the preventive or quasi-administrative measures which are to be found in the Criminal Procedure Code. Under section 107 of that Code, it is left to the discretion of the Magistrate concerned to determine whether in his opinion there is sufficient ground for proceeding against any person who is likely to occasion a breach of the peace. Under section 145 also, his initial action depends upon his personal satisfaction. Therefore I do not find anything wrong or unconstitutional in section 3 of the Act. But I must point out that it is a reasonable provision only for the first step, *i.e.*, for arrest and initial detention, and must be followed by some procedure for testing the so-called subjective satisfaction, which can be done only by providing a suitable machinery for examining the grounds on which the order of detention is made and considering the representations of the persons detained in relation to those grounds.

I do not also find anything radically wrong in section 7 of the Act, which makes it incumbent on the authority concerned to communicate to a detenu the grounds on which the order has been made and to afford him the earliest opportunity of making a representation against the order. Section 10 which provides that the advisory board shall make its report within ten weeks from the date of the detention order is in conformity with Article 22 (4) (*a*) of the Constitution, and the only comment which one can make is that Parliament was not obliged to fix such a long period for the submission of a report and could have made it shorter in ordinary cases. The real sections which appear to me to offend the Constitution are sections 12 and 14. I have already dealt with the principal objection to section 12, while discussing the provisions of Article 22 (7) (*a*) and I am of the opinion that section 12 does not conform to the provisions of the Constitution and is therefore *ultra vires*. I also think that even if it be held that it technically complies with the requirements of Article 22 (7) (*a*), Parliament has acted unreasonably in exercising its discretionary power without applying its mind to essential matters and thus depriving the detenus of the safeguard of an advisory board which the Constitution has provided in normal cases. So far as section 14 is concerned, all my colleagues have held it to be *ultra vires*, and, as I agree with the views expressed by them, I do not wish to encumber my judgment by repeating in my own words what has been said so clearly and so well by them. Section 14 may be severable from the other provisions of the Act and it may not be possible to grant any relief to the petitioner on the ground that section 14 is invalid. But I think that section 12 goes to the very root of the

legislation inasmuch as it deprives a detenu of an essential safeguard, and in my opinion the petitioner is entitled to a writ of *habeas corpus* on the ground that an essential provision of the Constitution has not been complied with. This writ will of course be without prejudice to any action which the authorities may have taken or may hereafter take against the petitioner under the penal law. I have to add this qualification because there were allegations of his being involved in some criminal cases but the actual facts were not clearly brought out before us.

I have only to add a few concluding remarks to my judgment. In studying the provisions of the impugned Act, I could not help instituting a comparison in my own mind between it and similar legislation in England during the last two world wars. I could not also help noticing that the impugned Act purports to be a peacetime Act, whereas the legislation to which I have referred was enacted during the war. During the first war as well as the second, a number of persons were detained and a number of cases were brought to court in connection with their detention, but the two leading cases which will be quoted again and again are *Rex* v. *Halliday*[1] and *Liversidge* v. *Sir John Anderson*[2]. We are aware that in America certain standards which do not conform to ordinary and normal law have been applied by the judges during the period of the war and sometimes they are compendiously referred to as being included in "war power". The two English cases to which I have referred also illustrate the same principle, as will appear from two short extracts which I wish to reproduce. In *Rex* v. *Halliday*[3], Lord Atkinson observed as follows :—

> "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."

In *Liversidge* v. *Sir John Anderson*[4], Lord Macmillan struck the same note in these words :—

> "The liberty which we so justly extol is itself the gift of the law and as Magna Charta recognizes may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."

These passages represent the majority view in the two cases, but the very elaborate judgments of Lord Shaw in *Rex* v. *Halliday*[1] and that of Lord Atkin in *Liversidge* v. *Sir John Anderson*[4], show that there was room for difference of opinion as well as for a more dispassionate treatment of the case and the points involved in it. It is difficult to say that there is not a good substratum of sound law in the celebrated dictum of Lord Atkin that even amidst the clash of arms the laws are not silent and that they speak the same language in war as in peace. However that may be, what I find is that in the regulations made in England during the first war as well as the second war, there was an elaborate provision for an advisory board in all cases without any exception, which provided a wartime safeguard for persons deprived of their liberty. There was also a provision in the Act of 1939 that the Secretary of State should report at least once in every month as to the action taken under the regulation including the number of persons detained under orders made thereunder. I find that these reports were printed and made available to the public. I also find that the Secretary of State stated in the House of Commons on the 28th January, 1943, that the general order would be to allow British subjects detained under the Regulation to have consultations with their legal advisers out of the hearing of an officer. This order applied to consultations with barristers and solicitors but not to cases where solicitors sent to interview a detained person a clerk who was not an officer of the High Court. The impugned Act suffers in comparison, on account of want of such provisions, though, so far as I can see, no great harm was likely to have been caused by setting up a machinery composed of either administrative or judicial authorities for

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1. (1917) A.C. 260.
2. (1942) A.C. 206.
3. (1917) A.C. 260 at page 271.
4. (1942) A.C. 206 at 257.

examining the cases of detained persons so as to satisfy the essentials of fairness and justice. The Act also suffers in comparison with some of the later Provincial Acts in which the safeguard of an advisory board is expressly provided for. I find that there is a provision in section 12 (2) of the Act for the review of the cases of detenus after six months, but this is quite different from examining the merits of the case. The object of such a review is obviously to find out whether by reason of any change in the circumstances, a review of the original order is required.

I hope that in pointing out the shortcomings of the Act I will not be misunderstood. I am aware that both in England and in America and also in many other countries, there has been a reorientation of the old notions of individual freedom which is gradually yielding to social control in many matters. I also realize that those who run the State have very onerous responsibilities and it is not correct to say that emergent conditions have altogether disappeared from this country. Granting then that private rights must often be subordinated to the public good, is it not essential in a free community to strike a just balance in the matter? That a person should be deprived of his personal liberty without a trial is a serious matter, but the needs of society may demand it and the individual may often have to yield to those needs. Still the balance between the maintenance of individual rights and public good can be struck only if the person who is deprived of his liberty is allowed a fair chance to establish his innocence, and I do not see how the establishment of an appropriate machinery giving him such a chance can be an impediment to good and just government.

Patanjali Sastri, J.—This is an application under Article 32 of the Constitution of India for releasing the petitioner from detention in jail without trial under directions purporting to be issued by the Government of Madras under the Preventive Detention Act, 1950, and it has the distinction of being the first application invoking the guaranteed protection of this Court as the guardian of Fundamental Rights against alleged infringement of the petitioner's right to freedom of movement. As the case involved issues of great public importance and breaking of new ground it was argued with thoroughness and ability on both sides, reference being made to more or less analogous provisions of the Constitutions of other countries and in particular the Constitution of the United States of America.

The petitioner had been under detention previously under orders passed by the said Government under the Madras Maintenance of Public Order Act, 1947, but as the validity of that Act and all other similar local public safety enactments had been questioned in some of the High Courts in India after the new Constitution came into force, the Parliament enacted a comprehensive measure called the Preventive Detention Act, 1950 (hereinafter referred to as the impugned Act) extending to the whole of India with a certain exception not material here.

The Act came into force on 25th February, 1950, and, on the 27th February, the Government of Madras, in purported exercise of the powers conferred by the impugned Act and in supersession of earlier orders, directed the detention of the petitioner, and the order was served on him on 1st March. The petitioner contends that the impugned Act and in particular sections 3, 7, 10, 11, 12, 13 and 14 thereof take away or abridge the fundamental right to freedom of movement in contravention of Article 13 (2) of the Constitution and is, therefore, void as declared therein.

Article 13 is one of a fasciculus of Articles which are comprised in Part III of the Indian Constitution headed "Fundamental Rights". This Part forms a new feature of the Constitution and is the Indian "Bill of Rights". It is modelled on the first ten Amendments of the American Constitution which declare the fundamental rights of the American citizen. Article 12, which is the first article in this Part, defines "the State" as including the Governments and Legislatures of the Union and the States as well as all local and other authorities against which

the fundamental rights are enforceable, and Article 13 (1) declares that all existing laws inconsistent with the provisions of Part III shall, to the extent of the inconsistency, be void. Clause (2) of the Article, on which the petitioner's contention is primarily founded, reads as follows :

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

As the constitutional inhibition against deprivation or abridgment relates only to "the rights conferred by this Part", it is necessary first to ascertain the nature and extent of the right which, according to the petitioner, Part III has conferred on him, and, secondly, to determine whether the right so ascertained has been taken away or abridged by the impugned Act or by any of its provisions. The first question turns on the proper interpretation of the relevant Articles of the Constitution, and the second involves the consideration of the provisions of the impugned Act.

Mr. Nambiar appearing for the petitioner advanced three main lines of argument. In the first place, the right to move freely throughout the territory of India referred to in Article 19 (1) (*d*) is of the very essence of personal liberty, and inasmuch as the detention authorised by the impugned Act was not a "reasonable restriction" which Parliament could validly impose on such right under clause (5) of the Article, the impugned Act is void. Alternatively, the petitioner had a fundamental right under Article 21 not to be deprived of his personal liberty except according to procedure established by law, and the impugned Act by authorising detention otherwise than in accordance with proper procedure took away that right and was therefore void. And, lastly, the provisions of the impugned Act already referred to were *ultra vires* and inoperative as Parliament in enacting them has overstepped the limitations placed on its legislative power by Article 22, clauses (4) to (7).

Accordingly, the first question for consideration is whether Article 19 (1) (*d*) and (5) are applicable to the present case.

"Liberty", says John Stuart Mill, "consists in doing what one desires. But the liberty of the individual must be thus far limited—he must not make himself a nuisance to others."

Man, as a rational being, desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed. Accordingly, Article 19, while guaranteeing some of the most valued phases or elements of liberty to every citizen as civil rights, provides for their regulation for the common good by the State imposing certain "restrictions" on their exercise. The power of locomotion is no doubt an essential element of personal liberty which means freedom from bodily restraint, and detention in jail is a drastic invasion of that liberty. But the question is : Does Article 19, in its setting in Part III of the Constitution, deal with the deprivation of personal liberty in the sense of incarceration ? Sub-clause (*d*) of clause (1) does not refer to freedom of movement *simpliciter* but guarantees the right to move freely "throughout the territory of India". Sub-clause (*e*) similarly guarantees the right to reside and settle in any part of the territory of India. And clause (5) authorises the imposition of "reasonable restrictions" on these rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Reading these provisions together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to interpose. The use of the word "restrictions" in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the Article are still capable of being exercised, and to exclude the idea of incarceration though the words "restriction" and "deprivation" are sometimes used as

interchangeable terms, as restriction may reach a point where it may well amount to deprivation. Read as a whole and viewed in its setting among the group of provisions (Articles 19-22) relating to "Right to Freedom", Article 19 seems to my mind to pre-suppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests. It was said that sub-clause (*f*) would militate against this view, as the enjoyment of the right "to acquire, hold and dispose of property" does not depend upon the owner retaining his personal freedom. This assumption is obviously wrong as regards moveable properties, and even as regards immoveables he could not acquire or dispose of them from behind the prison bars; nor could he "hold" them in the sense of exercising rights of possession and control over them which is what the word seems to mean in the context. But where, as a penalty for committing a crime or otherwise, the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in clause (1). Deprivation of personal liberty in such a situation is not, in my opinion, within the purview of Article 19 at all but is dealt with by the succeeding Articles 20 and 21. In other words, Article 19 guarantees to the citizens the enjoyment of certain civil liberties *while they are free*, while Articles 20-22 secure to all persons—citizens and non-citizens—certain constitutional guarantees in regard to punishment and prevention of crime. Different criteria are provided by which to measure legislative judgments in the two fields, and a construction which would bring within Article 19 imprisonment in punishment of a crime committed or in prevention of a crime threatened would, as it seems to me, make a *reductio ad absurdum* of that provision. If imprisonment were to be regarded as a "restriction" of the right mentioned in Article 19 (1) (*d*), it would equally be a restriction on the rights mentioned by the other sub-clauses of clause (1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to run the gauntlet of clauses (2) to (6) before their validity could be accepted. For instance, the law which imprisons for theft would, on that view, fall to be justified under clause (2) as a law sanctioning restriction of freedom of speech and expression. Indeed, a Division Bench of the Allahabad High Court, in a recent unreported decision brought to our notice, applied the test of undermining the security of the State or tending to overthrow it in determining the validity or otherwise of the impugned Act. The learned Judges construed Article 19 as covering cases of deprivation of personal liberty and held, logically enough, that inasmuch as the impugned Act, by authorising preventive detention, infringed the right to freedom of speech and expression, its validity should be judged by the reservations in clause (2), and, as it failed to stand that test, it was unconstitutional and void.

Mr. Nambiar did not seek to go so far. He drew a distinction between the right conferred by sub-clause (*d*) and those conferred by the other sub-clauses. He urged, referring to Blackstone's Commentaries, that personal liberty consisted

"in moving one's person to whatever place one's inclination might direct"

and that any law which deprived a person of such power of locomotion was a direct invasion of the right mentioned in sub-clause (*d*), whereas it interfered only indirectly and consequently with the rights mentioned in the other sub-clauses. There is no substance in the distinction suggested. It would be illogical, in construing Article 19, to attribute to one of the sub-clauses a scope and effect totally different from the scope and effect of the others or to draw a distinction between one right and another in the group. All the rights mentioned in clause (1) are equally essential elements in the liberty of the individual in any civilised and democratic community, and imprisonment operates as an extinction of all of them alike. It cannot, therefore, be said that deprivation of personal liberty is an infringement of the right conferred by sub-clause (*d*) alone but not of the others. The learned Judges of the Allahabad High Court realised this and were perfectly logical in holding that the constitutional validity of a law providing for deprivation of personal liberty or imprisonment must be judged by the tests laid down not

only in clause (5) of Article 19 but also in the other clauses including clause (2), though their major premise that deprivation of personal liberty was a "restriction" within the meaning of Article 19 is, in my judgment, erroneous.

It was said that preventive detention being a drastic restriction of the right to move freely was, in its "pith and substance", within Article 19 (1) (*d*) read with clause (5) and not within Article 21 which deals with crime and its punishment and prevention. There is no room here, in my opinion, for the application of the rule of "pith and substance". As pointed out by the Privy Council in *Prafulla Kumar Mukherjee* v. *The Bank of Commerce, Ltd., Khulna*[1], approving the observations of the Federal Court in *Subrahmanyan Chettiar* v. *Muttuswami Goundan*[2], the rule was evolved by the Board for determining whether an impugned statute was, in its true character, legislation with respect to matters within the jurisdiction of one Legislature or another in a scheme of divided legislative power. No such question arises here. What the Court has to ascertain is the true scope and meaning of Article 19 in the context of Part III of the Constitution, in order to decide whether deprivation of personal liberty falls within that Article, and the pith and substance rule will be more misleading than helpful in the decision of that issue. Article 19, as I have already indicated, guarantees protection for the more important civil liberties of citizens who are in the enjoyment of their freedom, while at the same time laying down the restrictions which the Legislature may properly impose on the exercise of such rights, and it has nothing to do with deprivation of personal liberty or imprisonment which is dealt with by the succeeding three articles.

There is also another consideration which points to the same conclusion. The Drafting Committee of the Constituent Assembly, to whose Report reference was freely made by both sides during the argument, recommended

> "that the word liberty should be qualified by the insertion of the word 'personal' before it, for otherwise it might be construed very widely so as to include even the freedoms, already dealt with in Article 13" (now Article 19).

The acceptance of this suggestion shows that whatever may be the generally accepted connotation of the expression "personal liberty", it was used in Article 21 in a sense which excludes the freedoms dealt with in Article 19, that is to say, personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India.

It was further submitted that Article 19 declared the substantive rights of personal liberty while Article 21 provided the procedural safeguard against their deprivation. This view of the correlation between the two Articles has found favour with some of the Judges in the High Courts which have had occasion to consider the constitutional validity of the impugned Act. It is, however, to be observed that Article 19 confers the rights therein specified only on the citizens of India, while Article 21 extends the protection of life and personal liberty to all persons—citizens and *non-citizens* alike. Thus, the two Articles do not operate in a conterminous field, and this is one reason for rejecting the correlation suggested. Again, if Article 21 is to be understood as providing only procedural safeguards, where is the substantive right to personal liberty of *non-citizens* to be found in the Constitution? Are they denied such right altogether? If they are to have no right of personal liberty, why is the procedural safeguard in Article 21 extended to them? And where is that most fundamental right of all, the right to life, provided for in the Constitution? The truth is that Article 21, like its American prototype in the Fifth and Fourteenth Amendments of the Constitution of the United States, presents an example of the fusion of procedural and substantive rights in the same provision. The right to live, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by due process of law or by authority of law. "Process" or "procedure" in this context connotes both the

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1. (1947) 2 M.L.J. 6: L.R. 74 I.A. 23: 1947 F.L.J. 34 (P.C.).
2. (1940) 2 M.L.J. 170: (1940) F.C.R. 188 (F.C.).

act and the manner of proceeding to take away a man's life or personal liberty. And the first and essential step in a procedure established by law for such deprivation must be a law made by a competent Legislature authorising such deprivation. This brings me to the consideration of Articles 21 and 22 to which was devoted the greater part of the debate at the Bar.

These Articles run as follows :

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, not shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

Mr. Nambiar urged that the word "law" in Article 21 should be understood, not in the sense of an enactment but as signifying the immutable and universal principles of natural justice—the *jus naturale* of the civil law—and that the expression "procedure established by law" meant the same thing as that famous phrase "due process of law" in the American Constitution in its procedural aspect. Numerous American decisions were cited to show that the phrase implied the basic requirements of (1) an objective and ascertainable standard of conduct to which it is possible to conform, (2) notice to the party of the accusation against him, (3) a reasonable opportunity for him to establish his innocence, and (4) an impartial tribunal capable of giving an unbiased judgment. Mr. Nambiar conceded that these requirements might have to be modified or adapted to suit the nature of the particular proceeding and the object it had in view, as for instance, in a case of preventive detention, previous notice, which might result in the person concerned going underground might be dispensed with. Learned counsel insisted that these requirements, being the very core of the principles of natural

justice which transcended all State-made laws, must be substantially complied with by any law governing the process of deprivation of life or personal liberty, subject, of course, to any express provision in the Constitution sanctioning their relaxation or dispensation in any case or class of cases. He also appealed to the Preamble of the Constitution as the guiding star in its interpretation to support his thesis that, in view of the democratic Constitution which the people of India have purported to give themselves guaranteeing to the citizens certain fundamental rights which are justiciable, the provisions of Part III must be construed as being paramount to the legislative will, as otherwise the so-called fundamental right to life and personal liberty would have no protection against legislative action, and Article 13 (2) would be rendered nugatory.

There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the Legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model. Madison (who played a prominent part in framing the First Amendment of the American Constitution) pointing out the distinction, due to historical reasons, between the American and the British ways of securing " the great and essential rights of the people ", observed :

" Here they are secured not by laws paramount to prerogative but by Constitutions paramount to laws."

Report on the Virginia Resolutions, quoted in *Near* v. *Minnesota*[1]. This has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit, no less than its intendment should be collected primarily from the natural meaning of the words used.

Giving full effect to these principles, however, I am unable to agree that the term " Law " in Article 21 means the immutable and universal principles of natural justice. " Procedure established by law " must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as " the immutable and universal principles of natural justice ". In my opinion, " law " in Article 21 means " positive or State-made law ".

No doubt, the American Judges have adopted the other connotation in their interpretation of the due process clause in the Fifth and Fourteenth Amendments of the American Constitution

(" Nor shall any person be deprived of life, liberty or property without due process of law ").

But that clause has an evolutionary history behind it. The phrase has been traced back to 28 Edw. III Ch. 3, and Coke in his Institutes identified the term with the expression " the law of the land " in the Great Charter of John. Even in England where the legislative omnipotence of Parliament is now firmly established, Coke understood these terms as implying an inherent limitation on all legislation, and ruled in *Dr. Bonham's case*[2] that

" the common law will control Acts of Parliament and sometimes adjudge them to be utterly void when they are against common right and reason ".

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1. 283 U.S. 697. 2. 8 Rep. 118 (a).

Though this doctrine was later discarded in England as being "a warning rather than an authority to be followed" [per Willes, J., in *Lee* v. *Dude and Torrington Ry.*[1]], it gained ground in America, at first as a weapon in the hands of the Revolutionists with which to resist the laws of Parliament, and later as an instrument in the hands of the Judges for establishing the supremacy of the judiciary [see *Calder* v. *Bull*[2]]. In the latter half of the 19th century, this doctrine of a transcendental common law or natural justice was absorbed in the connotation of the phrase "due process of law" occurring in the Fifth and Fourteenth Amendments. By laying emphasis on the word "due", interpreting "law" as the fundamental principles of natural justice and giving the words "liberty" and "property" their widest meaning, the judges have made the due process clause into a general restriction on all legislative power. And when that power was threatened with prostration by the excesses of due process, the equally vague and expansive doctrine of "police power", *i.e.*, the power of Government to regulate private rights in public interest, was evolved to counteract such excesses. All this has been criticised as introducing great uncertainty in the state of the law in that country, for no one could be sure how due process of law would affect a particular enactment. A century after the phrase had been the subject of judicial interpretation one learned Judge observed in 1877 that it was incapable of precise definition and that its intent and application could only be ascertained by "the gradual process of inclusion and exclusion" [*Davidson* v. *New Orleans*[3]] and, as recently as 1948, another Judge referred to the difficulty of "giving definiteness to the vague contours of due process" and "of spinning judgment upon State action out of that gossamer concept" [*Haley* v. *State of Ohio*[4]].

It is not a matter for surprise, therefore, that the Drafting Committee appointed by the Constituent Assembly of India recommended the substitution of the expression "except according to procedure established by law" taken from the Japanese Constitution, 1946, for the words "without due process of law" which occurred in the original draft, "as the former is more specific". In their Report the Committee added that they have

"attempted to make these rights (fundamental rights) and the limitations to which they must necessarily be subject as definite as possible, since the courts may have to pronounce upon them" (para. 5).

In the face of all these considerations it is difficult to accept the suggestion that "law" in Article 21 stands for the *jus naturale* of the civil law, and that the phrase "according to procedure established by law" is equivalent to due process of law in its procedural aspect, for that would have the effect of introducing into our Constitution those "subtle and elusive criteria" implied in that phrase which it was the deliberate purpose of the framers of our Constitution to avoid.

On the other hand the interpretation suggested by the Attorney-General on behalf of the intervener that the expression means nothing more than procedure prescribed by any law made by a competent Legislature is hardly more acceptable. "Established" according to him, means prescribed, and if Parliament or the Legislature of a State enacted a procedure, however novel and ineffective for affording the accused person a fair opportunity of defending himself, it would be sufficient for depriving a person of his life or personal liberty. He submitted that the Constituent Assembly definitely rejected the doctrine of judicial supremacy when it rejected the phrase "due process of law" and made the legislative will unchallengeable, provided only "some procedure" was laid down. The Indian Constitution having thus preferred the English doctrine of Parliamentary supremacy, the phrase "procedure established by law" must be construed in accordance with the English view of due process of law, that is to say, any procedure which Parliament may choose to prescribe. Learned counsel drew attention to the speeches made by several members of the Assembly on the floor of the House for explaining, as he put it, the "historical background". A speech made in the course of the debate

1. (1871) L.R. 6 C.P. 576, 582.
2. (1798) 3 Dallas 386.
3. 96 U.S. 97.
4. 332 U.S. 596.

on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the Legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles, etc. I attach no importance, therefore, to the speeches made by some of the members of the Constituent Assembly in the course of the debate on Article 15 (now Article 21).

The main difficulty I feel in accepting the construction suggested by the Attorney-General is that it completely stultifies Article 13 (2) and, indeed, the very conception of a fundamental right. It is of the essence of that conception that it is protected by the fundamental law of the Constitution against infringement by ordinary legislation. It is not correct to say that the Constitution has adopted the doctrine of Parliamentary supremacy. So far, at any rate, as Part III is concerned, the Constitution, as I have already observed, has accepted the American view of fundamental rights. The provisions of Articles 13 and 32 make this reasonably clear. Could it then have been the intention of the framers of the Constitution that the most important fundamental rights to life and personal liberty should be at the mercy of legislative majorities as, in effect, they would be if " established " were to mean merely " prescribed " ? In other words, as an American Judge said in a similar context, does the constitutional prohibition in Article 13 (2) amount to no more than " You shall not take away life or personal freedom unless you choose to take it away ", which is mere verbiage. It is no sound answer to say that, if Article 21 conferred no right immune from legislative invasion, there would be no question of contravening Article 13 (2). The argument seems, to my mind, to beg the question, for it assumes that the Article affords no such immunity. It is true that Article 21 affords no protection against competent legislative action in the field of substantive criminal law, for there is no provision for judicial review, on the ground of reasonableness or otherwise of such laws, as in the case of the rights enumerated in Article 19. But the construction of the learned Attorney-General would have the effect of rendering wholly ineffective and illusory even the procedural protection which the Article was undoubtedly designed to afford. It was argued that " law " in Article 31 which provides that no person shall be deprived of his property " save by authority of law " must mean enacted law and that if a person's property could be taken away by legislative action, his right to life and personal liberty need not enjoy any greater immunity. The analogy is misleading. Clause (2) of Article 31 provides for payment of compensation and that right is justiciable except in the two cases mentioned in clauses (4) and (6) which are of a transitory character. The constitutional safeguard of the right to property in the said Article is, therefore, not so illusory or ineffective as clause (1) by itself might make it appear, even assuming that " law " there means ordinary legislation.

Much reliance was placed on the Irish case *The King* v. *The Military Governor of Hare Park Camp*[1], where the Court held that the term " law " in Article 6 of the Irish Constitution of 1922 which provides that " the liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law " meant a law enacted by the Parliament, and that therefore the Public Safety Act of 1924 did not contravene the Constitution. The Court followed *The King* v. *Halliday*[2] where the House of Lords by a majority held that the Defence of the Realm (Consolidation) Act, 1914, and the Regulations framed thereunder did not infringe upon the *Habeas Corpus* Acts and the *Magna Charta* " for the simple reason that the Act and the Orders become part of the law of the land ". But that was because, as Lord Dunedin pointed out

" the British Constitution has entrusted to the two Houses of Parliament subject to the assent of the King, an absolute power untrammelled by any written instrument obedience to which may be compelled by some judicial body ",

1. (1924) 2 I.R. 104. 2. (1917) A.C. 260.

whereas the Irish Constitution restricted the legislative powers of the Irish Parliament by a formal declaration of fundamental rights and by providing for a judicial review of legislation in contravention of the Constitution (Article 65). This radical distinction was overlooked.

The Attorney-General further submitted that, even on his interpretation, Article 21 would be a protection against violation of the rights by the executive and by individuals, and that would be sufficient justification for the Article ranking as a fundamental safeguard. There is no substance in the suggestion. As pointed out in *Eshugbayi Eleko* v. *Government of Nigeria* (*Officer Administering*)[1], the executive could only act in pursuance of the powers given by law and no constitutional protection against such action is really needed. Even in monarchical Britain the struggle between prerogative and law has long since ended in favour of the latter.

"In accordance with British jurisprudence," said Lord Atkin in the case cited above, "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his act on before a court of justice."

As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law. It is therefore idle to suggest that Article 21 was designed to afford protection against infringements by the executive or individuals. On the other hand, the insertion of a declaration of Fundamental Rights in the forefront of the Constitution, coupled with an express prohibition against legislative interference with these rights (Article 13) and the provision of a constitutional sanction for the enforcement of such non-interference by means of a judicial review (Article 32) is, in my opinion, a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws.

After giving the matter my most careful and anxious consideration, I have come to the conclusion that there are only two possible solutions of the problem. In the first place, a satisfactory *via media* between the two extreme positions contended for on either side may be found by stressing the word "established" which implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute. "Procedure established by law" may well be taken to mean what the Privy Council referred to in *King-Emperor* v. *Benoari Lal Sharma*[2] as "the ordinary and well-established criminal procedure", that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code which is the general law of criminal procedure in the country. Their Lordships were referring to the distinction between trial by special courts provided by an Ordinance of the Governor-General and trial by ordinary courts under the Criminal Procedure Code. It can be no objection to this view that the Code prescribes no single and uniform procedure for all types of case but provides varying procedures for different classes of cases. Certain basic principles, emerge as the constant factors common to all those procedures, and they form the core of the procedure established by law. I realise that even on this view, the life and liberty of the individual will not be immune from legislative interference, for a competent Legislature may change the procedure so as to whittle down the protection if so minded. But, in the view I have indicated, it must not be a change *ad hoc* for any special purpose or occasion, but a change in the general law of procedure embodied in the Code. So long as such a change is not effected, the protection under Article 21 would be available. The different measures of constitutional protection which the fundamental right to life and personal liberty will enjoy under Article 21 as interpreted in the three ways referred to above will perhaps be best illustrated by a concrete example. Suppose that Article 22 (1) was not there and Parliament passed an Act, as a temporary

1. (1931) A.C. 662.
2. (1945) F.L.J. 1 : (1945) F.C.R. 161, 175 : L.R. 72 I.A. 57 : (1945) 1 M.L.J. 76 (P.C.).

measure, taking away in certain cases the right of an accused person to be defended by a legal practitioner. According to the petitioner's learned counsel the Act would be void as being contrary to the immutable principles of natural justice embodied in Article 21, whereas on the construction contended for by the Attorney-General, the Act would be perfectly valid, while, on the view I have indicated above, the Act would be bad, but if the denial of such right of defence is made a normal feature of the ordinary law of criminal procedure by abrogating section 340 (1) of the Code, Article 21 would be powerless to protect against such legislative action. But in a free democratic republic such a drastic change in the normal law of procedure, though theoretically possible, would be difficult to bring about, and that practical difficulty will be the measure of the protection afforded by Article 21.

It was said that the safeguards provided in clauses (1) and (2) of Article 22 are more or less covered by the provisions of the Criminal Procedure Code, and this overlapping would have been avoided if Article 21 were intended to bear the construction as indicated above. The argument overlooks that, while the provisions of the Code would be liable to alteration by competent legislative action, the safeguards in clauses (1) and (2) of Article 22, being constitutional, could not be similarly dealt with, and this sufficiently explains why those safeguards find a place in the Constitution.

The only alternative to the construction I have indicated above, if a constitutional transgression is to be avoided, would be to interpret the reference to "law" as implying a constitutional amendment *pro tanto*, for it is only a law enacted by the procedure provided for such amendment (Article 368) that could modify or override a fundamental right without contravening Article 13 (2).

The question next arises as to how far the protection under Article 21, such as it has been found to be, is available to persons under preventive detention. The learned Attorney-General contended that Article 21 did not apply to preventive detention at all, as Article 22, clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view. The language of Article 21 is perfectly general and covers deprivation of personal liberty or incarceration, both for punitive and preventive reasons. If it was really the intention of the framers of the Constitution to exclude the application of Article 21 to cases of preventive detention, nothing would have been easier than to add a reference to Article 21 in clause (3) of Article 22 which provides that clauses (1) and (2) of the latter shall not apply to any person who is arrested or detained under any law providing for preventive detention. Nor is there anything in the language of clauses (4) to (7) of Article 22 leading necessarily to the inference that Article 21 is inapplicable to preventive detention. These clauses deal only with certain aspects of preventive detention such as the duration of such detention, the constitution of an Advisory Board for reviewing the order of detention in certain cases, the communication of the grounds of detention to the person detained and the provision of an opportunity to him of making a representation against the order. It cannot be said that these provisions form an exhaustive code dealing with all matters relating to preventive detention and cover the entire area of protection which Article 21, interpreted in the sense I have indicated above, would afford to the person detained. I am, therefore, of opinion that Article 21 is applicable to preventive detention as well.

I will now proceed to examine whether the impugned Act or any of its provisions under which the petitioner has been ordered to be detained, takes away any of the rights conferred by Articles 21 and 22 or infringes the protection afforded thereby. The outstanding fact to be borne in mind in this connection is that preventive detention has been given a constitutional status. This sinister-looking feature, so strangely out of place in a democratic constitution which invests personal

liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its preamble is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic. It is in this spirit that clauses (3) to (7) of Article 22 should, in my opinion, be construed and harmonised as far as possible with Article 21 so as not to diminish unnecessarily the protection afforded for the legitimate exercise of personal liberty. In the first place, as already stated, clause (3) of Article 22 excludes a person detained under any law providing for preventive detention from the benefit of the safeguards provided in clauses (1) and (2). No doubt clause (5) of the same Article makes some amends for the deprivation of these safeguards in that it provides for the communication to the person detained the grounds on which the order has been made and for an opportunity being afforded to him of making a representation against the order, but the important right to consult and to be defended by a legal practitioner of his choice is gone. Similarly, the prohibition against detention in custody beyond a period of 24 hours without the authority of a Magistrate has also been taken away in cases of preventive detention. It was not disputed that, to the extent to which the express provisions of clauses (4) to (7) authorised the abrogation or abridgment of the safeguards provided under other Articles or substitution of other safeguards in a modified form, those express provisions must rule. Of the four essentials of the due process on which Mr. Nambiar insisted, (which also form part of the ordinary and established procedure under the Criminal Procedure Code, though I cannot agree that they are immutable and beyond legislative change) the requirements of notice and an opportunity to establish his innocence must, as already stated, be taken to have been provided for by clause (5) of Article 22. As for an ascertainable standard of conduct to which it is possible to conform, Article 22 makes no specific provision in cases of preventive detention, and if such a safeguard can be said to be implicit in the procedure established by law in the sense explained above in preventive detention cases, it could no doubt be invoked. This point will be considered presently in dealing with provisions of the impugned Act. The only other essential requirement, and the most essential of all, is an impartial tribunal capable of giving an unbiased verdict. This, Mr. Nambiar submitted, was left unprovided for by Article 22, the Advisory Board referred to in clause (4) (*a*) being, according to him, intended to deal solely with the question of duration of the detention, that is to say, whether or not there was sufficient cause for detaining the person concerned for more than three months, and not with judging whether the person detained was innocent. A tribunal which could give an unbiased judgment on that issue was an essential part of the protection afforded by Article 21 in whichever way it may be interpreted, and reference was made in this connection to the preventive provisions of the Criminal Procedure Code (Ch. VIII). The impugned Act, not having provided for such a tribunal contravened Article 21 and was therefore void. It will be seen that the whole of this argument is based on the major premise that the Advisory Board mentioned in clause (4) (*a*) of Article 22 is not a tribunal intended to deal with the issue of justification of detention. Is that view correct?

It was argued that the words "sufficient cause for such detention" in sub-clause (*a*) of clause (4) had reference to the detention beyond three months mentioned in clause (4) and that this view was supported by the language of sub-clause (*a*) of clause (7) whereby Parliament is authorised to prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without the opinion of an Advisory Board. In other words, learned counsel submitted, the combined effect of clauses (4) and (7) was that no person could be detained for a period over three months without obtaining the opinion of an Advisory Board that there was sufficient cause for detention for the longer period, except in cases where Parliament passed a law authorising detention for such period even without the opinion of an Advisory Board. Thus, these two clauses were concerned solely with the duration of the preventive detention, and so was the Advisory Board which those clauses provided for that purpose. I am unable

to accept this view. I am inclined to think that the words "such detention" in sub-clause (*a*) refer back to the preventive detention mentioned in clause (4) and not to detention for a longer period than three months. An Advisory Board, composed as it has to be of Judges or lawyers, would hardly be in a position to judge how long a person under preventive detention, say, for reasons connected with defence, should be detained. That must be a matter for the executive authorities, the Department of Defence, to determine, as they alone are responsible for the defence of the country and have the necessary data for taking a decision on the point. All that an Advisory Board can reasonably be asked to do, as a safeguard against the misuse of the power, is to judge whether the detention is justified and not arbitrary or *mala fide*. The fact that the Advisory Board is required to make its report before the expiry of three months and so could submit it only a day or two earlier cannot legitimately lead to an inference that the Board was solely concerned with the issue whether or not the detention should continue beyond that period. Before any such tribunal could send in its report a reasonable time must elapse, as the grounds have to be communicated to the person detained, he has to make his representation to the detaining authority which has got to be placed before the Board through the appropriate departmental channel. Each of these steps may, in the course of official routine, take some time, and three months period might well have been thought a reasonable period to allow before the Board could be required to submit its report.

Assuming, however, that the words "such detention" had reference to the period of detention, there is no apparent reason for confining the enquiry by the Advisory Board to the sole issue of duration beyond three months without reference to the question as to whether the detention was justified or not. Indeed, it is difficult to conceive how a tribunal could fairly judge whether a person should be detained for more than three months without at the same time considering whether there was sufficient cause for the detention at all. I am of opinion that the Advisory Board referred to in clause (4) is the machinery devised by the Constitution for reviewing orders for preventive detention in certain cases on a consideration of the representations made by the persons detained. This is the view on which Parliament has proceeded in enacting the impugned Act as will be seen from sections 9 and 10 thereof, and I think it is the correct view. It follows that the petitioner cannot claim to have his case judged by any other impartial tribunal by virtue of Article 21 or otherwise.

Mr. Nambiar, however, objected that, on this view, a law could authorise preventive detention for three months without providing for review by any tribunal, and for even longer periods if Parliament passed an Act such as is contemplated in sub-clause (*a*) of clause (7). That may be so, but, however deplorable such a result may be from the point of view of the person detained, there could be no remedy, if, on a proper construction of clauses (4) and (7) the Constitution is found to afford no higher protection for the personal liberty of the individual.

Turning next to the provisions of the impugned Act, whose constitutional validity was challenged, it will be necessary to consider only those provisions which affect the petitioner before us. In the first place, it was contended that section 3 which empowers the Central Government or the State Government to detain any person if it is "satisfied" that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to (among other things) the security of the State or the maintenance of public order, cannot be said to comply with the procedure established by law, as the section prescribes no objective and ascertainable standard of conduct to which it will be possible to conform, but leaves it to the will and pleasure of the Government concerned to make an order of detention. The argument proceeds on the assumption that the procedure established by law is equivalent to the due process of law. I have already endeavoured to show that it is not. Apart from this, the argument overlooks that for the purposes of *preventive* detention it would be difficult, if not impossible to lay down objective

rules of conduct failure to conform to which should lead to such detention. As the very term implies, the detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention has in view. Nor would it be practicable to indicate or enumerate in advance what acts or classes of acts would be regarded as prejudicial. The responsibility for the security of the State and the maintenance of public order, etc., having been laid on the executive government, it must naturally be left to that government to exercise the power of preventive detention whenever they think the occasion demands it.

Section 12 came in for a good deal of criticism. That section, which governs the duration of the petitioner's detention reads as follows :—

"*Duration of detention in certain cases.*—Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(*a*) the defence of India, relations of India with foreign powers or the security of India ; or

(*b*) the security of a State or the maintenance of public order.

(2) The case of every person detained under a detention order to which the provisions of sub-section (1) apply shall, within a period of six months from the date of his detention, be reviewed where the order was made by the Central Government or a State Government, by such Government, and where the order was made by any officer specified in sub-section (2) of section 3 by the State Government to which such officer is subordinate, in consultation with a person who is, or has been, or is qualified to be appointed as a Judge of a High Court nominated in that behalf by the Central Government or the State Government, as the case may be."

It was urged that this did not comply with the requirements of clause (7) of Article 22 as it merely repeated the "matters" or legislative topics mentioned in Entry 9 of List I and Entry 3 of List III of the Seventh Schedule to the Constitution. What Parliament has to do under clause (7) of Article 22 is to prescribe "the circumstances under which and the class or classes of cases in which" a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board. It was said that clause (4) (*a*) provided for ordinary cases of preventive detention where such detention could not continue beyond three months without obtaining the opinion of an Advisory Board, whereas clause (7) (*a*) made provision for special cases of detention for more than three months without the safeguard of the Advisory Board's opinion, for aggravated forms of prejudicial conduct. In other words, clause (4) (*a*) laid down the rule and clause (7) (*a*) enacted an exception. It was therefore necessary for Parliament to indicate to the detaining authority for its guidance the more aggravated forms of prejudicial activity, and mere mention of the subjects in respect of which Parliament is authorised under the legislative lists to make laws in respect of preventive detention could hardly afford any guidance to such authority and should not be regarded as sufficient compliance with the requirements of clause (7). There is a twofold fallacy in this argument. In the first place, the suggested correlation between clause (4) (*a*) and clause (7) (*a*) as enacting a rule and an exception is, as a matter of construction, without foundation. Reading clauses (4) and (7) together it is reasonably clear that preventive detention could last longer in two cases : (1) where the opinion of an Advisory Board is obtained, subject however to a prescribed period [sub-clause (*a*) of clause (4)] and (2) where a person is detained under a law made by Parliament under sub-clauses (*a*) and (*b*) of clause (7) [sub-clause (*b*) of clause (4)]. These are two distinct and independent provisions. It is significant that sub-clause (*b*) of clause (4) is not worded as a proviso or an exception to sub-clause (*a*) of the same clause as it would have been if it was intended to operate as such. The attempt to correlate clause (4) (*a*) and clause (7) (*a*) as a rule and an exception respectively is opposed both to the language and the structure of those clauses.

Secondly, the argument loses sight of the fact that clause (7) deals with *preventive* detention which is a purely precautionary measure which "must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct

from proof" (per Lord Atkinson in *Rex* v. *Halliday*[1]). The remarks I have already made with reference to the absence of any objective rules of conduct in section 3 of the impugned Act apply also to this criticism of section 12. It would be difficult, if not impracticable, to mention the various circumstances, or to enumerate the various classes of cases exhaustively in which a person should be detained for more than three months for *preventive* purposes, except in broad outline. Suppose a person belongs to an organization pledged to violent and subversive activity as its policy. Beyond his membership of the party the person might have done nothing until he was arrested and detained. But if released he might indulge in anything from the mildest form of prejudicial activity, like sticking an objectionable handbill on a hoarding, to the most outrageous acts of sabotage. How could the insertion in section 12 of a long series of categories of aggravated forms of prejudicial activities, or the enumeration of the various circumstances in which such activities are likely to be indulged in, be of any assistance to the detaining authority in determining whether the person concerned should be detained for three months or for a longer period? All that would be necessary and sufficient for him to know for coming to a decision on the point is that the person is a member of such an organisation and will probably engage in subversive activities prejudicial to the security of the State or the maintenance of public order or, in other words, he belongs to class (*b*) in section 12. While enumeration and classification in detail would undoubtedly help in grading punishment for offences committed, they would not be of much use in fixing the duration of *preventive* detention. Sufficient guidance in such cases could be given by broadly indicating the general nature of the prejudicial activity which a person is likely to indulge in, and that in effect is what Parliament has done in section 12. Reference was made in this connection to rule 34 of the Defence of India Rules framed under the Defence of India Act, 1939, where "prejudicial act" is defined by enumeration. But it was also for the purpose of prohibiting such acts [rule 38, sub-rule (1)] and making them offences (sub-rule 5). And even there, the definition had to end in a residuary clause sweeping in acts likely "to prejudice the efficient prosecution of the war, the defence of British India or the public safety or interest." In Lists I and III of the Seventh Schedule to the Constitution six topics are mentioned in respect of which Parliament could make laws providing for preventive detention, and section 12 of the impugned Act mentions five of them as being the classes of cases or the circumstances in which longer detention is authorised. I fail to see why this could not be regarded as a broad classification of cases or a broad description of circumstances where Parliament considers longer detention to be justifiable. A class can well be designated with reference to the end which one desires to secure, and the matters referred to as classes (*a*) and (*b*) of sub-section (1) of section 12 being clearly the objects which Parliament desired to secure by enacting the section, it seems to me that the classification with reference to such general aims does not contravene Article 22 (7).

It was argued that Parliament did not, in enacting section 12, perform its duty of prescribing *both* the circumstances and the class or classes of cases where detention without obtaining the Advisory Board's opinion could be for a period longer than three months. The use of the disjunctive "or" between the word "circumstances" and the words "class or classes of cases" showed, it was said, that Parliament proceeded on the view that it need not prescribe both. This was in contravention of Article 22 (7) which used the conjunctive "and" between those words. There is no substance in this objection. As I read Article 22 (7) it means that Parliament may prescribe either the circumstances or the classes of cases or both, and in enacting section 12 Parliament evidently regarded the matters mentioned in classes (*a*) and (*b*) of sub-section (1) as sufficiently indicative both of the circumstances under which and the classes in which a person could be detained for the longer period. To say, for instance, that persons who are likely to act prejudicially to the defence of India may be detained beyond three months is at once to "prescribe a class of persons in which and the circumstances under which" a person

1. (1917) A.C. 260, 275.

may be detained for the longer period. In other words, the classification itself may be such as to amount to a sufficient description of the circumstances for purposes of clause (7). The circumstances which would justify precautionary detention beyond three months without recourse to an Advisory Board must be far too numerous for anything approaching an exhaustive enumeration, and it can, in my judgment, be no objection to the validity of section 12 that no circumstances are mentioned apart from the matters referred to in clauses (*a*) and (*b*) of sub-section (1). It would indeed be singular for the Court to strike down a parliamentary enactment because in its opinion a certain classification therein made is imperfect or the mention of certain circumstances is unspecific or inadequate.

Lastly, Mr. Nambiar turned his attack on section 14 which prohibits the disclosure of the grounds of detention communicated to the person detained and of the representation made by him against the order of detention, and debars the Court from allowing such disclosure to be made except for purposes of a prosecution punishable under sub-section (2) which makes it an offence for any person to disclose or publish such grounds or representation without the previous authorisation of the Central Government or the State Government as the case may be. The petitioner complains that this provision nullifies in effect the rights conferred upon him under clause (5) of Article 22 which entitles him to have the grounds of his detention communicated to him and to make a representation against the order. If the grounds are too vague to enable him to make any such representation, or if they are altogether irrelevant to the object of his detenion, or are such as to show that his detention is not *bona fide*, he has the further right of moving this Court and this remedy is also guaranteed to him under Article 32. These rights and remedies, the petitioner submits cannot be effectively exercised, if he is prevented on pain of prosecution, from disclosing the grounds to the Court. There is great force in this contention. All that the Attorney-General could say in answer was that if the other provisions of the Act were held to be valid, it would not be open to the Court to examine the sufficiency of the grounds on which the executive authority was " satisfied " that detention was necessary, as laid down in *Machindar Shivaji Mahar* v. *The King*[1], and so the petitioner could not complain of any infringement of his rights by reason of section 14 which enacted only a rule of evidence. The argument overlooks that it was recognised in the decision referred to above that it would be open to the Court to examine the grounds of detention in order to see whether they were relevant to the object which the Legislature had in view, such as, for instance, the prevention of acts prejudicial to public safety and tranquillity, or were such as to show that the detention was not *bona fide*. An examination of the grounds for these purposes is made impossible by section 14, and the protection afforded by Article 22 (5) and Article 32 is thereby rendered nugatory. It follows that section 14 contravenes the provisions of Article 22 (5) and Article 32 in so far as it prohibits the person detained from disclosing to the Court the grounds of his detention communicated to him by the detaining authority or the representation made by him against the order of detention, and prevents the Court from examining them for the purposes aforesaid, and to that extent it must be held under Article 13 (2) to be void. This, however, does not affect the rest of the Act which is severable. As the petitioner did not disclose the grounds of his detention pending our decision on this point, he will now be free to seek his remedy, if so advised, on the basis of those grounds.

In the result, the application fails and is dismissed.

Mahajan, J.—The people of India having solemnly resolved to constitute India into a Sovereign Democratic Republic on the 26th Day of November, 1949, gave to themselves a constitution which came into force on the 26th January, 1950. This is the first case in which this Court has been called upon to determine how far the constitution has secured personal liberty to the citizens of this country.

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1. (1949) F.C.R. 827.

A. K. Gopalan, the petitioner, who was already under the custody of the Superintendent, Central Jail, Cuddalore, was served with an order of detention under section 3 (1) of the Preventive Detention Act, 1950 (Act IV of 1950) on the 27th February, 1950. It was said in the order that the Governor of Madras was satisfied that it was necessary to make the order with a view to preventing him from acting in any manner prejudicial to the security of the State and the maintenance of public order. On 20th March, 1950, a petition was presented to this Court under Article 32 of the Constitution praying for the issue of a writ of *habeas corpus* directing the State of Madras to produce him before the Court and to set him at liberty. A writ was accordingly issued. The return to the writ is that the detention is legal under Act IV of 1950, enacted by Parliament. The petitioner contends that the Act abridges and infringes certain provisions of Part III of the Constitution and is thus outside the constitutional limits of the Legislature and therefore void and unenforceable.

The matter is one of great importance both because the legislative power expressly conferred by the 7th Schedule has been impugned and because the liberty of the citizen is seriously affected. The decision of the question whether Act IV of 1950 takes away or abridges the rights conferred by Part III of the Constitution depends on a consideration of two points :

(1) In what measure has the Constitution secured personal liberty to a citizen of India, and

(2) has the impugned legislation in any way taken away or abridged the rights so secured and if so, to what extent ?

Act IV of 1950 provides for preventive detention in certain cases and it has been enacted as a temporary measure. It will cease to have effect on 1st April, 1951. It empowers the Central Government and the State Governments to make an order directing a person to be detained with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers or the security of India. It also gives power to detain a person who acts in any manner prejudicial to the security of the State or the maintenance of public order or the maintenance of supplies and services essential to the community. It came into force on 26th February, 1950, and was enacted by virtue of the powers conferred on Parliament by Article 22, clause (7) of Part III of the Constitution read with the entries in the 7th Schedule. There can be no doubt that the legislative will expressed herein would be enforceable unless the Legislature has failed to keep within its constitutional limits. It is quite obvious that the Court cannot declare a statute unconstitutional and void simply on the ground of unjust and oppressive provisions or because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution. It may also be observed that an Act cannot be declared void because in the opinion of the Court it is opposed to the spirit supposed to pervade the constitution but not so expressed in words. It is difficult on any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition except in so far as the express words of the written constitution give that authority. Article 13 (2) of our Constitution gives such an authority and to the extent stated therein. It says that the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the contravention be void.

Preventive detention laws are repugnant to democratic constitutions and they cannot be found to exist in any of the democratic countries of the world. It was stated at the Bar that no such law was in force in the United States of America. In England for the first time during the first world war certain regulations framed under the Defence of the Realm Act provided for preventive detention at the satisfaction of the Home Secretary as a war measure and they ceased to have effect at the conclusion of hostilities. The same thing happened during the second world

war. Similar regulations were introduced during the period of the war in India under the Defence of India Act. The Government of India Act, 1935, conferred authority on the Central and Provincial Legislatures to enact laws on this subject for the first time and since then laws on this subject have taken firm root here and have become a permanent part of the statute book of this country. Curiously enough this subject has found place in the Constitution in the chapter on Fundamental Rights. Entry 9 of the Union List and entry 3 of the Concurrent List of the 7th schedule mention the scope of legislative power of Parliament in respect of this topic. The jurisdiction, however, to enact these laws is subject to the provisions of Part III of the Constitution. Article 22 in this part provides :—

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

The question of the constitutional validity of the impugned statute has to be approached with great caution in view of these provisions of the Constitution and has to be considered with patient attention. The benefit of reasonable doubt has to be resolved in favour of legislative action, though such a presumption is not conclusive. It seems that the subject of the preventive detention became the particular concern of the Constitution because of its intimate connection with deprivation of personal liberty to protect which certain provisions were introduced in the chapter on Fundamental Rights and because of the conditions prevailing in the newly born republic. Preventive detention means a complete negation of freedom of movement and of personal liberty and is incompatible with both those subjects and yet it is placed in the same compartment with them in Part III of the Constitution.

Though the Constitution has recognized the necessity of laws as to preventive detention it has also provided certain safeguards to mitigate their harshness by placing fetters on legislative power conferred on this subject. These are—

(1) That no law can provide for detention for a period of more than three months unless the sufficiency for the cause of the detention is investigated by an Advisory Board within the said period of three months. This provision limits legislative power in the matter of duration of the period of detention. A law of preventive detention would be void if it permits detention for a longer period than three months without the intervention of an Advisory Board.

(2) That a State law cannot authorize detention beyond the maximum period prescribed by Parliament under the powers given to it in clause (7). This is a limitation on the legislative power of the State Legislature. They cannot make a law authorizing preventive detention for a longer period than that fixed by Parliament.

(3) That Parliament also cannot make a law authorizing detention for a period beyond three months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in clause (7) of Article 22. Provision also has been made to enable Parliament to make laws for procedure to be followed by Advisory Boards. This is a safeguard against any arbitrary form of procedure that may otherwise find place in State laws.

Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by clause (5) of Article 22. A person detained under a law of preventive detention has a right to obtain information as to the grounds of his detention and has also the right to make a representation protesting against an order of preventive detention. This right has been guaranteed independently of the duration of the period of detention and irrespective of the existence or non-existence of an Advisory Board. No machinery, however, has been provided or expressly mentioned for dealing with this representation. It seems to me that when a constitutional right has been conferred as a necessary consequence, a constitutional remedy for obtaining redress in case of infringement of the right must be presumed to have been contemplated and it could not have been intended that the right was merely illusory and that a representation made may well find place in cold storage. Consideration of the representation made by virtue of clause (5) by an unbiassed authority is, in my opinion, a necessary consequence of the guaranteed right contained herein. The right has been conferred to enable a detained person to establish his innocence and to secure justice, and no justice can be said to be secured unless the representation is considered by some impartial person. The interpretation that I am inclined to place on clause (5) of Article 22 is justified by the solemn words of the declaration contained in the Preamble to the Constitution. It is this declaration that makes our Constitution sublime and it is the guarantees mentioned in the chapter on Fundamental Rights that make it one of the greatest charters of liberty and of which the people of this country may well be proud. This charter has not been forced out of unwilling hands of a sovereign like the Magna Carta but it has been given to themselves by the people of the country through their Constituent Assembly. Any interpretation of the provisions of Part III of the Constitution without reference to this solemn declaration is apt to lead one into error. If the right of representation given to a detained person by clause (5) of Article 22 is a guaranteed right and has been given for the purpose of securing justice, then it follows that no justice can be held secured to him unless an unbiassed person considers the merits of the representation and gives his opinion on the guilt or the innocence of the persons detained. In my view, the right cannot be defeated or made elusive by presuming that the detaining authority itself will consider the representation with an unbiassed mind and will render justice. That would in a way make the prosecutor a judge in the case and such a procedure is repugnant to all notions of justice. The constitution has further curtailed the rights given in clause (5) by providing in clause (6) a privilege on the detaining authority of withholding facts which the said authority considers not in

public interests to disclose. This privilege has been conferred for the security of the State and possibly for the security of the Constitution itself, but in view of these stringent provisions no additional clogs can be put on the proper consideration of the representation of the detained person by presuming that the detaining authority itself will properly consider the representation. It has also to be remembered in this context that a person subjected to the law of preventive detention has been deprived of the rights conferred on persons who become subject to the law of punitive detention. [*Vide* clauses (1) and (2) of Article 22.] He has been denied the right to consult a lawyer or be defended by him and he can be kept in detention without being produced before a Magistrate.

Having examined the provisions of Article 22, I now proceed to consider the first question that was canvassed before us by the learned Attorney-General, *i.e.*, that Article 22 of the Constitution read with the entries in the 7th Schedule was a complete code on the subject of preventive detention, and that being so, the other articles of Part III could not be invoked in the consideration of the validity of the impugned statute. It was conceded by the learned counsel for the petitioner that to the extent that express provisions exist in Article 22 on the topic of preventive detention those provisions would prevail and could not be controlled by the other provisions of Part III. It was, however, urged that on matters on which this article had made no special provision on this topic the other provisions of Part III of the Constitution had application, namely, Articles 19 and 21 and to that extent laws made on this subject were justiciable. In order to draw the inference that the framers of the Constitution intended the provisions as regards preventive detention in Article 22 to be self-contained a clear indication of such an intention has to be gathered. If the provisions embodied in this article have dealt with all the principal questions that are likely to arise in matters of procedure or on questions of the reasonableness of the period of detention, the inference of such an indication would be irresistible. Ordinarily when a subject is expressly dealt with in a constitution in some detail, it has to be assumed that the intention was to exclude the application of the general provisions contained therein elsewhere. Express mention of one thing is an exclusion of the other. *Expressio unius est exclusio alterius.* I am satisfied on a review of the whole scheme of the Constitution that the intention was to make Article 22, self-contained in respect of the laws on the subject of preventive detention. It was contended that all the articles in the Constitution should be read in an harmonious manner and one article should not be read as standing by itself and as having no connection with the other articles in the same part. It was said that they were all supplementary to one another. In this connection, it was argued that a law made under Article 22 would not be valid unless it was in accord with the provisions of Article 21 of the Constitution. This article provides that no person shall be deprived of life or liberty except according to procedure established by law. It was contended that in substance the article laid down that no person will be deprived of life or liberty without having been given a fair trial or a fair hearing and that unless a law of preventive detention provided such a hearing that law would be in contravention of this article and thus void. Conceding for the sake of argument (but without expressing any opinion on it) that this contention of the learned counsel is correct, the question arises whether there is anything in Article 22 which negatives the application of Article 21 as above construed to a law on preventive detention. In my opinion, sub-clause (5) of Article 22 read with clauses (1) and (2) leads to the inference that the contention raised by the learned counsel is unsound. Clause (5), as already stated, provides that notice has to be given to a detenu of the grounds of his detention. It also provides a limited hearing inasmuch as it gives him an opportunity to establish his innocence. As, in my opinion, the consideration of a representation made by a detained person by an unbiassed authority is implicit in clause (5), it gives to the detained person all that he is entitled to under the principles of natural justice. The right to consult and to be represented by a counsel of his own choice has been denied in express terms to such a person by the Constitution. He is also denied an opportunity of appearing before a Magistrate. When the Constitution has

taken away certain rights that ordinarily will be possessed by a detained person and in substitution thereof certain other rights have been conferred on him even in the matter of procedure, the inference is clear that the intention was to deprive such a person of the right of an elaborate procedure usually provided for in judicial proceedings. Clause (6) of Article 22 very strongly supports this conclusion. There would have been no point in laying down such detailed rules of procedure in respect of a law of preventive detention if the intention was that such a law would be subject to the provisions of Article 21 of the Constitution. In its ultimate analysis the argument of the learned counsel for the petitioner resolves itself to this: that the impugned statute does not provide for an impartial tribunal for a consideration of the representation of the detained person and to this extent it contravenes Article 21 of the Constitution. As discussed above, in my opinion, such a provision is implicit within Article 22 itself and that being so, the application of Article 21 to a law made under Article 22 is excluded.

It was next contended that a law of preventive detention encroaches on the right of freedom of movement within the territory of India guaranteed to a citizen under Article 19 (1) (*d*) and that being so, by reason of the provisions of sub-clause (5) of Article 19 it was justiciable on the ground of reasonableness. It is true, as already pointed out, that the law of preventive detention is wholly incompatible with the right of freedom of movement of a citizen. Preventive detention in substance is a negation of the freedom of locomotion guaranteed under Article 19 (1) (*d*) but it cannot be said that it merely restricts it. Be that as it may, the question for consideration is whether it was intended that Article 19 would govern a law made under the provisions of Article 22. Article 19 (5) is a saving and an enabling provision. It empowers Parliament to make a law imposing reasonable restriction on the right of freedom of movement while Article 22 (7) is another enabling provision empowering Parliament to make a law on the subject of preventive detention in certain circumstances. If a law conforms to the conditions laid down in Article 22 (7), it would be a good law and it could not have been intended that that law validly made should also conform itself to the provisions of Article 19 (5). One enabling provision cannot be considered as a safeguard against another enabling provision. Article 13 (2) has absolutely no application in such a situation. If the intention of the Constitution was that a law made on the subject of preventive detention had to be tested on the touchstone of reasonableness, then, it would not have troubled itself by expressly making provision in Article 22 about the precise scope of the limitation subject to which such a law could be made and by mentioning the procedure that the law dealing with that subject had to provide. Some of the provisions of Article 22 would then have been redundant, for instance, the provision that no detention can last longer than three months without the necessity of such detention being examined by an Advisory Board. This provision negatives the idea that the deprivation of liberty for a period of three months without the consultation of the Advisory Board would be justiciable on the ground of reasonableness. Again Article 22 has provided a safeguard that if an Advisory Board has to be dispensed with, it can only be so dispensed with under a law made by Parliament and that Parliament also in enacting such a law has to conform to certain conditions. This provision would have been unnecessary in Article 22 if a law on this subject was justiciable. In sub-clause (*b*) of clause (7) of Article 22 provision has been made enabling Parliament to fix the maximum period for which a person can be detained under a law on the subject of preventive detention. Under this express provision it is open to Parliament to fix any period, say, even a period of five to ten years as the maximum period of detention of a person. Can it be said that in view of this express provision of the Constitution such a law was intended to be justiciable by reason of Article 19 (5). Duration of detention is the principal matter in preventive detention laws which possibly could be examined on the touchstone of reasonableness under Article 19 (5), but this has been expressly excluded by express provisions in Article 22. In my judgment, therefore, an examination of the provisions of Article 22 clearly suggests that the intention was to make it self-contained as regards the law of preventive detention and that the validity of a law

on the subject of preventive detention cannot be examined or controlled either by the provisions of Article 21 or by the provisions of Article 19 (5) because Article 13 (2) has no application to such a situation and Article 22 is not subject to the provisions of these two articles. The Constitution in Article 22 has gone to the extent of even providing that Parliament may by law lay down the procedure to be followed by an Advisory Board. On all important points that could arise in connection with the subject of preventive detention provision has been made in Article 22 and that being so, the only correct approach in examining the validity of a law on the subject of preventive detention is by considering whether the law made satisfied the requirements of Article 22 or in any way abridges or contravenes them and if the answer is in the affirmative, then the law will be valid, but if the answer is in the negative, the law would be void.

In expressing the view that Article 22, is in a sense self-contained on the law of preventive detention I should not however be understood as laying down that the framers of the article in any way overlooked the safeguards laid down in Article 21. Article 21, in my opinion, lays down substantive law as giving protection to life and liberty inasmuch as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the executive. It further gives immunity against invalid laws which contravenes the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of fantastic, arbitrary, and oppressive forms of proceedings. The principles therefore underlying Article 21 have been kept in view in drafting Article 22. A law properly made under Article 22 and which is valid in all respects under that article and lays down substantive as well as adjective law on this subject would fully satisfy the requirements of Article 21, and that being so, there is no conflict between these two articles.

The next question that arises for decision is whether there is anything in Act IV of 1950 which offends against the provisions of Article 22 of Part III of the Constitution. The learned counsel for the petitioner contended that section 3 of the Act was bad inasmuch as it made "satisfaction of the Government" as the criterion for detaining a person. It was said that as section 3 laid down no objective rule of conduct for a person and as people were not told as to what behaviour was expected of them, the result was that it could not be known what acts a person was expected to avoid and what conduct on his part was prejudicial to the security of the State or the maintenance of public order; in other words, it was argued that section 3 left the determination of the prejudicial act of a person to the arbitrary judgment of the Government and that even the officer who was to administer this law had been furnished no guide and no standard of conduct in arriving at his own satisfaction whether the conduct was prejudicial to the security of the State, etc. This criticism of the learned counsel in my opinion, is not valid. It is no doubt true that a detention order depends on the satisfaction of the Government but this provision is in accordance with Article 22 of the Constitution which to my mind contemplates detention on the satisfaction of the executive authority. By its very nature the subject is such that it implies detention on the judgment of the authority entrusted with the making of the order. The whole intent and purpose of the law of preventive detention would be defeated if satisfaction of the authority concerned was subject to such an objective standard and was also subject to conditions as to legal proof and procedure. In the 7th Schedule jurisdiction to make the law on this subject has been given for reasons connected with defence, etc., and the maintenance of public order. These are subjects which concern the life and the very existence of the State. Every citizen is presumed to know what behaviour is prejudicial to the life of the State or to its existence as an ordered State. Considering that the State is

presumed to have a government that conducts itself in a reasonable way and also presuming that its officers usually will be reasonable men, it cannot be said that in making "satisfaction of the Government" as the standard for judging prejudicial acts of persons who are subject to the law of preventive detention section 3 in any way contravenes Article 22 of the Constitution.

Section 7 of the impugned Act gives full effect to the provisions of Article 22 sub-clause (5) and enacts that representation has to be made to the Central or State Government as the case may be. It was impeached on the ground that no machinery has been provided herein to consider and adjudicate on the merits of the representation. To this extent, as already indicated, the law is defective. In the absence of a machinery for the investigation of the contentions raised in the representation it may be open to detenu to move this court under Article 32 for a proper relief. It is, however, unnecessary to express any opinion as to the precise remedy open to a detained person in this respect. The absence of a provision of this nature in the statute however would not make the law wholly void. Section 9 of the Act makes reference to the Advisory Board obligatory in cases falling under sub-clause (iii) of clause (*a*) or clause (*b*) of sub-section (1) of section 3 within six weeks of the order. The procedure to be followed by the Advisory Board is laid down in section 10. Parliament has been authorized to lay down such a procedure to be followed by an Advisory Board in sub-clause (*c*) of clause 7. It was contended that the law had not provided a personal hearing to the detenu before an Advisory Board, nor had it given him a right to lead evidence to establish his innocence. In my opinion, this criticism is not sound and does not in any way invalidate the law. The advisory Board has been given the power to call for such information as it requires even from the person detained. It has also been empowered to examine the material placed before it in the light of the facts and arguments contained in the representation. The opportunity afforded is not as full as a person gets under normal judicial procedure but when the Constitution itself contemplates a special procedure being prescribed for preventive detention cases, then the validity of the law on that subject cannot be impugned on the grounds contended for.

Section 11 of the Act was also impugned on the ground that it offended against the Constitution inasmuch as it provided for preventive detention for an in definite period. This section in my opinion has to be read in the background of the provision in sub-clause (3) of section 1 of the Act which says that the Act will cease to have effect on 1st April, 1951. Besides, the words "for such period as it thinks fit" do not in any way offend against the provisions of Article 22 wherein Parliament has been given the power to make a law fixing the maximum period for preventive detention. It has to be noted that Parliament has fixed a period of one year as the maximum period for the duration of detention where detention has to be without reference to an Advisory Board. In my opinion, there is nothing in section 11 which is outside the constitutional limits of the powers of the supreme Legislature.

It is section 12 of the Act which was assailed by the learned counsel for the petitioner rather vehemently. This section is of a very controversial character. It has been enacted on the authority of clause (7) of Article 22 and runs thus :—

"(1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(*a*) the defence of India, relations of India with foreign powers or the security of India ; or

(*b*) the security of a State or the maintenance of public order.

(2) The case of every person detained under a detention order to which the provisions of sub-section (1) apply shall, within a period of six months from the date of his detention, be reviewed where the order was made by the Central Government or a State Government, by such Government, and where the order was made by any officer specified in sub-section (2) of section 3, by the State Government to which such officer is subordinate, in consultation with a person who is, or has been, or is qualified to be appointed as, a Judge of a High Court nominated in that behalf by the Central Government or the State Government, as the case may be."

The section purports to comply with the conditions laid down in clause 7 of Article 22. It was, however, argued that in substance and reality it has failed to comply with any of the conditions laid down therein : that it neither mentions the circumstances under which nor the classes of cases in which preventive detention without recourse to the machinery of an Advisory Board could be permitted. The crucial question for consideration is whether section 12 mentions any circumstances under which are defined the classes or cases in which authority was conferred by clause 7 to dispense with an Advisory Board. So far as I have been able to gather from opinions of text-book writers on the subject of classification, the rule seems clear that in making classification of cases there has to be some relationship to the classification to the objects sought to be accomplished. The question for consideration therefore is what object was sought to be accomplished when the Constitution included clause (7) in Article 22. It seems clear that the real purpose of clause 7 was to provide for a contingency where compulsory requirement of an Advisory Board may defeat the object of the law of preventive detention. In my opinion, it was incorporated in the Constitution to meet abnormal and exceptional cases, the cases being of a kind where an Advisory Board could not be taken into confidence. The authority to make such drastic legislation was entrusted to the Supreme Legislature but with the further safeguard that it can only enact a law of such a drastic nature provided it prescribed the circumstances under which such power had to be used or in the altrernative it prescribed the classes of cases or stated a determinable group of cases in which this could be done. The intention was to lay down some objective standard for the guidance of the detaining authority on the basis of which without consultation of an Advisory Board detention could be ordered beyond the period of three months. In this connection it has to be remembered that the Constitution must have thought of really some abnormal situation and of some dangerous groups of persons when it found it necessary to dispense with a tribunal like an Advisory Board which functions *in camera* and which is not bound even to give a personal hearing to the detenu and whose proceedings are privileged. The law on the subject of preventive detention in order to avoid even such an innocuous institution could only be justified on the basis of peculiar circumstances and peculiar situations which had to be objectively laid down and that was what in my opinion was intended by clause 7. If the pecularity lies in a situation outside the control or view of a detained person, then it may be said that the description of such a situation would amount to a prescription of the circumstances justifving the detention for a longer period than three months by a law without the intervention of an Advisory Board. If, however, the abnormality relates to the conduct and character of the activities of a certain determinable group of persons, then that would amount to a class of cases which was contemplated to be dealt with under clause 7. In such cases alone arbitrary detention could be held justifiable by law beyond a period of three months.

It was argued by the learned counsel for the petitioner that the phrase "circumstances under which and the classes of cases in which" used in clause 7 had to be construed in a cumulative sense ; on the other hand, the learned Attorney-General contended that the word "and" had been used in this clause in the same sense as "or". He further argued that even if the word "and" is not given that meaning the true construction of the phrase was that Parliament could prescribe either the circumstances or the classes of cases for making a law on the subject preventive detention authorizing detention for a longer period than three months without the machinery of an Advisory Board. In Full Bench Reference No. 1 of 1950, Das Gupta, J., of the Calcutta High Court held that the intention of the Legislature in enacting the clause was that the law of preventive detention authorizing detention for a longer period than three months without the intervention of an Advisory Board had to fulfil both the requirements laid down in clause 7 and not only one of the requirements in the alternative. The same view has been expressed by my brother Sir Fazl Ali. I share this view with him. I would, however, like to consider this

matter from a different aspect on the assumption that the contention raised by the learned Attorney-General is right.

Dealing first with the question whether section 12 mentions any circumstances, so far as I have been able to see, it does not prescribe any circumstances unless it can be said that the prejudicial acts for reasons connected with the security of State, maintenance of public order, etc., are both the circumstances as well as the classes of cases. In my opinion, this line of approach cannot be held to be correct in the construction of clause 7 of Article 22. I am inclined to agree with the learned Attorney-General that the phrase "circumstances under which" means some situation extraneous to the detenu's own acts, in other words, it means some happening in the country with which the detenu is not concerned, such as a situation of tense communal feelings, an apprehended internal rebellion or disorder, the crisis of an impending war or apprehended war, etc. In such a situation the machinery of an Advisory Board could be dispensed with because it may become cumbersome or it may hamper the exercise of necessary powers. In this view of the matter I have no hesitation in holding that no circumstances have been stated in section 12, though the section ostensibly says so. If it was permissible to conjecture, it seems that the draftsman of section 12 repeated the words of clause 7 of Article 22 without an application of his mind to the meaning of those words and as the legislation was passed in haste to meet an emergent situation, it suffers from the defects which all hasty legislation suffer from.

I now proceed to consider whether section 12 has classified the cases in which detention for a longer period beyond three months could be suffered by a citizen without the benefit of the machinery of an Advisory Board. The section has placed five subjects out of the legislative list within its ambit and these are described as the classes of cases. The question is whether it can be said that a mere selection of all or any of the categories of the subjects for reasons connected with which a law of preventive detention could be made under the 7th schedule amounts to a classification of cases as contemplated in clause 7 of Article 22. Entry 9 of the Union List and entry 3 of the Concurrent List of the 7th Schedule lay down the ambit of legislative power of Parliament on the subject of preventive detention on the following six subjects :—

(1) Defence of India, (2) Foreign Affairs, (3) Security of India, (4) Security of the State, (5) Maintenance of public order, (6) Maintenance of supplies and services essential to the community.

Clause 4 of Article 22 enjoins in respect of all the six subjects that no law can provide for preventive detention for a longer period than three months without reference to an Advisory Board. Clause 7 gives permission to make a law for dispensing with an Advisory Board by a prescription of the circumstances and by a prescription of the classes of cases in which such a dispensation can be made. The legislative authority under clause 4 and clause 7, in my opinion, extends to all these six subjects. The normal procedure to be followed when detention is intended to be beyond a period of three months in respect of the six subjects is provided in sub-clause 4. The extraordinary and unusual procedure was intended to be adopted in certain abnormal cases for which provision could be made by a Parliamentary statute under clause 7. It seems to me, however, that section 12 of Act IV of 1950 has reversed this process quite contrary to the intention of the Constitution. By this section Act IV of 1950 has dispensed with the Advisory Board in five out of the six subjects above mentioned and the compulsory procedure of an Advisory Board laid down in clause 4 of Article 22 has been relegated to one out of these six subjects. This has been achieved by giving a construction to the phrase "circumstances under which and the classes of cases in which" so as to make it coextensive and coterminous with the "subjects of legislation". In my opinion, this construction of clause 7 is in contravention of the clear provisions of Article 22, and makes clause 4 of Article 22 to all intents and purposes nugatory. Such a construction of the clause would amount to the Constitution saying in one breath that

a law of preventive detention cannot provide for detention for a longer period than three months without reference to an Advisory Board and at the same breath and moment saying that Parliament, if it so chooses, can do so in respect of all or any of the subjects mentioned in the legislative field. If that was so, it would have been wholly unnecessary to provide such a safeguard in the Constitution on a matter which very seriously affects personal liberty. On the other hand, it would be a reasonable construction of the clause to hold that the Constitution authorized Parliament that in serious classes of cases or in cases of those groups of persons who are incorrigible or whose activities are secret the procedure of an Advisory Board may well be dispensed with, that being necessary in the interests of the State. On the other construction as adopted by the framers of section 12, the Constitution need not have troubled itself by conferring an authority on Parliament for making such a law.

Moreover, if that was the intention, it would have in very clear words indicated this by drafting Article 22, clause 4, thus :—

"Unless otherwise provided by Parliament no law providing for preventive detention shall authorize detention for a longer period than three months unless an Advisory Board has investigated the sufficiency of the cause of such detention".

The words "Unless otherwise provided for by Parliament" would have been in accord with the construction which the framers of section 12 have placed on Article 22, clause 7.

I am further of the opinion that the construction placed by the learned Attorney-General on clause 7 of Article 22 and adopted by the framers of Act IV of 1950 creates a very anomalous situation. The matter may be examined from the point of view of the law of preventive detention for reasons connected with supplies and services essential to the life of the community. This subject has been put under section 9 in Act IV of 1950. Suppose a tense situation arises and there is a danger of the railway system being sabotaged and it becomes necessary to pass detention orders against certain persons. According to Act IV of 1950 in such a serious state of affairs the procedure of an Advisory Board is compulsory, while on the other hand, if there is an apprehension of disturbance of public order by reason of a wrong decision of an umpire at a cricket match or on account of conduct of persons celebrating the festival of Holi, then detention beyond three months can be ordered without reference to an Advisory Board. Could such an anomalous result be in the contemplation of the framers of the Constitution? The construction that I am inclined to place on the section is in accord with the scheme of the law of punitive detention. Hurt is an offence under the Indian Penal Code and this is one of the subjects of punitive detention. The cases on the subject have been classified in different groups, namely, simple hurt, grievous hurt, grievous hurt with dangerous weapons, grievous hurt to extort a confession, grievous hurt to restrain a public officer from doing his duty, grievous hurt by a rash act, and grievous hurt on provocation. Even simple hurt has been classified in different categories. The subject of assault has also been similarly dealt with. Sections 352 to 356 deal with cases classified according to the gravity of the offence, *i.e.*, cases of simple assault, assault on a public servant, assault on women, assault in attempt to commit theft, assault for wrongfully confining a person and assault on grave provocation have been separately grouped. Another illustration is furnished by the Criminal Procedure Code in the preventive sections 107 to 110. These deal with different groups of persons, vagrants are in one class, habitual offenders in another, bad characters in the third and disturbers of peace in the fourth. It seems that it is on lines similar to these that it must have been contemplated by the Constitution that classes of cases would be prescribed by Parliament, but this has not been done. The Constitution has recognised varying scales of duration of detention with the idea that this will vary with the nature of the apprehended act, detention for a period of three months in ordinary cases, detention for a longer period than three months with the intervention of an Advisory Board in more serious cases, while detention for a longer period than three

months without the intercession of an Advisory Board for a still more dangerous class and for acts committed in grave situations. It can hardly be said that all cases of preventive detention for reasons connected with the maintenance of public order stand on the same footing in the degree of gravity and deserve the same duration of detention and all cases connected with the maintenance of supplies and services essential to the life of the community stand in the matter of their gravity on such a footing as to require a lenient treatment. It is true that in a sense all persons who act prejudicially to the defence of India may be comprehensively said to form one group and similarly persons who act prejudicially to the maintenance of supplies and services essential to the life of the community may form another class but the question is, whether it was in this comprehensive sense that classification was intended by the Constitution in clause 7 or was it intended in a narrower and restricted sense? It has to be remembered that the law under clause 7 was intended to provide detention for a longer period and such a law very seriously abridges personal liberty and in this situation giving a narrower and restricted meaning to this expression will be in accordance with well established canons of construction of statutes.

The wide construction of clause 7 of Article 22 brings within the ambit of the clause all the subjects in the legislative list and very seriously abridges the personal liberty of a citizen. This could never have been the intention of the framers of the Constitution. The narrow and restricted interpretation is in accord with the scheme of the article and it also operates on the whole field of the legislative list and within that field it operates by demarcating certain portions out of each subject which requires severe treatment. If I may say so in conclusion, section 12 treats the lamb and the leopard in the same class because they happen to be quadrupeds. Such a classification could not have been in the thoughts of the constitution makers when clause 7 was introduced in Article 22. For the reasons given above, I am of the opinion that section 12 of Act IV of 1950 does not fulfil the requirements of clause 7 of Article 22 of the Constitution and is not a law which falls within the ambit of that clause. That being so, this section of Act IV of 1950 is void and by reason of it the detention of the petitioner cannot be justified. There is no other provision in this law under which he can be detained for any period whatsoever.

It was argued that it was neither practicable nor possible to make a classification on any definite basis in the case of apprehended acts of persons whose activities are of a prejudicial character to the maintenance of public order or to the security of the State or to the defence of India. This contention to my mind is not sound. Such a classification was made in the rules under the Defence of India Act by defining "a prejudicial act" in regulation 34. Mere difficulty in precisely ascertaining the groups or in defining objectively the conduct of such groups is no ground for not complying with the clear provisions of the statute or for disobeying it. I see no difficulty whatsoever if a serious effort was made to comply with the provisions of clause 7. I cannot see that the compulsory requirement of an Advisory Board is likely to lead to such diastrous or calamitous results that in all cases or at least in five out of the six objects of legislation it becomes necessary to dispense with this requirement. The requirement of an Advisory Board is in accordance with the preamble of the Constitution and is the barest minimum that can make a law of preventive detention to some little degree tolerable to a democratic Constitution. Such a law also may have some justification even without the requirement of an Advisory Board to meet certain defined dangerous situations or to deal with a class of people who are a danger to the State but without such limitation the law would be destructive of all notions of personal liberty. The Constitution must be taken to have furnished an adequate safeguard to its citizens when it laid down certain conditions in clause 7 and it could not be considered that it provided no safeguard to them at all and that the words used in clause 7 were merely illusory and had no real meaning.

Section 14 of Act IV of 1950 has been impugned on the ground that it contravenes and abridges the provisions of Articles 22 (5) and 32 of the Constitution. This section is in these terms :—

" (1) No court shall, except for the purposes of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order, and, notwithstanding anything contained in any other law, no court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an Advisory Board or that part of the report of an Advisory Board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1) ;

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

This section is in the nature of an iron curtain around the acts of the authority making the order of preventive detention. The Constitution has guaranteed to the detained person the right to be told the grounds of his detention. He has been given a right to make a representation [vide Article 22 (5)], yet section 14 prohibits the disclosure of the grounds furnished to him or the contents of the representation made by him in a Court of law and makes a breach of this injunction punishable with imprisonment.

Article 32 (1) of the Constitution is in these terms :—

" The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed."

Sub-section (4) says—

" The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution ".

Now it is quite clear that if an authority passes an order of preventive detention for reasons not connected with any of the six subjects mentioned in the 7th schedule, this court can always declare the detention illegal and release the detenu, but it is not possible for this court to function if there is a prohibition against disclosing the grounds which have been served upon him. It is only by an examination of the grounds that it is possible to say whether the grounds fall within the ambit of the legislative power contained in the Constitution or are outside its scope. Again something may be served on the detenu as being grounds which are not grounds at all. In this contingency it is the right of the detained person under Article 32 to move this court for enforcing the right under Article 22 (5) that he be given the real grounds on which the detention order is based. This court would be disabled from exercising its functions under Article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub-clause if it is not open to it to see the grounds that have been furnished. It is a guaranteed right of the person detained to have the very grounds which are the basis of the order of detention. This court would be entitled to examine the matter and to see whether the grounds furnished are the grounds on the basis of which he has been detained or they contained some other vague or irrelevant material. The whole purpose of furnishing a detained person with the grounds is to enable him to make a representation refuting these grounds and of proving his innocence. In order that this court may be able to safeguard this fundamental right and to grant him relief it is absolutely essential that the detenu is not prohibited under penalty of punishment to disclose the grounds to the court and no injunction by law can be issued to this Court disabling it from having a look at the grounds.

Section 14 creates a substantive offence if the grounds are disclosed and it also lays a duty on the court not to permit the disclosure of such grounds. It virtually amounts to a suspension of a guaranteed right provided by the Constitution inasmuch as it indirectly by a stringent provision makes administration of the law by this court impossible and at the same time it deprives a detained person from obtaining justice from this court. In my opinion, therefore, this section when it prohibits the disclosure of the grounds contravenes or abridges the rights given by Part III to a citizen and is *ultra vires* the powers of Parliament to that extent.

The result of the above discussion is that, in my opinion, sections 12 and 14 of Act IV of 1950 as above indicated are void and the decision of the detenu's case has to be made by keeping out of sight these two provisions in the Act. If sections 12 and 14 are deleted from the impugned legislation, then the result is that the detention of the petitioner is not legal. The statute has not provided for detention for a period of three months or less in such cases as it could have done under article 22 (4) of the Constitution and that being so, the petitioner cannot be justifiably detained even for a period of three months. I would accordingly order his release.

In view of the decision above arrived at I do not consider it necessary to express any opinion on the other points that were argued at great length before us, namely, (1) what is the scope and true meaning of the expression "procedure established by law" in Article 21 of the Constitution, and (2) what is the precise scope of Articles 19 (1) (*d*) and 19 (5) of the Constitution.

Mukherjea, J.—This is an application under Article 32 of the Constitution praying for a writ of *habeas corpus* upon the respondents with a view to release the petitioner who, it is alleged, is being unlawfully detained in the Central Jail, Cuddalore, within the State of Madras.

The petitioner, it is said, was initially arrested in Malabar on 17th of December, 1947, and prosecution was started against him on various charges for having delivered certain violent speeches. While these criminal cases were going on, he was served with an order of detention under the Madras Maintenance of Public Order Act on 22nd April, 1948. This order of detention was held to be illegal by the Madras High Court, but on the same day that the judgment was pronounced, a second order of detention was served upon him. On his moving the High Court again for a writ of *habeas corpus* in respect to the subsequent order, his application was dismissed on the ground that as he was not granted bail in one of the three criminal cases that were pending against him, the detention could not be said to be unlawful. Liberty, however, was given to him to renew his application if and when his detention under the criminal proceedings ceased. In two out of the three criminal cases the trial before the Magistrate ended on February 23, 1949 and the petitioner was sentenced to rigorous imprisonment for 6 months in each of the cases. These sentences, however, were set aside in appeal on 26th September, 1949. As regards the third case, he was tried by the Sessions Judge of North Malabar and sentenced to rigorous imprisonment for 5 years but this sentence was reduced to 6 months' imprisonment by the Madras High Court on appeal. The petitioner made a fresh application to the High Court praying for a writ of *habeas corpus* in respect of his detention under the Madras Maintenance of Public Order Act and this application, which was heard after he had served out his sentences of imprisonment referred to above, was dismissed in January, 1950. On 25th February, 1950, the Preventive Detention Act was passed by the Parliament and on the 1st of March following, the detention of the applicant under the Madras Maintenance of Public Order Act was cancelled and he was served with a fresh order of detention under section 3 (1) of the Preventive Detention Act, 1950. On behalf of the respondents the detention of the petitioner is sought to be justified on the strength of the Preventive Detention Act of 1950. The position taken up on behalf of the petitioner on the other hand is that the said Act is invalid and *ultra vires* the Constitution by reason of its being in conflict with certain

fundamental rights which are guaranteed by the Constitution. It is argued, therefore, that the detention of the petitioner is invalid and that he should be set at liberty.

The contentions that have been put forward by Mr. Nambiar who appeared in support of the petition, may be classified under four heads. His first contention is that as preventive detention is, in substance, a restriction on the free movements of a person throughout the Indian territory, it comes within the purview of Article 19 (1) (*d*) of Part III of the Constitution which lays down the fundamental rights. Under clause 5 of the Article, any restriction imposed upon this right of free movement must be reasonable and should be prescribed in the interests of the general public. The question as to whether it is reasonable or not is a justiciable matter which is to be determined by the court. This being the legal position, the learned counsel invites us to hold that the main provisions of the impugned Act, particularly those which are contained in sections 3, 7, 10, 11, 12, 13 and 14 are wholly unreasonable and should be invalidated on that ground.

The second contention advanced by the learned counsel is that the impugned legislation is in conflict with the provision of Article 21 of the Constitution inasmuch as it provides for deprivation of the personal liberty of a man not in accordance with a procedure established by law. It is argued that the word 'law' here does not mean or refer to any particular legislative enactment but it means the general law of the land, embodying those principles of natural justice with regard to procedure which are regarded as fundamental, in all systems of civilised jurisprudence.

It is conceded by the learned counsel that the procedure, if any, with regard to preventive detention as has been prescribed by Article 22 of the Constitution which itself finds a place in the Chapter on Fundamental Rights must override those general rules of procedure which are contemplated by Article 21 but with regard to matters for which no provision is made in Article 22, the general provision made in Article 21 must apply. He has indicated in course of his arguments what the essentials of such procedure are and the other point specifically raised in this connection is that the provision of section 12 of the Preventive Detention Act is in conflict with Article 22 (7) of the Constitution.

The last argument in support of this application is that the provisions of sections 3 and 14 of the Preventive Detention Act are invalid as they take away and render completely nugatory the fundamental right to constitutional remedies as is provided for in Article 32 of the Constitution.

In discussing these points it should be well to keep in mind the general scheme of the Indian Constitution relating to the protection of the fundamental rights of the citizens and the limitations imposed in this respect upon the legislative powers of the Government. The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of the absolute supremacy of Parliament in matters of legislation. In this respect it has followed the American Constitution and other systems modelled on it. Notwithstanding the representative character of their political institutions, the Americans regard the limitations imposed by their Constitution upon the action of the Government, both legislative and executive, as essential to the preservation of public and private rights. They serve as a check upon what has been described as the despotism of the majority; and as was observed in the case of *Hurtado* v. *The People of California*[1],

"a government which holds the lives, the liberty and the property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism."

In India it is the Constitution that is supreme and Parliament as well as the State Legislatures must not only act within the limits of their respective

1. 110 U.S. 516.

legislative spheres as demarcated in the three lists occurring in the Seventh Schedule to the Constitution, but Part III of the Constitution guarantees to the citizens certain fundamental rights which the legislative authority can on no account transgress. A statute law to be valid, must, in all cases, be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is unconstitutional or not. Article 13 (2) is imperative on this point and provides expressly that the State shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void. Clause (1) of the Article similarly invalidates all existing laws which are inconsistent with the provisions of this part of the Constitution.

The fundamental rights guaranteed by the Constitution have been classified under seven heads or categories. They are :

(1) Right to equality ;
(2) Right to freedom ;
(3) Right against exploitation ;
(4) Right to freedom of religion ;
(5) Cultural and educational rights ;
(6) Right to property ; and
(7) Right to constitutional remedy.

The arrangement differs in many respects from that adopted in the American Constitution and bears a likeness on certain points to similar declarations in the Constitutions of other countries.

Of the different classes of fundamental rights spoken of above, we are concerned here primarily with right to freedom which is dealt with, in four articles beginning from Article 19 and also with the right to constitutional remedy which is embodied in Article 32.

Article 10 enumerates certain forms of liberty or freedom, the protection of which is guaranteed by the Constitution. In Article 20, certain protections are given in cases of persons accused of criminal offences. Article 21 lays down in general terms that no person shall be deprived of his life or personal liberty, except according to the procedure established by law. Article 22 provides for certain additional safeguards in respect to arrest and detention and by way of exception to the rules so made, makes certain special provisions for the particular form of detention known as Preventive Detention.

The first contention advanced by Mr. Nambiar involves a consideration of the question as to whether Preventive Detention, which is the subject-matter of the impugned legislative enactment, comes within the purview of Article 19 (1) (*d*) of the Constitution, according to which a right to move freely throughout the territory of India is one of the fundamental rights guaranteed to all citizens. If it comes within that sub-clause, it is not disputed that clause (5) of Article 19 would be attracted to it and it would be for the Courts to decide whether the restrictions imposed upon this right by the Parliament are reasonable restrictions and are within the permissible limits prescribed by clause (5) of the Article.

There is no authoritative definition of the term 'Preventive Detention' in Indian law, though as description of a topic of legislation it occurred in the legislative lists of the Government of India Act, 1935, and has been used in Item 9 of List I and Item 3 of List III in the Seventh Schedule to the Constitution. The expression has its origin in the language used by Judges or the Law Lords in England while explaining the nature of detention under Regulation 14 (B) of the Defence of Realm Consolidated Act, 1914, passed on the outbreak of the First World War ; and the same language was repeated in connection with the emergency Regulations

made during the last World War. The word 'preventive' is used in contra-distinction to the word 'punitive.' To quote the words of Lord Finlay in *Rex* v. *Halliday*[1], "it is not a punitive but a precautionary measure." The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence.[2] Detention in such form is unknown in America. It was resorted to in England only during war time but no country in the world that I am aware of has made this an integral part of their Constitution as has been done in India. This is undoubtedly unfortunate, but it is not our business to speculate on questions of policy or to attempt to explore the reasons which led the representatives of our people to make such a drastic provision in the Constitution itself, which cannot but be regarded as a most unwholesome encroachment upon the liberties of the people.

The detention of a man even as a precautionary measure certainly deprives him of his personal liberty, and as Article 21 guarantees to every man, be he a citizen or a foreigner, that he shall not be deprived of his life and personal liberty, except in accordance with the procedure established by law, the requirements of Article 21 would certainly have to be complied with, to make preventive detention valid in law. What these requirements are I will discuss later on. Article 22 comes immediately after Article 21. It secures to all persons certain fundamental rights in relation to arrest and detention, and as already said, by way of exception to the rights thus declared, makes certain specific provisions relating to preventive detention. The subject of preventive detention is specified in and constitutes item No. 9 in the Union Legislative List and it also forms item No. 3 in the Concurrent List. Under Article 246 of the Constitution, the Parliament and the State Legislatures are empowered to legislate on this subject within the ambit of their respective authorities. Clause (3) of Article 22 expressly enjoins that the protective provisions of clauses (1) and (2) of the Article would not be available to persons detained under any law providing for preventive detention. The only fundamental rights which are guaranteed by the Constitution in the matter of preventive detention and which to that extent impose restraints upon the exercise of legislative powers in that respect are contained in clauses (4) to (7) of Article 22. Clause (4) lays down that no law of preventive detention shall authorise the detention of a person for a period longer than 3 months, unless an Advisory Board constituted in the manner laid down in sub-clause (*a*) of that clause has reported before the expiration of the period that there is sufficient cause for such detention. The period of detention cannot, in any event, exceed the maximum which the Parliament is entitled to prescribe under clause 7 (*b*). The Parliament is also given the authority to prescribe the circumstances and the class of cases under which a person can be detained for a period longer than 3 months under any law of preventive detention without obtaining the opinion of the Advisory Board. There is one safeguard provided for all cases which is contained in clause (5) and which lays down that the authority making the order of detention shall, as soon as possible communicate to such persons the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. But even here, the authority while giving the grounds of detention need not disclose such facts which it considers against public interest to disclose.

The question that we have to consider is whether a law relating to preventive detention is justiciable in a Court of law on the ground of reasonableness under Article 19 (6) of the Constitution inasmuch as it takes away or abridges the right to free movement in the territory of India guaranteed by clause (1) (*d*) of the Article. It will be seen from what has been said above that Article 20 deals specifically with the subject of preventive detention and expressly takes away the fundamental

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1. (1917) A.C. 260 at p. 269.
2. *Vide* Lord Macmillan in *Liversidge* v. *Anderson*, (1942) A.C. 206.

rights relating to arrest and detention enumerated in clauses (1) and (2) of the Article from persons who are detained under any law which may be passed by the Parliament or State Legislatures acting under Article 240 of the Constitution read with the relevant items in the legislative lists. I will leave aside for the moment the question as to how far the Court can examine the reasonableness or otherwise of the procedure that is prescribed by any law relating to preventive detention, for that would involve a consideration of the precise scope and meaning of Article 21; but this much is beyond controversy that so far as substantive law is concerned, Article 22 of the Constitution gives a clear authority to the Legislature to take away the fundamental rights relating to arrest and detention which are secured by the first two clauses of the Article. Any legislation on the subject would only have to conform to the requirements of clauses (4) to (7) and provided that is done, there is nothing in the language employed nor in the context in which it appears which affords any ground for suggestion that such law must be reasonable in its character and that it would be reviewable by the Court on that ground. Both Articles 19 and 22 occur in the same part of the Constitution and both of them purport to lay down the fundamental rights which the Constitution guarantees. It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting the words of a Constitution, the same principles undoubtedly apply which are applicable in construing a statute, but as was observed by Lord Wright in *James* v. *Commonwealth of Australia*[1]

> "the ultimate result must be determined upon the actual words used not in vacuo but as occurring in a single complex instrument in which one part may throw light on the other."

"The Constitution," his Lordship went on saying,

> "has been described as the federal compact and the construction must hold a balance between all its parts."

It seems to me that there is no conflict or repugnancy between the two provisions of the Constitution and an examination of the scheme and language of the catena of articles which deal with the rights to freedom would be sufficient to show that what clause (1) (*d*) of Article 19 contemplates is not freedom from detention, either punitive or preventive; it relates to and speaks of a different aspect or phase of civil liberty.

Article 19, which is the first of this series of Articles, enumerates seven varieties or forms of freedom beginning with liberty of speech and expression and ending with free right to practise any trade, profession or business. The rights declared in Articles 19 to 22 do not certainly exhaust the whole list of liberties which people possess under law. The object of the framers of the Constitution obviously is to enumerate and guarantee those forms of liberty which come under well-known categories recognised by constitutional writers and are considered to be fundamental and of vital importance to the community.

There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in *Jacobson* v. *Massachusetts*[2], are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other

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1. (1936) A.C. 578 at p. 613. 2. 197 U.S. 11.

person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrong doer and if his property or possessions could be preyed upon by a thief or a marauder. The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search, imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unknown to law. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

To me it seems that Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised. Article 19 uses the expression 'freedom' and mentions the several forms and aspects of it which are secured to individuals, together with the limitations that could be placed upon them in the general interests of the society. Articles 20, 21 and 22 on the other hand do not make use of the expression 'freedom' and they lay down the restrictions that are to be placed on State control where an individual is sought to be deprived of his life or personal liberty. The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birthrights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things. There is also no question of imposing limits on the activities of individuals so far as the exercise of these rights is concerned. For these reasons, I think these rights have not been mentioned in Article 19 of the Constitution. An individual can be deprived of his life or personal liberty only by action of the State, either under the provisions of any penal enactment or in the exercise of any other coercive process vested in it under law. What the Constitution does therefore is to put restrictions upon the powers of the State, for protecting the rights of the individuals. The restraints on State authority operate as guarantees of individual freedom and secure to the people the enjoyment of life and personal liberty which are thus declared to be inviolable except in the manner indicated in these articles. In my opinion, the group of Articles 20 to 22 embody the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as well as to procedural law. It is not correct to say, as I shall show more fully later on, that Article 21 is confined to matters of procedure only. There must be a substantive law, under which the State is empowered to deprive a man of his life and personal liberty and such law must be a valid law which the Legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the fundamental rights that the Constitution lays down. Thus a person cannot be convicted or punished under an *ex post facto* law, or a law which compels the accused to incriminate himself in a criminal trial or punishes him for the same offence more than once. These are the protections provided for by Article 20. Again a law providing for arrest and detention must conform to the limitations prescribed by clauses (1) and (2) of Article 22. These provisions indeed have been withdrawn expressly in case of preventive detention and protections of much more feeble and attenuated character have been substituted in their place; but this is a question of the policy adopted by the Constitution which does not concern us at all. The position, therefore, is that with regard to life and personal liberty, the Constitution guarantees protection to this extent that no man could be deprived of these rights except under a valid law passed

by a competent Legislature within the limits mentioned above and in accordance with the procedure which such law lays down. Article 19, on the other hand, enunciates certain particular forms of civil liberty quite independently of the rights dealt with under Article 21. Most of them may be connected with or dependent upon personal liberty but are not identical with it; and the purpose of Article 19 is to indicate the limits within which the State could, by legislation, impose restrictions on the exercise of these rights by the individuals. The reasonableness or otherwise of such legislation can indeed be determined by the court to the extent laid down in the several clauses of Article 19, though no such review is permissible with regard to laws relating to deprivation of life and personal liberty. This may be due to the fact that life and personal freedom constitute the most vital and essential rights which people enjoy under any State and in such matters the precise and definite expression of the intention of the Legislature has been preferred by the Constitution to the variable standards which the judiciary might lay down. We find the rights relating to personal liberty being declared almost in the same terms in the Irish Constitution, Article 40 (1) (4) (1) of which lays down that "no citizen shall be deprived of his personal liberty save in accordance with law". In the Constitution of the Free City of Danzig,

"the liberty of the person has been declared to be inviolable and no limitation or deprivation of personal liberty may be imposed by public authority except by virtue of a law." (*Vide* Article 74).

Article 31 of the Japanese Constitution is the closest parallel to Article 21 of the Indian Constitution and the language is almost identical. This is the scheme adopted by the Constitution in dealing with the rights to freedom described in the chapter on fundamental rights and in my opinion, therefore, the proper test for determining the validity of an enactment under which a person is sought to be deprived of his life and personal liberty has to be found not in Article 19, but in the three following Articles of the Constitution. Article 20 of course has no application so far as the law relating to preventive detention is concerned.

Mr. Nambiar's endeavour throughout has been to establish that Article 19 (1) (*d*) of the Constitution read with Article 19 (5) enunciates the fundamental rights of the citizens regarding the substantive law of personal liberty, while Article 21 embodies the protection as regards procedural law. This, in my opinion, would be looking at these provisions from a wrong angle altogether. Article 19 cannot be said to deal with substantive law merely, nor Article 21 with mere matters of procedure. It cannot also be said that the provisions of Article 19 (1) (*d*) read with clause (5) and Article 21 are complementary to each other. The contents and subject-matter of the two provisions are not identical and they proceed on totally different principles. There is no mention of any 'right to life' in Article 19, although that is the primary and the most important thing for which provision is made in Article 21. If the contention of the learned counsel is correct, we would have to hold that no protection is guaranteed by the Constitution as regards right to life so far as substantive law is concerned. In the second place, even if freedom of movement may be regarded as one of the ingredients of personal liberty, surely there are other elements included in the concept and admittedly no provision for other forms of personal liberty are to be found in Article 19 (5) of the Constitution. Furthermore, Article 19 is applicable to citizens only, while the rights guaranteed by Article 21 are for all persons, citizens, as well as aliens. The only proper way of avoiding these anomalies is to interpret the two provisions as applying to different subjects and this would be the right conclusion if we have in mind the scheme which underlies this group of articles.

I will now turn to the language of Article 19 (1) (*d*) and see whether preventive detention really comes within its purview. Article 19 (1) (*d*) provides that all citizens shall have the right to move freely throughout the territory of India. The two sub-clauses which come immediately after sub-clause (*d*) and are intimately connected with it, are in these terms:

"(*e*) To reside and settle in any part of the territory of India;

(*f*) to acquire, hold and dispose of property."

Clause (5) relates to all these three sub-clauses and lays down that nothing in them shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe.

I agree with the learned Attorney-General that in construing Article 19 (1) (*d*) stress is to be laid upon the expression "throughout the territory of India," and it is a particular and special kind of right, *viz.*, that of free movement throughout the Indian territory, that is the aim and object of the Constitution to secure. In the next sub-clause, right to reside and settle 'in any part of the territory of India' is given and here again the material thing is not the right of residence or settlement but the right to reside or settle in any part of the Indian territory. For an analogous provision, we may refer to Article 301 which says that subject to the other provisions of this part, commerce and intercourse throughout the territory of India shall be free. The meaning of sub-clause (*d*) of 19 (1) will be clear if we take it along with sub-clauses (*e*) and (*f*), all of which have been lumped together in clause (5) and to all of which the same restrictions including those relating to protection of the interests of any scheduled tribe have been made applicable. It will be remembered that these rights are available only to citizens. To an alien or foreigner, no guarantee of such rights has been given. Normally all citizens would have the free right to move from one part of the Indian territory to another. They can shift their residence from one place to any other place of their choice and settle anywhere they like. The right of free trade, commerce and intercourse throughout the territory of India is also secured. What the Constitution emphasises upon by guaranteeing these rights is that the whole of Indian Union in spite of its being divided into a number of States is really one unit so far as the citizens of the Union are concerned. All the citizens would have the same privileges and the same facilities for moving into any part of the territory and they can reside or carry on business anywhere they like; and no restrictions either inter-State or otherwise would be allowed to be set up in these respects between one part of India and another.

So far as free movement throughout the territory is concerned, the right is subject to the provision of clause (5), under which reasonable limitation may be imposed upon these liberties in the interests of the general public or protection of any scheduled tribe. The interest of the public which necessitates such restrictions may be of various kinds. They may be connected with the avoidance of pestilence or spreading of contagious diseases; certain places again may be kept closed for military purposes and there may be prohibition of entry into areas which are actual or potential war zones or where disturbances of some kind or other prevail. Whatever the reasons might be, it is necessary that these restrictions must be reasonable, that is to say, commensurate with the purpose for which they are laid down. In addition to general interest, the Constitution has specified the protection of the interests of the scheduled tribes as one of the factors which has got to be taken into consideration in the framing of these restrictions. The scheduled tribes, as is well known, are a backward and unsophisticated class of people who are liable to be imposed upon by shrewd and designing persons. Hence there are various provisions disabling them from alienating even their own properties except under special conditions. In their interest and for their benefit, laws may be made restricting the ordinary right of citizens to go or settle in particular areas or acquire property in them. The reference to the interest of scheduled tribe makes it quite clear that the free movement spoken of in the clause relates not to general rights of locomotion but to the particular right of shifting or moving from one part of the Indian territory to another, without any sort of discriminatory barriers.

This view will receive further support if we look to some analogous provisions in the Constitution of other countries. It will be seen that sub-clauses (*d*), (*e*) and (*f*) of Article 19 (1) are embodied in almost identical language in one single

Article, *viz.*, Article 75 of the Constitution of the Free City of Danzig. The Article runs as follows:

"All nationals shall enjoy freedom of movement within the free city and shall have the right to stay and to settle at any place they may choose, to acquire real property and to earn their living in any way. This right shall not be curtailed without legal sanctions."

The several rights are thus mentioned together as being included in the same category, while they are differentiated from the 'liberty of the person' which is "described to be inviolable except by virtue of a law" in Article 74 which appears just previous to this article. An analogous provision in slightly altered language occurs in Article 111 of the Constitution of the German Reich which is worded in the following manner:

"All Germans enjoy the right of change of domicile within the whole Reich. Every one has the right to stay in any part of the Realm that he chooses, to settle there, acquire landed property and pursue any means of livelihood."

Here again the right to personal liberty has been dealt with separately in Article 114. A suggestion was made in course of our discussions that the expression 'throughout the territory of India' occurring in Article 19 (1) (*d*) might have been used with a view to save Passport Regulations or to emphasise that no rights of free emigration are guaranteed by the Constitution. The suggestion does not seem to me to be proper. No State can guarantee to its citizens the free right to do anything outside its own territory. This is true of all the fundamental rights mentioned in Article 19 and not merely of the right of free movement. Further it seems to me that the words "throughout the territory of India" have nothing to do with rights of emigration. We find that both in the Danzig as well as in the German Constitution, where similar words have been used with regard to the exercise of the right of free movement throughout the territory, there are specific provisions which guarantee to all nationals the free right of emigration to other countries (*vide* Article 76 of the Danzig Constitution and Article 112 of the Constitution of the German Reich). In my opinion, therefore, preventive detention does not come either within the express language or within the spirit and intendment of clause 1 (*d*) of Article 19 of the Constitution which deals with a totally different aspect or form of civil liberty.

It is true that by reason of preventive detention, a man may be prevented from exercising the right of free movement within the territory of India as contemplated by Article 19 (1) (*d*) of the Constitution, but that is merely incidental to or consequential upon loss of liberty resulting from the order of detention. Not merely the right under clause 1 (*d*), but many of the other rights which are enumerated under the other sub-clauses of Article 19 (1) may be lost or suspended so long as preventive detention continues. Thus a detenu so long as he is under detention may not be able to practise any profession, or carry on any trade or business which he might like to do; but this would not make the law providing for preventive detention a legislation taking away or abridging the rights under Article 19 (1) (*g*) of the Constitution and it would be absurd to suggest that in such cases the validity of the legislation should be tested in accordance with the requirement of clause (6) of Article 19 and that the only restrictions that could be placed upon the person's free exercise of trade and profession are those specified in that clause. Mr. Nambiar concedes that in such cases we must look to the substance of the particular legislation and the mere fact that it incidentally trenches upon some other right to which it does not directly relate is not material. He argues, however, that the essence or substance of a legislation which provides for preventive detention is to take away or curtail the right of free movements and in fact, 'personal liberty' according to him, connotes nothing else but unrestricted right of locomotion. The learned counsel refers in this connection to certain passages in Blackstone's Commentaries on the Laws of England, where the author discusses what he calls the three absolute rights inherent in every Englishman, namely, rights of personal security, personal liberty and property. 'Personal security', according to Blackstone, consists in a person's legal and

uninterrupted enjoyment of his life, his limb, his body, his health and his reputation; whereas 'personal liberty' consists in the power of locomotion, of changing of situation or moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint unless by due course of law.[1] It will be seen that Blackstone uses the expression 'personal liberty' in a somewhat narrow and restricted sense. A much wider and larger connotation is given to it by later writers on constitutional documents, particularly in America. In ordinary language 'personal liberty' means liberty relating to or concerning the person or body of the individual; and 'personal liberty' in this sense is the antithesis of *physical restraint* or *coercion*. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.[2] It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory.

In this connection, it may not be irrelevant to point out that it was in accordance with the recommendation of the Drafting Committee that the word 'personal' was inserted before 'liberty' in Article 14 of the Constitution which now stands as Article 21. In the report of the Drafting Committee it is stated that the word 'liberty' should be qualified by the insertion of the word 'personal' before it; otherwise, it might be construed very widely so as to include even the freedoms already dealt with in Article 13. Article 13, it should be noted, is the present Article 19. If the views of the Drafting Committee were accepted by the Constituent Assembly, the intention obviously was to exclude the contents of Article 19 from the concept of 'personal liberty' as used in Article 21. To what extent the meaning of words used in the Constitution could be discovered from reports of Drafting Committee or debates on the floor of the House is a matter not quite free from doubt and I may have to take up this matter later on when discussing the meaning of the material clause in Article 21 of the Constitution. It is enough to say at this stage that if the report of the Drafting Committee is an appropriate material upon which the interpretation of the words of the Constitution could be based, it certainly goes against the contention of the applicant and it shows that the words used in Article 19 (1) (*d*) of the Constitution do not mean the same thing as the expression 'personal liberty' in Article 21 does. It is well known that the word 'liberty' standing by itself has been given a very wide meaning by the Supreme Court of the United States of America. It includes not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into free contractual relations. In the Indian Constitution, on the other hand, the expression 'personal liberty' has been deliberately used to restrict it to freedom from physical restraint of a person by incarceration or otherwise. Apart from the report of the Drafting Committee, that is the plain grammatical meaning of the expression as I have already explained.

It may not, I think, be quite accurate to state that the operation of Article 19 of the Constitution is limited to free citizens only and that the rights have been described in that Article on the presupposition that the citizens are at liberty. The deprivation of personal liberty may entail as a consequence the loss or abridgment of many of the rights described in Article 19, but that is because the nature of these rights is such that free exercise of them is not possible in the absence of personal liberty. On the other hand, the right to hold and dispose of property which is in sub-clause (*f*) of Article 19 (1) and which is not dependent on full possession of personal liberty by the owner may not be affected if the owner is imprisoned or detained. Anyway, the point is not of much importance for purposes of the present discussion. The result is that, in my opinion, the first contention raised by Mr. Nambiar cannot succeed and it must be held that we are

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1. *Vide* Chase's Blackstone, 4th Edn., pp. 68, 78.

2. *Vide* Dicey on Constitutional Law, 9th Edn., pp. 207-208.

not entitled to examine the reasonableness or otherwise of the Preventive Detention Act and see whether it is within the permissible bounds specified in clause (5) of Article 19.

I now come to the second point raised by Mr. Nambiar in support of the application; and upon this point we had arguments of a most elaborate nature addressed to us by the learned Counsel on both sides, displaying a considerable amount of learning and research. The point, however, is a short one and turns upon the interpretation to be put upon Article 21 of the Constitution, which lays down that "no person shall be deprived of his . . . . personal liberty, except according to procedure established by law". On a plain reading of the Article the meaning seems to be that you cannot deprive a man of his personal liberty, unless you follow and act according to the law which provides for deprivation of such liberty. The expression 'procedure' means the manner and form of enforcing the law. In my opinion, it cannot be disputed that in order that there may be a legally established procedure, the law which establishes it must be a valid and lawful law which the Legislature is competent to enact in accordance with Article 245 of the Constitution and the particular items in the legislative lists which it relates to. It is also not disputed that such law must not offend against the fundamental rights which are declared in Part III of the Constitution. The position taken up by the learned Attorney-General is that as in the present case there is no doubt about the competency of the Parliament to enact the law relating to preventive detention which is fully covered by item 9 of List I, and item 3 of List III, and as no question of the law being reasonable or otherwise arises for consideration by reason of the fact that Article 19 (1) (*d*) is not attracted to this case, the law must be held to be a valid piece of legislation and if the procedure laid down by it has been adhered to, the validity of the detention cannot possibly be challenged. His further argument is that Article 22 specifically provides for preventive detention and lays down fully what the requirements of a legislation on the subject should be. As the impugned Act conforms to the requirements of Article 22, no further question of its validity under Article 21 of the Constitution at all arises. The latter aspect of his arguments, I will deal with later on. So far as the main argument is concerned, the position taken up by Mr. Nambiar is that Article 21 refers to procedure only and not to substantive law; the procedure, however, must be one which is established by law. The expression 'law' in this context does not mean or signify, according to the learned Counsel, any particular law enacted by the Legislature in conformity with the requirements of the Constitution or otherwise possessing a binding authority. It refers to law in the abstract or general sense—in the sense of *jus* and not *lex*—and meaning thereby the legal principles or fundamental rules that lie at the root of every system of positive law including our own, and the authority of which is acknowledged in the jurisprudence of all civilised countries. It is argued that if the word 'law' is interpreted in the sense of any State-made law, Article 21 could not rank as a fundamental right imposing a check or limitation on the legislative authority of the Government. It will be always competent to the Legislature to pass a law laying down a thoroughly arbitrary and irrational procedure opposed to all elementary principles of justice and fairness and the people would have no protection whatsoever, provided such procedure was scrupulously adhered to. In support of this argument the learned Counsel has relied upon a large number of American cases, where the Supreme Court of America applied the doctrine of 'due process of law' as it appears in the American Constitution for the purpose of invalidating various legislative enactments which appeared to that Court to be capricious and arbitrary and opposed to the fundamental principles of law.

It may be noted here that in the original draft of the Indian Constitution the words used in Article 15 (which now stands as Article 21) were "in accordance with due process of law". The Drafting Committee recommended that in place of the 'due process' clause, the expression 'according to procedure established by law' should be substituted. The present Article 21 seems to have been modelled on Article 31 of the Japanese Constitution, where the language employed is

"no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

Mr. Nambiar argues that the expression 'procedure established by law' in Article 21 of the Constitution bears the same meaning as the 'due process' clause does in America, restricted only to this extent, *viz.*, that it is limited to matters of procedure and does not extend to questions of substantive law. To appreciate the arguments that have been advanced for and against this view and to fix the precise meaning that is to be given to this clause in Article 21, it would be necessary to discuss briefly the conception of the doctrine of 'due process of law' as it appears in the American Constitution and the way in which it has been developed and applied by the Supreme Court of America.

In the history of Anglo-American Law, the concept of 'due process of law or what is considered to be its equivalent 'law of the land' traces its lineage far back into the beginning of the 13th century A.D. The famous 39th Chapter of the Magna Charta provides that

"no free man shall be taken or imprisoned or disseized, or outlawed or exiled or in any way destroyed; nor shall we go upon him nor send upon him but by the lawful judgment of his Peers and by the *law of the land*."

Magna Charta as a charter of English liberty was confirmed by successive English monarchs and it is in one of these confirmations (28 Ed. III Chap. 3) known as 'Statute of Westminster of the liberties of London', that the expression 'due process of law' for the first time appears. Neither of these phrases was explained or defined in any of the documents, but on the authority of Sir Edward Coke it may be said that both the expressions have the same meaning. In substance, they guaranteed that persons should not be imprisoned without proper indictment and trial by Peers, and that property should not be seized except in proceedings conducted in due form in which the owner or the person in possession should have an opportunity to show cause why seizure should not be made[1]. These concepts came into America as part of the rights of Englishmen claimed by the colonists. The expression in one form or other appeared in some of the earlier State constitutions and the exact phrase 'due process of law' came to be a part of the Federal Constitution by the Fifth Amendment which was adopted in 1791 and which provided that

"no person shall . . . be deprived of life, liberty or property without due process of law".

It was imposed upon the State Constitution in almost identical language by the Fourteenth Amendment in the year 1868.

What 'due process of law' exactly means is difficult to define even at the present day. The Constitution contains no description of what is 'due process of law', nor does it declare the principles by application of which it could be ascertained. In *Twinning* v. *New Jersey*[2] the Court observed :

"Few phrases in the law are so elusive of exact apprehension as this. This Court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise".

It is clear, however, that the requirement of 'due process of law' in the United States' Constitution imposes a limitation upon all the powers of Government, legislative as well as executive and judicial. Applied in England only as protection against executive usurpation and royal tyranny, in America it became a bulwark against arbitrary legislation[3]. As it is a restraint upon the legislative power and the object is to protect citizens against arbitrary and capricious legislation, it is not within the competence of the Congress to make any process a 'due process of law' by its mere will ; for that would make the limitation quite nugatory. As laid down in the case cited above,

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1. *Vide* Willoughby on the Constitution of the United States, Vol. III, p. 1087.
2. 211 U.S. 79.
3. Vide *Hurtado* v. *People of California*, 110 U.S. 516 at p. 532.

"it is not any act legislative in form that is law; law is something more than mere will exerted as an act of power."

It means and signifies the general law of the land, the settled and abiding principles which inhere in the Constitution and lie at the root of the entire legal system. To quote the words of Daniel Webster in a famous argument before the Supreme Court :[1]

"By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society".

What these principles of general law are nobody has over attempted to enumerate. To a large extent they are the principles of English common law and modes of judicial proceedings obtaining in England, the traditions of which came along with the settlers in America. Some Judges seem to have alluded to the principles of natural justice in explaining what is meant by general law or 'law of the land', though the doctrine of a law of nature did not obtain a firm footing at any time. In *Wynehamer* v. *New York*[2], Justice Hubbard declared himself opposed to the judiciary attempting to set bounds to the legislative authority or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside of the Constitution. Coke's dictum of a supreme fundamental law which obviously referred to principles of English common law certainly did exercise considerable influence upon the minds of the American Judges[3] and there are observations in some cases which go to suggest that the principles of natural justice were regarded as identical with those of common law, except where the rules of common law were not considered to be of fundamental character or were not acted upon as being unsuited to the progress of time or conditions of the American Society[4]. In the case of *Loan Association* v. *Topeka*[5] it was observed that there are limitations upon powers of Government which grow out of the essential nature of free Governments—implied reservations of individual rights without which the social compact could not exist and which are respected by all Governments entitled to the name. What is hinted at, is undoubtedly the old idea of a social compact under which political institutions were supposed to come into being; and the suggestion is that when the Americans formed themselves into a State by surrendering a portion of their rights which they possessed at that time and which presumably they inherited from their English ancestors, there were certain rights of a fundamental character still reserved by them which no State could possible take away.

As has been said already, 'due process of law' has never been defined by Judges or Jurists in America. The best description of the expression would be to say that it means in each particular case such an exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs[6].

In the actual application of the clause relating to 'due process of law' to particular cases the decisions of the Supreme Court of America present certain peculiar and unusual features and there is total lack of uniformity and consistency in them. Ever since the appearance of the clause in the Fifth Amendment and down to the middle of the 19th century, it was interpreted as a restriction on procedure, and particularly the judicial procedure, by which the Government exercises its powers. Principally it related to the procedure by which persons were tried for crimes and guaranteed to accused persons the right to have a fair trial in compliance with well established criminal proceedings. The same principle

1. Vide *Darmouth College* case, 4 Wheaton, p. 518.
2. 13 N.Y. 379.
3. *Vide* Willis on Constitutional Law, p. 647.
4. *See* Cooley's Constitutional Limitations, Vol. II, pp. 739-40.
5. 20 Wall, p. 655.
6. *See* Cooley's Constitutional Limitations, Vol. II, p. 741.

applied to the machinery or proceeding by which property rights were adjudicated and by which the powers of *eminent domain* and taxation were exercised. During this period it was not considered to have any bearing on substantial law at all.

Change, however, came in and the period that followed witnessed a growing recognition of the doctrine that substantive rights of life, liberty and property are protected by the requirement of due process of law against any deprivation attempted at by legislative authority; and the political and economic conditions of the country accounted to a great extent for this change in judicial outlook. The close of the civil war brought in a new period of industrial development leading to accumulation of large capital in the hands of industrialists and the emergence of a definite labouring class. New and important problems arose which the States attempted to deal with by various laws and regulations. Some of them seem to have been ill-advised and arbitrary and there was a clamour amongst business men against what they described as legislative encroachments upon their vested private rights. The Supreme Court now began to use the rule of due process of law as a direct restraint upon substantive legislation and any statute or Administrative Act, which imposed a limitation upon rights of private property or free contractual relations between the employers and employed, was invalidated as not being in accordance with due process of law[1]. What constituted a legitimate exercise of the powers of legislation now came to be a judicial question and no statute was valid unless it was reasonable in the opinion of the Court. The question of reasonableness obviously depends largely upon the ideas of particular individuals and the courts or rather the majority of Judges thus marshalled their own views of social and economic policy in deciding the reasonableness or otherwise of the statutes. In the language of a well known writer, the Courts became a kind of negative third chamber both to the State Legislatures and the Congress[2]. To what extent the Courts laid stress upon the doctrine of freedom of contract is illustrated in the case of *Lochner* v. *New York*[3]. In that case the question arose as to the validity of a labour legislation which prohibited the employment of persons in certain fields of activity for more than 60 hours a week. Lochner was indicted for violating this law by employing a man in his Biscuit and Cake Factory who was to work more than 60 hours in a week. The Court by a majority of 5 to 4 held the statute to be invalid on the ground that the

> "right to purchase or sell labour is part of the liberty protected by the Amendment unless there are circumstances which excluded the right."

That decision has been criticized not merely on the ground that it rested upon an economic theory which to quote the language of Holmes, J., who was one of the dissentient Judges "was not entertained by a large part of the country;" but it ignored that such regulation was necessary for protecting the health of the employees, that is to say, it was in substance an exercise of police powers with a view to accomplish some object of public interest[4].

It may be mentioned here that while the due process doctrine was being extended by judicial pronouncements, the doctrine of police power which operates to some extent as a check upon the 'due process' clause was simultaneously gaining importance. Roughly speaking, police power may be defined as

> "a right of a Government to regulate the conduct of its people in the interests of public safety, health, morals and convenience. Under this authority, a Government may make regulations concerning the safety of building, the regulation of traffic, the reporting of incurable diseases, the inspection of markets, the sanitation of factories, the hours of work for women and children, the sale of intoxicants and such other matters"[5].

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1. *Vide* Encyclopædia of the Social Sciences, Vol. V pp. 265-67.
2. *Vide* Kelley and Harbinson on the American Constitution, p. 539.
3. 198 U.S. 45.
4. *Vide* Willoughby on the Constitution of the U.S. Vol. III, p. 171.
5. *Vide* Munroe—The Government of th U.S., p. 522.

Here again, the extent to which the Court can interfere with exercise of police powers by the State has not been clearly defined by judicial pronouncements. The doctrine generally accepted is that although any enactment by Legislature under the guise of exercise of police powers would not necessarily be constitutional, yet if the regulation has a direct relation to its proposed object which is the accomplishment of some legitimate public purpose, the wisdom or policy of the legislation should not be examined by the Courts. The rule is not without its exceptions but it is not necessary to elaborate them for our present purpose[1]. The later decisions, though not quite uniform, reveal the growing influence of the police power doctrine. It may be said that since 1936 there has been a definite swing of the judicial pendulum in the other direction. In the case of *West Coast Hotel Company* v. *Parrish*[2] which related to the legality of a Statute for regulating the minimum wages of women, Chief Justice Hughes, who delivered the opinion of the Court, observed as follows :

> "In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is the freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognise an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organisation which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."

In the succeeding years, the indications certainly are that the requirement of due process of law as a substantial restriction on Government control is becoming a thing of the past and the rule is being restricted more and more to its original procedural meaning. What will happen in future cannot certainly be predicted at this stage[3].

Thus it will be seen that the 'due process' clause in the American Constitution came to be used as a potent instrument in the hands of the judiciary for exercising control over social legislation. The judicial pronouncements are not guided by any uniform principle, and the economic and social ideas of the Judges, who form the majority in the Supreme Court for the time being, constitute so to say the yard stick for measuring the reasonableness or otherwise of any enactment passed during that period. No writer of American Constitutional Law has been able uptill now to evolve anything like a definite and consistent set of principles out of the large mass of cases, where the doctrine of 'due process of law' has been invoked or applied.

It is against this background that we must consider how the constitution makers in India dealt with and gave final shape to the provisions on an analogous subject in the Indian Constitution. In the draft Constitution, Article 15 (which now stands as Article 21) was apparently framed on the basis of the 5th and 14th Amendments in the American Constitution. The Article was worded as follows :

> "No person shall be deprived of his life or liberty without due process of law".

The Drafting Committee in their report recommended a change in the language of this Article. The first suggestion was that the word "personal" shall be inserted before the word 'liberty' and the second was that the expression 'in accordance with procedure established by law' shall be substituted for due process of law, the reason given being that the former expression was more specific.

The learned Attorney-General has placed before us the debates in the Constituent Assembly centering round the adoption of this recommendation of the Drafting Committee and he has referred us to the speeches of several members of the Assembly who played an important part in the shaping of the Constitution. As an aid to discover the meaning of the words in a Constitution, these debates are of doubtful value.

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1. *Vide* Willoughby on the Constitution of the U.S., Vol. III, pp. 1709-70.
2. 300 U.S. 379.
3. Swisher—The Growth of Constitutional Power in the United States, pp. 123-25.

"Resort can be had to them", says Willoughby, "with great caution and only when latent ambiguities are to be solved. The proceedings may be of some value when they clearly point out the purpose of the provision. But when the question is of abstract meaning, it will be difficult to derive from this source much material assistance in interpretation "[1].

The learned Attorney-General concedes that these debates are not admissible to explain the meaning of the words used and he wanted to use them only for the purpose of showing that the Constituent Assembly when they finally adopted the recommendation of the drafting Committee, were fully aware of the implications of the differences between the old form of expression and the new. In my opinion, in interpreting the Constitution, it will be better if such extrinsic evidence is left out of account. In matters like this, different members act upon different impulses and from different motives and it is quite possible that some members accepted certain words in a particular sense, while others took them in a different light.

The report of the Drafting Committee, however, has been relied upon by both parties and there are decided authorities in which a higher value has been attached to such reports than the debates on the floor of the House. In *Caminetti* v. *United States*[2], it is said that reports to Congress accompanying the introduction of proposed law may aid the courts in reaching the true meaning of the legislation in case of doubtful interpretation. The report is extremely short. It simply says that the reason for the suggested change is to make the thing more specific.

I have no doubt in my mind that if the 'due process' clause which appeared in the original draft was finally retained by the Constituent Assembly, it could be safely presumed that the framers of the Indian Constitution wanted that expression to bear the same sense as it does in America. But when that form was abandoned and another was deliberately substituted in its place, it is not possible to say that in spite of the difference in the language and expression, they should mean the same thing and convey the same idea. Mr. Nambiar's contention is that in view of the somewhat uncertain and fluidic state of law as prevails in America on the subject, the Drafting Committee recommended an alteration for the purpose of making the language more specific and he would have us hold that it was made specific in this way, namely, that instead of being extended over the whole sphere of law, substantive as well as adjective, it was limited to procedural law merely. That is the reason, he says, why instead of the word 'process' the expression 'procedure' was adopted, but the word 'law' means the same thing as it does in the 'due process' clause in America and refers not to any State made law but to the fundamental principles which are inherent in the legal system and are based upon the immutable doctrines of natural justice.

Attractive though this argument might at first sight appear, I do not think that it would be possible to accept it as sound. In the first place, it is quite clear that the framers of the Indian Constitution did not desire to introduce into our system the elements of uncertainty, vagueness and changeability that have grown round the 'due process' doctrine in America. They wanted to make the provision clear, definite and precise and deliberately chose the words 'procedure established by law', as in their opinion no doubts would ordinarily arise about the meaning of this expression. The indefiniteness in the application of the 'due process' doctrine in America has nothing to do with the distinction between substantive and procedural law. The uncertainty and elasticity are in the doctrine itself which is a sort of a hidden mine, the contents of which nobody knows and it is merely revealed from time to time to the judicial conscience of the Judges. This theory, the Indian Constitution deliberately discarded and that is why they substituted a different form in its place which, according to them, was more specific. In the second place, it appears to me that when the same words are not

1. *Vide* Willoughby on the Constitution of the United States, p. 64.

2. 242 U.S. 470.

used, it will be against the ordinary canons of construction to interpret a provision in our Constitution in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country, where not only the language is different, but the entire political conditions and constitutional set up are dissimilar. In the Supreme Court of America, stress has been laid uniformly upon the word 'due' which occurs before and qualifies the expression 'process of law'. 'Due' means 'what is just and proper' according to the circumstances of a particular case. It is this word which introduces the variable element in the application of the doctrine; for what is reasonable in one set of circumstances may not be so in another and a different set. In the Indian Constitution the word 'due' has been deliberately omitted and this shows clearly that the Constitution makers of India had no intention of introducing the American doctrine. The word 'established' ordinarily means 'fixed or laid down' and if 'law' means, as Mr. Nambiar contends, not any particular piece of law but the indefinite and indefinable principles of natural justice which underlie positive systems of law, it would not at all be appropriate to use the expression 'established', for natural law or natural justice cannot establish anything like a definite procedure.

It does not appear that in any part of the Constitution the word 'law' has been used in the sense of 'general law' connoting what has been described as the principles of natural justice outside the realm of positive law. On the other hand the provisions of Article 31 of the Constitution, which appears in the chapter on fundamental rights, makes it clear that the word 'law' is equivalent to State made law and to deprive a person of his property, the authority or sanction of such law is necessary. As has been said already, the provision of Article 21 of the Indian Constitution reproduces, save in one particular, the language of Article 31 of the Japanese Constitution and it is quite clear from the scheme and provisions of the Japanese Constitution that in speaking of law it refers to law passed or recognised as such by the State. In the Irish Constitution also, there is provision in almost similar language whch conveys the same idea. Article 40 (4) (1) provides that 'no citizen shall be deprived of his personal liberty save in accordance with law'; and by law is certainly meant the law of the State.

Possibly the strongest argument in support of Mr. Nambiar's contention is that if law is taken to mean State made law, then Article 21 would not be a restriction on legislation at all. No question of passing any law abridging the right conferred by this Article could possibly arise and Article 13 (2) of the Constitution would have no operation so far as this provision is concerned. To quote the words of an American Judge it would sound very much like the Constitution speaking to the Legislature that the latter could not infringe the right created by these Articles unless it chose to do so[1].

Apparently this is a plausible argument but it must be admitted that we are not concerned with the policy of the Constitution. The fundamental rights not merely impose limitations upon the Legislature, but they serve as checks on exercise of executive powers as well, and in the matter of depriving a man of his personal liberty, checks on the high-handedness of the executive in the shape of preventing them from taking any step, which is not in accordance with law, could certainly rank as fundamental rights. In the Constitutions of various other countries, the provisions relating to protection of personal liberty are couched very much in the same language as in Article 21. It is all a question of policy as to whether the Legislature or the judiciary would have the final say in such matters and the Constitution makers of India deliberately decided to place these powers in the hands of the Legislature. Article 31 of the Japanese Constitution, upon which Article 21 of our Constitution is modelled, also proceeds upon the same principle. The Japanese Constitution, it is to be noted, guarantees at the same time other rights in regard to arrest, detention and access to court

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1. *Vide* per Bronson, J. in *Taylor* v. *Porte*, 4 Hill 140.

which might serve as checks on legislative authority as well. Thus Article 32 provides :

"No person shall be denied the right of access to the courts";

Article 34 lays down :

"No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of Counsel, nor shall he be detained without adequate cause; and upon demand of any person, such cause must be immediately shown in open court in his presence and in the presence of his Counsel."

It was probably on the analogy of Article 34 of the Japanese Constitution that the first two clauses of Article 22 of the Indian Constitution were framed. Article 22 was not in the original draft Constitution at all; and after the 'due process' clause was discarded by the Constituent Assembly and the present form was substituted in its place in Article 21, Article 22 was introduced with a view to provide for some sort of check in matters of arrest and detention and the protection it affords places limitations upon the authority of the Legislature as well. These protections indeed have been denied to cases of preventive detention but that again is a question of policy which does not concern us as a Court. My conclusion therefore, is that in Article 21 the word 'law' has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. The Article presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competency of the Legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for.

In the view that I have taken, the question raised by Mr. Nambiar that the Preventive Detention Act is invalid, by reason of the fact that the procedure it lays down is not in conformity with the rules of natural justice, does not fall for consideration. It is enough, in my opinion, if the law is a valid law which the Legislature is competent to pass and which does not transgress any of the fundamental rights declared in Part III of the Constitution. It is also unnecessary to enter into a discussion on the question raised by the learned Attorney-General as to whether Article 22 by itself is a self-contained Code with regard to the law of Preventive Detention and whether or not the procedure it lays down is exhaustive. Even if the procedure is not exhaustive, it is not permissible to supplement it by application of the rules of natural justice. On the third point raised by Mr. Nambiar, the only question, therefore, which requires consideration is whether section 12 of the Preventive Detention Act is *ultra vires* of the Constitution by reason of its being not in conformity with the provision of Article 22 (7) (*a*). Article 22 (7) (*a*) of the Constitution empowers the Parliament to prescribe the circumstances under which and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (*a*) of clause (4). Section 12 of the Preventive Detention Act which purports to be an enactment in pursuance of Article 22 (7) (*a*) of the Constitution provides as follows :

"(1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(*a*) the defence of India, relations of India with foreign powers or the security of India; or

(*b*) the security of a State or the maintenance of public order."

It will be noticed that there are altogether six heads or subjects in the two items in the legislative lists, namely, item No. 9 of List I and item No. 3 of List III which deal with preventive detention. Item No. 9 of List I mentions reasons connected with defence, foreign affairs and security of India, while item No. 3 of List III speaks of reasons connected with security of a State, the maintenance of public order and the maintenance of supplies and services

essential to the community. With the exception of the last head, all the remaining five have been listed in section 12 of the Preventive Detention Act and they have been mentioned both as circumstances and classes of cases in which detention for more than 3 months would be permissible without the opinion of an Advisory Board. Mr. Nambiar's argument is that the mentioning of five out of the six legislative heads in section 12 does not amount to prescribing the circumstances under which, or the classes of cases in which, a person could be detained for more than 3 months as contemplated by Article 22 (7) (*a*). It is also contended that in view of the fact that the two items 'circumstances' and 'classes' are separated by the conjunction 'and', what the Constitution really contemplated was that both these items should be specified and a statement or specification of any one of them would not be a proper compliance with the provisions of the clause. It is further pointed out that the mentioning of the same matters as 'circumstances' or 'classes' is not warranted by Article 22 (7) of the Constitution and is altogether illogical and unsound.

I must say that section 12 has been drafted in a rather clumsy manner and certainly it could have been framed in a better and more proper way. Under Article 22 (7) (*a*), the Parliament may specify the circumstances under which and the classes of cases in which the necessity of placing the cases of detention for examination by the Advisory Board could be dispensed with. By 'classes of cases' we mean certain determinable groups, the individuals comprised in each group being related to one another in a particular way which constitutes the determining factor of that group. 'Circumstances' on the other hand connote situations or conditions which are external to the persons concerned. Preventive detention can be provided for by law for reasons connected with six different matters specified in the relevant items in the legislative lists, and whatever the reasons might be, there is a provision contained in Article 22 (4) (*a*) which lays down that detention for more than three months could not be permitted except with the sanction of the Advisory Board. An alternative however has been provided for by clause (*b*) and Parliament has been given the option to take away the protection given by clause (*a*) and specify the circumstances and the cases when this rule will not apply. I am extremely doubtful whether the classification of cases made by Parliament in section 12 of the Act really fulfils the object which the Constitution had in view. The basis of classification has been the apprehended acts of the persons detained described with reference to the general heads mentioned in the items in the legislative lists as said above. Five out of the six heads have been taken out and labelled as classes of cases to which the protection of clause (4) (*a*) of the Article would not be available. It is against common sense that all forms of activities connected with these five items are equally dangerous and merit the same drastic treatment. The descriptions are very general and there may be acts of various degrees of intensity and danger under each one of these heads.

Although I do not think that section 12 has been framed with due regard to the object which the Constitution had in view, I am unable to say that the section is invalid as being *ultra vires* the Constitution. The Constitution has given unfettered powers to Parliament in the matter of making the classifications and it is open to the Parliament to adopt any method or principle as it likes. If it choose the principle implied in the enumeration of subjects under the relevant legislative heads, it cannot be said that Parliament has exceeded its powers.

I am also unable to hold that both 'circumstances' as well as 'classes' have to be prescribed in order to comply with the requirement of sub-clause (*a*) of Article 22 (7). The sub-clause (*a*) of the Article lays down a purely enabling provision and Parliament, if it so chooses, may pass any legislation in terms of the same. Where an optional power is conferred on certain authority to perform two separate acts, ordinarily it would not be obligatory upon it to perform both; it may do either if it so likes. Here the classes have been specified and the classes apparently are composed of persons who are detained for the purpose of

preventing them from committing certain apprehended acts. I am extremely doubtful whether the classes themselves could be described as 'circumstances' as they purport to have been done in the section. 'Circumstances' would ordinarily refer to conditions like war, rebellion, communal disturbances and things like that, under which extra precaution might be necessary and the detention of suspected persons beyond the period of three months without the sanction of the Advisory Board might be justified. It is said that the likelihood of these persons committing the particular acts which are specified might constitute 'circumstances'. In my opinion, that is not a plain and sensible interpretation. But whatever that may be, as I am of opinion that it is not obligatory on Parliament to prescribe both the circumstances and the classes of cases, I am unable to hold that section 12 is *ultra vires* the Constitution because the circumstances are not mentioned. As I have said at the beginning, the draft is rather clumsy and I do not know why Parliament used the word "or" when in the Constitution itself the word 'and' has been used.

In the fourth and last point raised by Mr. Nambiar the principal question for consideration is the validity of section 14 of the Preventive Detention Act. Sub-section (1) of section 14 prohibits any court from allowing any statement to be made or any evidence to be given before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or any representation made by him against such order. It further provides that no court shall be entitled to require any public officer to produce before it or to disclose the substance of any such communication or representation made or the proceedings of an Advisory Board or that part of the report of an Advisory Board which is confidential. Sub-section (2) further provides that:

"It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1):

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

The provisions of this section are obviously of a most drastic character. It imposes a ban on the court and prevents it from allowing any statement to be made or any evidence produced before it of the substance of any communication made to the detenu apprising him of the grounds upon which the detention order was made. The Court is also incompetent to look into the proceedings before the Advisory Board or the report of the latter which is confidential. Further the disclosure of such materials has been made a criminal offence punishable with imprisonment for a term which may extend to one year. Mr Nambiar's contention is that these restrictions render utterly nugatory the provisions of Article 32 of the Constitution which guarantees to every person the right to move this court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. It is not disputed that the petitioner has the right of moving this court for a writ of *habeas corpus*, and unless the court is in a position to look into and examine the grounds upon which the detention order has been made, it is impossible for it to come to any decision on the point and pass a proper judgment. Though the right to move this court is not formally taken away, the entire proceedings are rendered ineffective and altogether illusory. On behalf of the respondent it is pointed out that Article 32 guarantees only the right to constitutional remedy for enforcement of the rights which are declared by the Constitution. If there are no rights, under the Constitution, guranteed to a person who is detained under any law of preventive detention, no question of enforcing such rights by an approach to this court at all arises. I do not think that this argument proceeds on a sound basis; and in my opinion, section 14 does take away and materially curtails some of the fundamental rights which are guaranteed by the Constitution itself. Article 22 clause (5) of the Constitution lays down as a fundamental right that when a person is detained

for preventive detention, the authority making the order shall, as soon as may be communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order. Under clause (6), the authority need not disclose such facts as it considers to be against public interest to disclose. But so far as the grounds are concerned, the disclosure is not prohibited under any circumstance. It is also incumbent upon the detaining authority to afford a detenu the earliest opportunity of making a representation against the detention order. It has been held in several cases, and in my opinion quite rightly, that if the grounds supplied to a detained person are of such a vague and indefinite character that no proper and adequate representation could be made in reply to the same, that itself would be an infraction of the right which has been given to the detenu under law. In my opinion, it would not be possible for the court to decide whether the provisions of Article 22 clause (5) have been duly complied with and the fundamental right guaranteed by it has been made available to the detenu unless the grounds communicated to him under the provisions of this Article are actually produced before the court. Apart from this, it is also open to the person detained to contend that the detention order has been a *mala fide* exercise of power by the detaining authority and that the grounds upon which it is based, are not proper or relevant grounds which would justify detention under the provisions of the law itself. These rights of the detenu would for all practical purposes be rendered unenforceable if the court is precluded from looking into the grounds which have been supplied to him under section 7 of the Preventive Detention Act. In my opinion, section 14 of the Preventive Detention Act does materially affects the fundamental rights declared under Part III of the Constitution and for this reason it must be held to be illegal and *ultra vires*. It is not disputed, however, that this section can be severed from the rest of the Act without affecting the other provisions of the Act in any way. The whole Act cannot, therefore, be held to be *ultra vires*.

Mr. Nambiar has further argued that section 3 of the Act also contravenes the provisions of Article 32 of the Constitution, for it makes satisfaction of the particular authorities final in matters of preventive detention and thereby prevents this court from satisfying itself as to the propriety of the detention order. This contention cannot succeed as no infraction of any fundamental right is involved in it. As has been pointed out already, this court cannot interfere unless it is proved that the power has been exercised by the authorities in a *mala fide* manner or that the grounds are not proper or relevant grounds which justify detention. The provisions are undoubtedly harsh, but as they do not take away the rights under Articles 21 and 22 of the Constitution, they cannot be held to be illegal or *ultra vires*.

The result, therefore, is that, in my opinion, the Preventive Detention Act must be declared to be *intra vires* the Constitution with the exception of section 14 which is held to be illegal and *ultra vires*. The present petition, however, must stand dismissed, though it may be open to the petitioner to make a fresh application if he so chooses and if the grounds that have been supplied to him under section 7 of the Act do furnish adequate reasons for making such application.

Das, J.—I am likewise of opinion that this application should be dismissed.

The contention of learned counsel appearing in support of this application is that the provisions of the Preventive Detention Act, 1950 (Act IV of 1950), are extremely drastic and wholly unreasonable and take away or, in any event, considerably abridge the fundamental rights conferred on the citizens by the provisions of Part III of the Constitution and that this Court should declare the Act wholly void under Article 13 (2) of the Constitution and set the petitioner at liberty.

It is necessary to bear in mind the scope and ambit of the powers of the Court under the Constitution. The powers of the Court are not the same under all Constitutions. In England Parliament is supreme and there is no limitation

upon its legislative powers. Therefore, a law duly made by Parliament cannot be challenged in any Court. The English Courts have to interpret and apply the law; they have no authority to declare such a law illegal or unconstitutional. By the American Constitution the legislative power of the Union is vested in the Congress and in a sense the Congress is the supreme legislative power. But the written Constitution of the United States is supreme above all the three limbs of Government and, therefore, the law made by the Congress, in order to be valid, must be in conformity with the provisions of the Constitution. If it is not, the Supreme Court will intervene and declare that law to be unconstitutional and void. As will be seen more fully hereafter, the Supreme Court of the United States, under the leadership of Chief Justice Marshall, assumed the power to declare any law unconstitutional on the ground of its not being in "due process of law", an expression to be found in the Fifth Amendment (1791) of the United States Constitution and the Fourteenth Amendment (1868) which related to the State Constitutions. It is thus that the Supreme Court established its own supremacy over the executive and the Congress. In India the position of the Judiciary is somewhere between the Courts in England and the United States. While in the main leaving our Parliament and the State Legislatures supreme in their respective Legislative fields, our Constitution has, by some of the Articles put upon the Legislatures certain specified limitations some of which will have to be discussed hereafter. The point to be noted, however, is that in so far as there is any limitation on the legislative power, the Court must, on a complaint being made to it, scrutinise and ascertain whether such limitation has been transgressed and if there has been any transgression the Court will courageously declare the law unconstitutional, for the Court is bound by its oath to uphold the Constitution. But outside the limitations imposed on the legislative powers our Parliament and the State Legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate Legislature. Our Constitution, unlike the English Constitution, recognises the Court's supremacy over the legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the Constitution itself. Within this restricted field the Court may, on a scrutiny of the law made by the Legislature, declare it void if it is found to have transgressed the constitutional limitations. But our Constituton, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Court in India to play the role of the Supreme Court of the United States. It is well for us to constantly remember this basic limitation on our own powers.

The impugned Act has been passed by Parliament after the Constitution came into force. Article 246 gives exclusive power to Parliament to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule and it gives exclusive power to the State Legislatures to make laws with respect to any of the matters specified in List II of that Schedule. It also gives concurrent power to Parliament as well as to the State Legislature to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule. Residuary powers of legislation are vested in Parliament under Article 248.

The first thing to note is that under entry 9 of List I the Parliament and under entry 3 in List III both Parliament and the State Legislatures are empowered to make laws for preventive detention for reasons connected with the several matters specified in the respective entries. This legislation is not conditioned upon the existence of any war with a foreign power or upon the proclamation of emergency under Part XVIII of the Constitution. Our Constitution has, therefore, accepted preventive detention as the subject-matter of peace time legislation as distinct from emergency legislation. It is a novel feature to provide for preventive detention

in the Constitution. There is no such provision in the Constitution of any other country that I know of. Be that as it may, for reasons good or bad, our Constitution has deliberately and plainly given power to Parliament and the State Legislatures to enact preventive detention laws even in peace time. To many of us a preventive detention law is odious at all times but what I desire to emphasise is that it is not for the Court to question the wisdom and policy of the Constitution which the people have given unto themselves. This is another basic fact which the Court must not overlook.

The next thing to bear in mind is that, if there were nothing else in the Constitution, the legislative powers of Parliament and the State Legislatures in their respective fields would have been absolute. In such circumstances the Court would have been entitled only to scrutinise whether Parliament or the State Legislature had, in making a particular law, overstepped its legislative field and encroached upon the legislative field of the other legislative power, but could not have otherwise questioned the validity of any law made by the Parliament or the State Legislatures. Thus under entry 9 of List I the Parliament and under entry 3 of List III the Parliament and the State Legislature could make as drastic a preventive detention law as it pleased. Such a law might have authorised a police man, not to speak of a District Magistrate or Sub-Divisional Magistrate or the Commissioner of Police, to take a man, citizen or non-citizen, into custody and keep him in detention for as long as he pleased. This law might not have made any provision for supplying to the detenu the grounds of his detention or affording any opportunity to him to make any representation to anybody or for setting up any Advisory Board at all. Likewise, under entries 1 and 2 in List III the Parliament or the State Legislature might have added as many new and novel offences as its fancy might have dictated and provided for any cruel penalty ranging from the maiming of the limbs to boiling to death in oil or repealed the whole of the Code of Criminal Procedure and provided for trial by battle or ordeal or for conviction by the verdict of a sorcerer or a soothsayer. Such law might have forbidden any speech criticising the Government, however mildly, or banned all public meetings or prohibited formation of all associations under penalty of law. Under entry 33 of List I the Parliament might have made a law for acquiring anybody's properties for the purposes of the Union without any compensation and under entry 36 in List III the State Legislature could do the same subject to the provisions of entry 42 in List III which empowers the making of a law laying down principles for payment of compensation which might be anything above nothing. Under entry 81 Parliament could have made any law restricting or even prohibiting inter-State migration so that a Bengali would not be able to move into and settle in Bihar or *vice versa*. It is needless to multiply instances of atrocious laws which Parliament or the State Legislature might have made under Article 246 read with the different lists if there were nothing else in the Constitution. Our Legislatures, subject to the limitation of distribution of legislative powers, would have been as supreme in their respective legislative fields as the English Parliament is and has been. The Court in India, in such event, would have had to take the law duly made, interpret it and apply it. It would not have been entitled to utter a word as to the propriety of the particular law, although it might have shuddered at the monstrous atrocities of such law.

Our Constitution, however, has not accepted this absolute supremacy of our Parliament or the State Legislature. Thus by Article 245 (1) the legislative power is definitely made " subject to the provisions of this Constitution ". Turning to the Constitution, Article 13 (2) provides as follows :—

" The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

This clearly puts a definite limitation on the wide legislative powers given by Article 246. It is certainly within the competency of the Court to judge and declare whether there has been any contravention of this limitation. In this respect again the Court has supremacy over the Legislature.

From the provisions so far referred to it clearly follows that there are two principal limitations to the legislative power of Parliament, namely,—

(i) that the law must be within the legislative competence of Parliament as prescribed by Article 246: and

(ii) that such law must be subject to the provisions of the Constitution and must not take away or abridge the rights conferred by Part III.

There can be no question—and, indeed, the learned Attorney-General does not contend otherwise—that both these matters are justiciable and it is open to the Courts to decide whether Parliament has transgressed either of the limitations upon its legislative power.

Learned counsel for the petitioner does not say that the impugned Act is *ultra vires* the legislative powers of Parliament as prescribed by Article 246. His contention is that the impugned Act is void because it takes away or abridges the fundamental rights of citizens conferred by Part III of the Constitution. It is, therefore, necessary to ascertain first the exact nature, extent and scope of the particular fundamental right insisted upon and then to see whether the impugned Act has taken away or, in any way, abridged the fundamental right so ascertained.

Civil rights of a person are generally divided into two classes, namely, the rights attached to the person (*jus personarum*) and the rights to things, *i.e.*, property (*jus rerum*). Of the rights attached to the person, the first and foremost is the freedom of life, which means the right to live, *i.e.*, the right that one's life shall not be taken away except under authority of law. Next to the freedom of life comes the freedom of the person, which means that one's body shall not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed except under authority of law. The truth of the matter is that the right to live and the freedom of the person are the primary rights attached to the person. If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can, within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his 'own inclination may direct', reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently rights attached to the person. It should be clearly borne in mind that these are not all the rights attached to the person. Besides them there are varieties of other rights which are also the attributes of the freedom of the person. All rights attached to the person are usually called personal liberties and they are too numerous to be enumerated. Some of these auxiliary rights are so important and fundamental that they are regarded and valued as separate and independent rights apart from the freedom of the person.

Personal liberties may be compendiously summed up as the right to do as one pleases within the law. I say within the law because liberty is not unbridled licence. It is what Edmund Burke called 'regulated freedom'. Said Montesquieu in Book III, Ch. 3, of his Spirit of the Laws:

"In Governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power".

To the same effect are the following observations of Webster in his Works Vol. II, p. 393;

"Liberty is the creation of law, essentially different from that authorised licentiousness that trespasses on right. It is a legal and refined idea, the offspring of high civilization, which the savage never understands, and never can understand. Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose that liberty consists in a paucity of laws . . . . . . The working of our complex system, full of checks and restraints on legislative, executive and judicial power is favourable to liberty and justice. These checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury".

Therefore, putting restraint on the freedom of wrongdoing of one person is really securing the liberty of the intended victims. To curb the freedom of the saboteur of surreptitiously removing the fish plates from the Railway lines is to ensure the safety and liberty of movement of the numerous innocent and unsuspecting passengers. Therefore, restraints on liberty should be judged not only subjectively as applied to a free individuals who come within their operations but also objectively as securing the liberty of a far greater number of individuals. Social interest in individual liberty may well have to be subordinated to other greater social interests. If a law ensures and protects the greater social interests then such law will be a wholesome and beneficent law although it may infringe the liberty of some individuals, for it will enure for the greater liberty of the rest of the members of the society. At the same time, our liberty has also to be guarded against executive, legislative as well as judicial usurpation of powers and prerogatives. Subject to certain restraints on individuals and reasonable checks on the State every person has a variety of personal liberties too numerous to be catalogued. As will be seen more fully hereafter, our Constitution has recognised personal liberties as fundamental rights. It has guaranteed some of them under Article 19 (1) but put restraints on them by clauses (2) to (6). It has put checks on the State's legislative powers by Articles 21 and 22. It has by providing for preventive detention, recognised that individual liberty may be subordinated to the larger social interests.

Turning now to the Constitution I find that Part III is headed and deals with "Fundamental Rights" under seven heads, besides, "General" provisions (Articles 12 and 13), namely "Right to Equality" (Articles 14 to 18), "Right to Freedom" (Articles 19 to 22), "Right against Exploitation" (Articles 23 and 24), "Right to Freedom of Religion" (Articles 25 to 28), "Cultural and Educational Rights" (Articles 29 and 30), "Right to Property" (Article 31), "Right to Constitutional Remedies." (Articles 32 to 35). Under the heading "Right to Freedom" are grouped four Articles 19 to 22. Article 19 (1) is in the following terms :—

> "(1) All citizens shall have the right—
> (a) to freedom of speech and expression ;
> (b) to assemble peaceably and without arms ;
> (c) to form associations or unions ;
> (d) to move freely throughout the territory of India ;
> (e) to reside and settle in any part of the territory of India ;
> (f) to acquire, hold and dispose of property ; and
> (g) to practise any profession, or to carry on any occupation, trade or business."

It will be noticed that of the seven rights protected by clause (1) of Article 19, six of them, namely, (a), (b), (c), (d), (e) and (g) are what are said to be rights attached to the person (*jus personarum*). The remaining item, namely, (f) is the right to property (*jus rerum*). If there were nothing else in Article 19 these rights would have been absolute rights and the protection given to them would have completely debarred Parliament or any of the State Legislatures from making any law taking away or abridging any of those rights. But a perusal of Article 19 makes it abundantly clear that none of the seven rights enumerated in clause (1), is an absolute right, for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in the several clauses (2) to (6) of that Article. Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights. The nett result is that the unlimited legislative power given by Article 246 read with the different legislative lists in the Seventh Schedule is cut down by the provisions of Article 19 and all laws made by the State with respect to these rights must, in order to be valid, observe these limitations. Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by clauses (2) to (6) whichever is applicable the Court will declare the same to be unconstitutional and, therefore,

void under Article 13. Here again there is scope for the application of the 'intellectual yardstick' of the Court. If, however, the Court finds, on scrutiny, that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not.

The first part of the argument is put broadly, namely, that personal liberty is generally guaranteed by the Constitution by Article 19 (1) and that the Preventive Detention Act, 1950, has imposed unreasonable restrictions thereon in violation of the provisions of clauses (2) to (6) of that Article. The very first question that arises, therefore, is as to whether the freedom of the person which is primarily and directly suspended or destroyed by preventive detention is at all governed by Article 19 (1). If personal liberty as such is guaranteed by any of the sub-clauses of Article 19 (1) then why has it also been protected by Article 21? The answer suggested by learned counsel for the petitioner is that personal liberty as a substantive right is protected by Article 19 (1) and Article 21 gives only an additional protection by prescribing the procedure according to which that right may be taken away. I am unable to accept this contention. If this argument were correct, then it would follow that our Constitution does not guarantee to any person, citizen, or non-citizen, the freedom of his life as a substantive right at all, for the substantive right to life does not fall within any of the sub-clauses of clause (1) of Article 19. It is retorted in reply that no constitution or human laws can guarantee life which is the gift of God who alone can guarantee and protect it. On a parity of reasoning no constitution of human laws can in that sense guarantee freedom of speech or free movement, for one may be struck dumb by disease or may lose the use of his legs by paralysis or as a result of amputation. Further, what has been called the procedural protection of Article 21 would be an act of supererogation, for when God takes away one's life, whatever opportunity He may have had given to Adam to explain his conduct before sending him down, He is not likely in these degenerate days to observe the requirements of notice or fair trial before any human tribunal said to be required by Article 21. The Fifth Amendment and the Fourteenth Amendment of the American Constitution give specific protection to life as a substantive right. So does Article 31 of the Japanese Constitution of 1946. There is no reason why our Constitution should not do the same. The truth is that Article 21 has given that protection to life as a substantive right and that, as will be seen hereafter, that Article properly understood does not purport to prescribe any particular procedure at all. The further astounding result of the argument of counsel for the petitioner will be that the citizen of India will have only the rights enumerated in Article 19, clause (1) and no other right attached to his person. As I have already stated, besides the several rights mentioned in the several sub-clauses of Article 19 (1) there are many other personal liberties which a free man, *i.e.*, a man who has the freedom of his person, may exercise. Some of those other rights have been referred to by Harries, C.J., of Calcutta in his unreported judgment in Miscellaneous Case No. 166 of 1950 (*Kshitindra* v. *The Chief Secretary of West Bengal*) while referring the case to a Full Bench in the following words :—

> "It must be remembered that a free man has far more and wider rights than those stated in Article 19 (1) of the Constitution. For example, a free man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundred and one things which are not included in Article 19. If freedom of person was the result of Article 19, then a free man would only have the seven rights mentioned in that Article. But obviously the free man in India has far greater rights".

I find myself in complete agreement with the learned Chief Justice on this point. If it were otherwise, the citizen's right to eat what he likes will be liable to be taken away by the executive fiat of the Civil Supply Department without the necessity of any rationing laws. The Government may enforce prohibition without any prohibition laws or licensing laws and so on. I cannot accept that our Constitution intended to give no protection to the bundle of rights which, together with the rights mentioned in sub-clauses (*a*) to (*e*) and (*g*) make up personal liberty. Indeed, I regard it as a merit of our Constitution that it does not attempt to

enumerate exhaustively all the personal rights but uses the compendious expression "personal liberty" in Article 21, and protects all of them.

It is pointed out that in the original draft the word "liberty" only was used as in the American Constitution but the Drafting Committee added the word "personal" to make it clear that what was being protected by what is now Article 21 was not what had already been protected by what is now Article 19. If it were permissible to refer to the Drafting Committee's report, it would be another answer to the contentions of learned counsel for the petitioner that personal liberty as a substantive right was protected by Article 19. I do not, however, desire to base my judgment on the Drafting Committee's Report and I express no opinion as to its admissibility. Whatever the intentions of the Drafting Committee might have been, the Constitution as finally passed has in Article 21 used the words "personal liberty" which have a definite connotation in law as I have explained. It does not mean only liberty of the person but it means liberty or the rights attached to the person (*jus personarum*). The expressions "freedom of life" or "personal liberty" are not to be found in Article 19 and it is straining the language of Article 19 to squeeze in personal liberty into that article. In any case the right to life cannot be read into Article 19.

Article 19 being confined, in its operation, to citizens only, a non-citizen will have no protection for his life and personal liberty except what has been called the procedural protection of Article 21. If there be no substantive right what will the procedure protect? I recognise that it is not imperative that a foreigner should have the same privileges as are given to a citizen, but if Article 21 is construed in the way I have suggested even a foreigner will have equal protection for his life and personal liberty before the laws of our country under our Constitution. I am unable, therefore, for all the reasons given above, to agree that personal liberties are the result of Article 19 or that that Article purports to protect all of them.

It is next urged that the expression 'personal liberty' is synonymous with the right to move freely and, therefore, comes directly under Article 19 (1) (*d*). Reference is made to the unreported dissenting judgment of Sen, J., of Calcutta in Miscellaneous Case No. 166 of 1950 while referring that case to a Full Bench. In his judgment Sen, J., quoted the following passage from Blackstone's Commentaries :—

"Next to personal security the law of England regards, asserts and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." (Page 73 of George Chase's Edition (4th Edition) of of Blackstone Book I, Chaper I.)

On the authority of the above passage the learned judge concluded that personal liberty came within Article 19 (1) (*d*). I am unable to agree with the learned Judge's conclusion. On a perusal of Chapter I of Book I of Blackstone's Commentaries it will appear that the learned commentator divided the rights attached to the person (*jus personarum*) into two classes, namely, 'personal security' and 'personal liberty'. Under the head 'personal security' Blackstone included several rights, namely, the rights to life, limb, body, health and reputation, and under the head 'personal liberty' he placed only the right of free movement. He first dealt with the several rights classified by him under the head 'personal security' and then proceeded to say that next to those rights came personal liberty which according to his classification consisted only in the right of free locomotion. There is no reason to suppose that in Article 21 of our Constitution the expression 'personal liberty' has been used in the restricted sense in which Blackstone used it in his Commentaries. If 'personal liberty' in Article 21 were synonymous with the right to move freely which is mentioned in Article 19 (1) (*d*), then the astounding result will be that only that last mentioned right has what has been called the procedural protection of Article 21 but none of the other rights in the other sub-classes of Article 19 (1) has any procedural protection at all. According

to learned counsel for the petitioner the procedure required by Article 21 consists of notice and a right of hearing before an impartial tribunal. Therefore, according to him, a man's right of movement cannot be taken away without giving him notice and a fair trial before an impartial tribunal but he may be deprived of his freedom of speech or his property or any of his other rights without the formality of any procedure at all. The proposition has only to be stated to be rejected. In my judgment, Article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Article 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men.

Learned counsel for the petitioner next contends that personal liberty undoubtedly means or includes the freedom of the person and the pith and substance of the freedom of the person is the right to move about freely and consequently a preventive detention law which destroys or suspends the freedom of the person must inevitably destroy or suspend the right of free movement and must necessarily offend against the protection given to the citizen by Article 19 (1) (*d*) unless it satisfies the test of reasonableness laid down in clause (5). The argument is attractive and requires serious consideration as to the exact purpose and scope of sub-clause (*d*) of Article 19 (1).

There are indications in the very language of Article 19 (1) (*d*) itself that its purpose is to protect not the general right of free movement which emanates from the freedom of the person but only a specific and limited aspect of it, namely, the special right of a free citizen of India to move freely throughout the Indian territorry, *i.e.*, from one State to another within the Union. In other words, it guarantees, for example, that a free Indian citizen ordinarily residing in the State of West Bengal will be free to move from West Bengal to Bihar or to reside and settle in Madras or the Punjab without any let or hindrance other than as provided in clause (5). It is this special right of movement of the Indian citizen in this specific sense and for this particular purpose which is protected by Article 19 (1) (*d*). It is argued on the authority of a decision of a Special Bench of the Calcutta High Court presided over by Sen, J., in *Sunil Kumar* v. *The Chief Secretary of West Bengal*[1], that the words "throughout the territory of India" occurring in that sub-clause only indicate that our Constitution does not guarantee to its citizens the right of free movement in or into foreign territory and that those words have been added to save passport restrictions. I am unable to accept this interpretation. Our Constitution cannot possibly give to any of its citizens any right of free movement in a foreign country and it was wholly superfluous to specifically indicate this in the Constitution, for that would have gone without saying. The words "throughout the territory of India" are not used in connection with most of the other sub-clauses of clause (1) of Article 19. Does such omission indicate that our Constitution guarantees to its citizens freedom of speech and expression, say, in Pakistan? Does it guarantee to its citizens a right to assemble or to form associations or unions in a foreign territory? Clearly not. Therefore, it was not necessary to use those words in sub-clause (*d*) to indicate that free movement in foreign countries was not being guaranteed. It is said that by the use of those words the Constitution makes it clear that no guarantee was being given to any citizen with regard to emigration from India without a passport and that the freedom of movement was restricted within the territory of India. Does the omission of those words from Article 19 (1) (*a*) indicate that the citizen of India has been guaranteed such freedom of speech and expression as will enable him to set up a broadcasting station and broadcast his views and expressions to foreign lands without a licence? Clearly not. Dropping this line of argument and adopting a totally new line of argument it is said that by the use of the words "throughout the territory of India" the Constitution indicates that the widest right of free movement that it could possibly give to its citizens has been given. Does, then, the omission of those words from the other sub-clauses

1. (1950) 54 C.W.N. 394.

indicate that the Constitution has kept back some parts of those rights even beyond the limits of the qualifying clauses that follow? Do not those other rights prevail throughout the Indian territory? Clearly they do, even without those words. Therefore, those words must have been used in sub-clause (*d*) for some other purpose. That other purpose, as far as I can apprehend it, is to indicate that free movement from one State to another within the Union is protected so that Parliament may not by a law made under entry 81 in List I curtail it beyond the limits prescribed by clause (5) of Article 19. Its purpose, as I read it, is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India regarded as an independent additional right apart from the general right of locomotion emanating from the freedom of the person. It is a guarantee against unfair discrimination in the matter of free movement of the Indian Citizen throughout the Indian Union. In short, it is a protection against provincialism. It has nothing to do with the freedom of the person as such. That is guaranteed to every person, citizen or otherwise, in the manner and to the extent formulated by Article 21.

Clause (5) of Article 19 qualifies sub-clause (*d*) of clause (1) which should, therefore, be read in the light of clause (5). The last mentioned clause permits the State to impose reasonable restrictions on the exercise of the right of free movement throughout the territory of India as explained above. Imposition of reasonable restrictions clearly implies that the right of free movement is not entirely destroyed but that parts of the right remain. This reasonable restriction can be imposed either in the interests of the general public or for the protection of the interests of any scheduled tribe. The scheduled tribes usually reside in what are called the scheduled areas. The provision for imposing restriction on the citizens' right of free movement in the interests of the scheduled tribes clearly indicates that the restriction is really on his right of free movement into or within the scheduled area. It means that if it be found necessary for the protection of the scheduled tribes the citizens may be restrained from entering into or moving about in the scheduled areas, although they are left quite free to move about elsewhere. This restraint may well be necessary for the protection of the members of the scheduled tribes who are generally impecunious and constitute a backward class. They may need protection against money-lenders or others who may be out to exploit them. They may have to be protected against their own impecunious habits which may result in their selling or mortgaging their hearths and homes. Likewise, the free movement of citizens may have to be restricted in the interest of the general public. A person suffering from an infectious disease may be prevented from moving about and spreading the disease and regulations for his segregation in the nature of quarantine may have to be introduced. Likewise, healthy people may be prevented, in the interests of the general public, from entering a plague-infected area. There may be protected places, *e.g.*, forts or other strategic places, access whereto may have to be regulated or even prohibited in the interests of the general public. The point to be noted, however, is that when free movement is thus restricted, whether in the interests of the general public or for the protection of the scheduled tribes, such restriction has reference generally to a certain local area which becomes the prohibited area but the right of free movement in all other areas in the Union is left unimpaired. The circumstance that clause (5) contemplates only the taking away of a specified area and thereby restricting the field of the exercise of the right conferred by sub-clause (*d*) of clause (1) indicates to my mind that sub-clause (*d*) is concerned, not with the freedom of the person or the general right of free movement but with a specific aspect of it regarded as an independent right apart from the freedom of the person. In other words, in sub-clause (*d*) the real emphasis is on the words "throughout the territory of India." The purpose of Article 19 (1) (*d*) is to guarantee that there shall be no State barrier. It gives protection against provincialism. It has nothing to do with the freedom of the person as such.

Finally, the ambit and scope of the rights protected by Article 19 (1) have to be considered. Does it protect the right of free movement and the other personal

rights therein mentioned in all circumstances irrespective of any other consideration? Does it not postulate a capacity to exercise the rights? Does its protection continue even though the citizen lawfully loses his capacity for exercising those rights? How can the continuance of those personal rights be compatible with the lawful detention of the person? These personal rights and lawful detention cannot go together. Take the case of a person who has been properly convicted of an offence punishable under a section of the Indian Penal Code as to the reasonableness of which there is no dispute. His right to freedom of speech is certainly impaired. Under clause (2) the State may make a law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Any law on any of these matters contemplated by this clause certainly must have some direct reference to speech and expression. It means that the law may directly curtail the freedom of speech so that the citizen may not talk libel or speak contemptuously of the Court or express indecent or immoral sentiments by speech or other forms of expression or utter seditious words. To say that every crime undermines the security of the State and, therefore, every section of the Indian Penal Code, irrespective of whether it has any reference to speech or expression, is a law within the meaning of this clause is wholly unconvincing and betrays only a vain and forlorn attempt to find an explanation for meeting the argument that any conviction by a Court of law must necessarily infringe Article 19 (1) (*a*). There can be no getting away from the fact that a detention as a result of a conviction impairs the freedom of speech far beyond what is permissible under clause (2) of Article 19. Likewise a detention on lawful conviction impairs each of the other personal rights mentioned in sub-clauses (*b*) to (*e*) and (*g*) far beyond the limits of clauses (3) to (6). The argument that every section of the Indian Penal Code irrespective of whether it has any reference to any of the rights referred to in sub-clauses (*b*) to (*e*) and (*g*) is a law imposing reasonable restriction on those several rights has not even the merit of plausibility. There can be no doubt that a detention as a result of lawful conviction must necessarily impair the fundamental personal rights guaranteed by Article 19 (1) far beyond what is permissible under clauses (2) to (6) of that Article and yet nobody can think of questioning the validity of the detention or of the section of the Indian Penal Code under which the sentence was passed. Why? Because the freedom of his person having been lawfully taken away, the convict ceases to be entitled to exercise the freedom of speech and expression or any of the other personal rights protected by clause (1) of Article 19. On a parity of reasoning he cannot, while the detention lasts, exercise any other personal right, *e.g.*, he cannot eat what he likes or when he likes but has to eat what the Jail Code provides for him and at the time when he is by Jail regulation required to eat. Therefore, the conclusion is irresistible that the rights protected by Article 19 (1), in so far as they relate to rights attached to the person, *i.e.*, the rights referred to in sub-clauses (*a*) to (*e*) and (*g*), are rights which only a free citizen, who has the freedom of his person unimpaired, can exercise. It is pointed out, as a counter to the above reasonings, that detention as a result of a lawful conviction does not deprive a person of his right to acquire or hold or dispose of his property mentioned in sub-clause (*f*). The answer is simple, namely, that that right is not a right attached to the person (*jus personarum*) and its existence is not dependent on the freedom of the person. Loss of freedom of the person, therefore, does not suspend the right to property. But suppose a person loses his property by reason of its having been compulsorily acquired under Article 31 he loses his right to hold that property and cannot complain that his fundamental right under sub-clause (*f*) of clause (1) of Article 19 has been infringed. It follows that the rights enumerated in Article 19 (1) subsist while the citizen has the legal capacity to exercise them. If his capacity to exercise them is gone, by reason of a lawful conviction with respect to the rights in sub-clauses (*a*) to (*e*) and (*g*), or by reason of a lawful compulsory acquisition with respect to the right in sub-clause (*f*), he ceases to have those rights while his incapacity lasts. It further follows that if a citizen's freedom of the person is lawfully taken away otherwise

than as a result of a lawful conviction for an offence, that citizen, for precisely the same reason, cannot exercise any of the rights attached to his person including those enumerated in sub-clauses (*a*) to (*e*) and (*g*) of Article 19 (1). In my judgment a lawful detention, whether punitive or preventive, does not offend against the protection conferred by Article 19 (1) (*a*) to (*e*) and (*g*), for those rights must necessarily cease when the freedom of the person is lawfully taken away. In short, those rights end where the lawful detention begins. So construed, Article 19 and Article 21 may, therefore, easily go together and there is, in reality, no conflict between them. It follows therefore, that the validity or otherwise of preventive detention does not depend on and is not dealt with by Article 19.

To summarise, the freedom of the person is not the result of Article 19. Article 19 only deals with certain particular rights which, in their origin and inception, are attributes of the freedom of the person but being of great importance are regarded as specific and independent rights. It does not deal with the freedom of the person as such. Article 19 (1) (*d*) protects a specific aspect of the right of free locomotion, namely, the right to move freely throughout the territory of India which is regarded as a special privilege or right of an Indian citizen and is protected as such. The protection of Article 19 is co-terminous with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (*a*) to (*e*) and (*g*) of Article 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses. A citizen who loses the freedom of his person by being lawfully detained, whether as a result of a conviction for an offence or as a result of preventive detention loses his capacity to exercise those rights and, therefore, has none of the rights which sub-clauses (*a*) to (*e*) and (*g*) may protect. In my judgment Article 19 has no bearing on the question of the validity or otherwise of preventive detention and that being so, clause (5) which prescribes a test of reasonableness to be defined and applied by the Court has no application at all.

Article 19 being thus out of the way I come to Article 20 which is concerned with providing protection against what are well known as *ex post facto* laws, double jeopardy and self-incrimination. This Article constitutes a limitation on the absolute legislative power which would, but for this Article, be exercisable by Parliament or the State Legislatures under Article 246 read with the legislative lists. If the Legislature disobeys this limitation the Court will certainly prevent it. Article 20 has no bearing on preventive detention laws and I pass on.

Article 21 runs thus:

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

The contention of learned counsel for the petitioner is that by this Article the Constitution offers to every person, citizen, or non-citizen, only a procedural protection. According to the argument, this Article does not purport to give any protection to life or personal liberty as a substantive right but only prescribes a procedure that must be followed before a person may be deprived of his life or personal liberty. I am unable to accept this contention. Article 21, as the marginal note states, guarantees to every person "protection of life and personal liberty". As I read it, it defines the substantive fundamental right to which protection is given and does not purport to prescribe any particular procedure at all. That a person shall not be deprived of his life or personal liberty except according to procedure established by law is the substantive fundamental right to which a protection is given by the Constitution. The avowed object of the Article, as I apprehend it, is to define the ambit of the right to life and personal liberty which is to be protected as a fundamental right. The right to life and personal liberty protected by Article 21 is not an absolute right but is a qualified right—a right circumscribed by the possibility or risk of being lost according to procedure established by law. Liability to deprivation according to procedure established by law is in the nature of words of limitation. The article delimits the right by a

reference to its liability to deprivation according to procedure established by law and by this very definition throws a corresponding obligation on the State to follow a procedure before depriving a man of his life and personal liberty. What that procedure is to be is not within the purpose or purview of this Article to prescribe or indicate.

The claim of learned counsel for the petitioner is that Article 21 prescribes a procedure. This procedure, according to learned counsel, means those fundamental immutable rules of procedure which are sanctioned or well established by principles of natural justice accepted in all climes and countries and at all times. Apart from the question whether any rule of natural procedure exists which conforms to the notions of justice and fair play of all mankind at all times, it has to be ascertained whether the language of Article 21 will permit its introduction into our Constitution. The question then arises as to what is the meaning of the expression "procedure established by law". The word 'procedure' in Article 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. According to the language used in the Article, this procedure has to be "established by law". The word "established" according to the Oxford English Dictionary, Vol. III, p. 297, means, amongst other things, "to render stable or firm"; to strengthen by material support; to fix, settle, institute or ordain permanently by enactment or agreement". According to Dr. Annandale's edition of the New Gresham Dictionary the word "establish" means amongst other things, "to found permanently; to institute; to enact or decree; to ordain; to ratify; to make firm". It follows that the word "established" in its ordinary natural sense means, amongst other things, "enacted". "Established by law" will, therefore, mean "enacted by law". If this sense of the word "established" is accepted then the word "law" must mean State-made law and cannot possibly mean the principles of natural justice, for no procedure can be said to have ever been "enacted" by those principles. When section 124-A of the Indian Penal Code speaks of "Government established by law", surely it does not mean "Government set up by natural justice". Therefore, procedure established by law must, I apprehend, be procedure enacted by the States which, by its definition in Article 12, includes Parliament. There is no escape from this position if the cardinal rule of construction, namely, to give the words used in a statute their ordinary natural meaning, is applied. And this construction introduces no novelty or innovation, for at the date of the Constitution the law of procedure in this country, both civil and criminal, was mainly if not wholly, the creature of statute. The Hindu or Muhammadan laws of procedure were abrogated and replaced by the Code of Civil Procedure or the Code of Criminal Procedure. Therefore, procedure established by law is quite compatible with procedure enacted by law. If, however, the word "established" is taken to mean "sanctioned" or "settled" or "made firm" then the question will arise as to the meaning of the word "law" in that context. Reference is made to Salmond's Jurisprudence, 10th Edition, p. 37, showing that the term "law" is used in two senses and it is suggested that the word "law" in the expression "established by law" means law in its abstract sense of the principles of natural justice. It is "jus" and not "lex", says learned counsel for the petitioner. It is pointed out that both the English and the Indian Law in many cases, some of which have been cited before us, have recognised and applied the principles of natural justice and that this Court should do the same in interpreting the provisions of our Constitution. I find it difficult to let in principles of natural justice as being within the meaning of the word "law", having regard to the obvious meaning of that word in the other Articles. Article 14 certainly embodies a principle of natural justice which ensures to every person equality before the law. When natural justice speaks of and enjoins equality before the law, that law must refer to something outside natural justice, and must mean the State-made laws. It is only when the State law gives equality to every person that that law is said to be in accordance with natural justice. There can be no doubt that the words 'in accordance with law" in Article 17 have reference to State law. Likewise,

the word "law" in Article 20 (1) can mean nothing but law made by the State. The same remark applies to the words "in accordance with law" in Articles 23, 31 and 31. Natural justice does not impose any tax and, therefore, the word "law" in Articles 265 and 286 must mean State-made law. If this be the correct meaning of the word "law" then there is no scope for introducing the principles of natural justice in Article 21 and "procedure established by law" must mean procedure established by law made by the State which, as defined, includes Parliament and the Legislatures of the States.

We have been referred to a number of text books and decisions showing the development of the American doctrine of "due process of law" and we have been urged to adopt those principles in our Constitution. The matter has to be considered against its historical background. The English settlers in different parts of America had carried with them the English common law as a sort of personal law regulating their rights and liberties *inter se* as well as between them and the State. After the War of Independence the Constitutions of the United States were drawn up in writing. The majority of those who framed the Constitution were lawyers and had closely studied the Commentaries of the great English jurist Blackstone, who in his famous commentaries had advocated the separation of the three limbs of the State, namely, the executive, legislature and the judiciary. Montesquieu's Spirit of Laws had already been published wherein he gave a broader and more emphatic expression to the Aristotelian doctrine of separation of powers. The experience of the repressive laws of Parliament had impressed upon the framers of the American Constitution the belief that it was the habit of all legislative bodies to grasp and exercise powers that did not belong to them. The interference of the colonial governors with legislation and the judiciary was also real. This sad experience coupled with the political philosophy of the time induced the framers of the American Constitutions to adopt safeguards not only against the executive but also against the Legislature. (*See* Munro on the Government of the United States, 5th Edition, Chapter IV, p. 53, *et seq.*) Says Judge Cooley in his Constitutional Limitations, 6th Edition, Vol. II, Chapter XI, p. 755:

"The people of the American States, holding the sovereignty in their own hands, have no occasion to exact any pledges from any one for a due observation of individual rights; but the aggressive tendency of power is such that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guarantee, and thereby adopt it as a principle of constitutional protection."

There can be little doubt that the people of the different States in America intended not to take any risk as to their life, liberty or property even from the Legislature. As Munro puts it at pp. 58-61 :—

"The framers of the Constitution set boundaries to the powers of the Congress, and it was their intent that these limitations should be observed. But how was such observance to be enforced by the Courts? The statesmen of 1767 did not categorically answer that question."

The Constitution was silent and there was no express provision as to who was to serve as umpire in case the Congress overstepped the limits of its legislative powers. By the 5th Amendment what is now known as the "due process clause" was introduced in the Federal Constitution and by the 14th Amendment a similar clause was adopted in the State Constitutions. Some of the State Constitutions used the words "due course of law", some repeated the words of Magna Charta namely, "the law of the land" but most of them used the expression "due process of law". All the expressions meant the same thing, namely, that no person should be deprived of his life, liberty or property except in due process of law. The Constitution by this clause gave the Supreme Court an opportunity to take upon itself the function of declaring the national laws unconstitutional. And the Supreme Court, under the leadership of Chief Justice John Marshall, seized this opportunity and assumed the right to say the last word on questions of constitutionality and possesses that right to-day. (Munro, p. 62).

The expression "due process of law" has been interpreted by the American Courts in different ways at different times. Carl Brent Swisher in his book on

the Growth of Constitutional Power in the United States at p. 107 says, with reference to the development of the doctrine of due procedure :

"The American history of its interpretation falls into three periods. During the first period covering roughly the first century of Government under the Constitution "due process" was interpreted "principally as a restriction upon procedure—and largely the judicial procedure—by which the Government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, "due process" was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the Government might engage'. During the third period extending from 1936 to date, the use of "due process" as a substantive restriction has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure."

In the guise of interpreting "due process of law" the American Courts went much further than even Lord Coke ever thought of doing. The American Courts gradually arrogated to themselves the power to revise all legislation. In the beginning they confined themselves to insisting on a due procedure to be followed before a person was deprived of his life, liberty or property. In course of time, "due process of law" came to be applied to personal liberty, to social control, to procedure, to jurisdiction and to substantive law. (Willis, p. 642). In the words of Munro "due process of law" became a sort of palladium covering all manner of individual rights. All the while the Supreme Court refused to define the phrase, but used it to enable it to declare unconstitutional any Act of legislation which it thought unreasonable. (Willis, p. 657). In *Holden* v. *Hardy*[1], we find the following observations :

"This Court has never attempted to define with precision the words "due process of law" . . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

In *Taylor* v. *Peter*[2] Bronson, J., observed :

"The words 'by the law of the land' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses : 'You shall be vested with the legislative power of the State, but no one shall be disenfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words you shall not do the wrong unless you choose to do it."

It was thus that the Supreme Court of the United States firmly established its own supremacy over the other two limbs of the State, namely, the executive and the Congress. In the words of John Dickinson quoted in Munro at p. 61, "The Judges of Aragon began by setting aside laws and ended by making them." And all this sweeping development could only be possible because of the presence of one little word "due" which, in its content, knows no bound and is not subject to any fixed definition. Whenever a substantive law or some procedure laid down in any law did not find favour with the majority of the learned Judges of the Supreme Court it was not reasonable and, therefore, it was not 'due'.

The very large and nebulous import of the word "due" was bound to result in anomalies, for what was not "due" on one day according to the Judges then constituting the Supreme Court became "due" say 20 years later according to the new Judges who then came to occupy the Bench, for the Court had to adapt the Constitution to the needs of the society which were continually changing and growing. The larger content of due process of law, which included both procedural and substantive due process of law, had of necessity to be narrowed down, for social interest in personal liberty had to give way to social interest in other matters which came to be considered to be of more vital interest to the community. This was achieved by the Supreme Court of the United States evolving the new doctrine of police powers—a peculiarly American doctrine. The police powers are nowhere exhaustively defined. In *Chicago B. & Q. Ry.* v. *Drainage Commissioner*[3], 'police power' has been stated to "embrace regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." Reference in this

1. 169 U.S. 366 at p. 389.
2. 4 Hill 140, 145.
3. 204 U.S. 561, 592.

connection may be made to Cooley's Constitutional Limitations, 8th Edition, Vol. II, p. 1223 and to Chapter XXVI of Willis at p. 727.

The nett result is that the all inclusive and indefinable doctrine of due process of law has in America now been brought back to its original status of a procedural due process of law by the enunciation and application of the new doctrine of police power as an antidote or palliative to the former. Who knows when the pendulum will swing again.

Turning now to what has been called the procedural due process of law it will be found that the matter has been described in different language in different cases. In *Westervelt* v. *Gregg*[1], Edwards, J., defined it thus :

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."

A more specific definition of the expression "the law of the land" meaning procedural due process was given by Webster appearing as counsel for the plaintiff in error in the *Trustees of Dartmouth College* v. *Woodward*[2] :

"By the law of the land is most clearly intended the general laws ; a law which hears before it condemns ; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

Willis in Ch. XXIII, p. 661, says :

"The guarantee of due process of law as a matter of procedure means that no part of a person's personal liberty, including ownership, shall be taken away from him except by the observance of certain formalities. Hence its object is the protection of the social interest in personal liberty."

At p. 662 Willis enumerates the requirements of the procedural due process of law as follows : (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) an orderly course of procedure. In short, the procedural due process requires that a person who is to be deprived of his life, liberty or property shall have had "his day in Court". This, according to Willoughby, p. 736, means :

"(1) that he shall have had due notice, which may be actual or constructive, of the institution of the proceedings by which his legal rights may be affected ; (2) that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence, (3) that the tribunal in or before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality; and (4) that it is a Court of competent jurisdiction."

It will ne noticed that the fourth item of Willoughby is different from the fourth item of Willis. Such, in short, are the history of the development of the doctrine of the process of law in the United States and the requirements of the procedural due process as insisted on by the Supreme Court of that country.

Learned counsel for the petitioner before us does not contend that we should import this American doctrine of due process of law in its full glory but that we should adopt the procedural part of it and insist that no person shall be deprived of his life or personal liberty except by the observance of the formalities which justice and fair play require to be observed. The arguments of learned counsel for the petitioner are attractive and in the first blush certainly appeal to our sentiment but on serious reflection I find several insuperable objections to the introduction of the American doctrine of procedural due process of law into our Constitution. That doctrine can only thrive and work where the Legislature is subordinate to the judiciary in the sense that the latter can sit in judgment over and review all acts of the Legislature. Such a doctrine can have no application to a field where the Legislature is supreme. That is why the doctrine of "due process of of law" is quite different in England where Parliament is supreme. This difference is pointedly described by Mathews, J., in *Joseph Hurtado* v. *People California* :[3]

"The concessions of Magna Charta were wrung from the King as guarantees against oppression and usurpation of his prerogatives. It did not enter into the minds of the barons to provide security

1. 12 N.Y. 202. at p. 645.
2. 4 Wheaton 518 at p. 570 : 4 L. Edn., 629
3. (1883) 110 U.S. 516 (531).

against their own body or in favour of the commons by limiting the power of Parliament, so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land, for, notwithstanding what was attributed to Lord Coke in *Bonham's case*[1], the omnipotence of Parliament over the Common Law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments and the provisions of Magna Charta were incorporated in the bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

This basic distinction between the two systems should never be lost sight of, if confusion of thought is to be avoided. Although our Constitution has imposed some limitations on the legislative authorities, yet subject to and outside such limitations our Constitution has left our Parliament and the State Legislatures supreme in their respective legislative fields. In the main, subject to the limitations I have mentioned, our Constitution has preferred the supremacy of the Legislature to that of the Judiciary. The English principle of due process of law is, therefore, more in accord with our Constitution than the American doctrine which has been evolved for serving quite a different system. The picturesque language of Bronson, J., quoted above, while that is quite appropriate to the American Constitution which does not recognise the supremacy of the Congress, is wholly out of place in and has no application to a constitution such as ours, which, subject only to certain restrictions, recognises the supremacy of the Legislatures in their respective fields. In the next place, it is common knowledge that our Constitution makers deliberately declined to adopt the uncertain and shifting American doctrine of due process of law and substituted the words "except in due process of law" that were in the original draft by the more specific expression "except in accordance with procedure established by law". To try to bring in the American doctrine, in spite of this fact, will be to stultify the intention of the Constitution as expressed in Article 21. In the third place, in view of the plain meaning of the language of that Article as construed and explained above it is impossible to let in what have been called the principles of natural justice as adpoted in the procedural due process of law by the American Supreme Court. Again, even the all-pervading little word "due" does not find a place in Article 21 so as to qualify the procedure. It speaks of procedure and not "due" procedure and, therefore, "the intellectural yard-stick" of the Court is definitely ruled out. Finally, it will be incongruous to import the doctrine of due process of law without its palliative, the doctrine of police powers. It is impossible to read the last mentioned doctrine into Article 21.

It has also been suggested as a compromise that this Court should adopt a middle course between the flexible principles of natural justice as adopted by the American doctrine of due process of law and the unbending rigidity of mere State-made laws. It is said that we have our Code of Criminal Procedure which embodies within its provisions certain salutary principles of procedure and we must insist that those underlying principles should be regarded as procedure established or settled by our positive law. But who will say what are those fundamental principles? What principles do I reject as inessential and what shall I adopt as fundamental? What is fundamental to me today may not appear to be so to another Judge a decade hence, for principles give way with changing social conditions. In America it was suggested that due process of law should be taken to mean the general body of common law as it stood at the date of the Constitution. In *Bardwell* v. *Collins*[2], it was negatived in the following words:

"'Due process of law' does not mean the general body of the law, common and statute, as it was at the time the Constitution took effect; for that would deny the Legislature power to change or amend the law in any particular."

1. 8 Coke, 115, 118 (a). 2. 44 Minn. 97.

The Court, however, brought in principles of natural justice under the due process clause. To sanctify what I may to-day regard as the basic principles underlying our Code of Criminal Procedure will be to make them immutable and to prevent the Legislature even to improve upon them. This is nothing but imposing on the Legislature a limitation which the Constitution has not placed on it. I do not think it is a permissible adventure for the Court to undertake. It is a dangerous adventure, for it will bring about stagnation which means ruin. We must accept the Constitution which is the supreme law. The Constitution has by Article 21 required a procedure and has prescribed certain minimum requirements of procedure in Article 22. To add to them is not to interpret the Constitution but to recast it according to our intellectual yard-stick and our unconscious predilections as to what an ideal Constitution should be.

Article 21, in my judgment, only formulates a substantive fundamental right to life and personal liberty which in its content is not an absolute right but is a limited right having its ambit circumscribed by the risk of its being taken away by following a procedure established by law made by the appropriate legislative authority and the proximate purpose of Article 21 is not to prescribe any particular procedure. It is to be kept in mind that at the date when the Constitution came into effect we had the Indian Penal Code creating diverse offences and a conviction for any of them would deprive a person of his personal liberty. Under Article 246 read with entry 1 of the Concurrent List Parliament or any State Legislature could add more offences and create further means for taking away personal liberty. But all this deprivation of personal liberty as a result of a conviction could only be done by following the procedure laid down by the Code of Criminal Procedure. Again, at the date of this Constitution there were preventive detention laws in almost every Province and a person could be deprived of his personal liberty under those laws. Those laws, however, provided a procedure of a sort which had to be followed. Therefore, before the Constitution came into force, personal liberty could be taken away only by following the procedure enacted by the Criminal Procedure Code in the case of punitive detention or by the procedure enacted by the different Security Acts in case of preventive detention. Power, however, has been given to Parliament and the State Legislatures under Article 246 read with entry 2 of the Concurrent List to make laws with respect to Criminal Procedure. If that Article stood by itself the Parliament or the State Legislature could repeal the whole of the Criminal Procedure Code and also do away even with the skeleton procedure provided in the Security Acts. If Article 246 stood by itself then the appropriate legislative authority could have taken away the life and personal liberty of any person without any procedure at all. This absolute supremacy of the legislative authority has, however, been cut down by Article 21 which delimits the ambit and scope of the substantive right to life and personal liberty by reference to a procedure and by Article 22 which prescribes the minimum procedure which must be followed. In this situation the only power of the Court is to determine whether the impugned law has provided some procedure and observed and obeyed the minimum requirements of Article 22 and if it has, then it is not for the Court to insist on more elaborate procedure according to its notion or to question the wisdom of the legislative authority in enacting the particular law, however harsh, unreasonable, archaic or odious the provisions of that law may be.

It is said that if this strictly technical interpretation is put upon Article 21 then it will not constitute a fundamental right at all and need not have been placed in the chapter of fundamental rights, for every person's life and personal liberty will be at the mercy of the Legislature which, by providing some sort of a procedure and complying with the few requirements of Article 22, may, at any time, deprive a person of his life and liberty at its pleasure and whim. There are several answers to this line of argument. Article 21 as construed by me will, if nothing else, certainly protect every person against the executive and as such will be as much a fundamental right deserving a place in the Constitution as the famous 39th Chapter of the Magna Charta was and is a bulwark of liberty in English law. It appears to me that Article

21 of our Constitution read with Article 32 also gives us some protection even against the legislative authority in that a person may only be deprived of his life and personal liberty in accordance with procedure which, although enacted by it, must at least conform to the requirements of Article 22. Subject to this limitation our Parliament or any State Legislature may enact any law and provide any procedure it pleases for depriving a person of his life and personal liberty under Article 21. Such being the meaning of that Article and the ambit and extent of the fundamental right of life and personal liberty which the people of this country have given unto themselves, any law for depriving any person of his life and personal liberty that may be made by the appropriate legislative authority under Article 246 and in conformity with the requirements of Article 22 does not take away or abridge any right conferred by Article 21, for the very right conferred by that Article is circumscribed by this possibility or risk and, therefore, such law cannot be regarded as violating the provisions of Article 13 (2). Our Constitution is a compromise between Parliamentary supremacy of England and the supremacy of the Supreme Court of the United States. Subject to the limitations I have mentioned which are certainly justiciable, our Constitution has accepted the supremacy of the legislative authority and, that being so, we must be prepared to face occasional vagaries of that body and to put up with enactments of the nature of the atrocious English statute to which learned counsel for the petitioner has repeatedly referred, namely, that the Bishop of Rochester's cook be boiled to death. If Parliament may take away life by providing for hanging by the neck, logically there can be no objection if it provides a sentence of death by shooting by a firing squad or by guillotine or in the electric chair or even by boiling in oil. A procedure laid down by the Legislature may offend against the Court's sense of justice and fair play and a sentence provided by the Legislature may outrage the Court's notions of penology, but that is a wholly irrelevant consideration. The Court may construe and interpret the Constitution and ascertain its true meaning but once that is done the Court cannot question its wisdom or policy. The Constitution is supreme. The Court must take the Constitution as it finds it even if it does not accord with its preconceived notions of what an ideal Constitution should be. Our protection against legislative tyranny, if any, lies in ultimate analysis in a free and intelligent public opinion which must eventually assert itself.

The conclusion I have arrived at does not introduce any novelty, for in many other Constitutions the supremacy of the Legislature is recognised in the matter of depriving a person of his life, liberty and property. The English democratic Constitution is one in point. Take the Constitution of the Irish Free State. Article 40 (4) (i) provides that no citizen shall be deprived of personal liberty save in accordance with law, and Article 50 (5) guarantees that the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law. The words "in accordance with law" in both the above clauses must mean the same thing and I have no doubt in my mind, reading clause (5) that it means in accordance with the State-made law, for we have not been referred to any rule prescribed by natural justice regulating searches of or entry into dwelling houses. Article 107 (2) of the Czechoslovakian Constitution uses the words "in accordance with law" which, read with clause (1) of that Article, obviously means the law to be made which will form part of the Constitution. Take the Constitution of the Free City of Danzig. Article 74 of that Constitution which is in Part II headed "Fundamental Rights and Duties" provides as follows:

"The liberty of the person shall be inviolable. No limitation or deprivation of personal liberty may be imposed by public authority, except by virtue of a law."

The word "law" clearly cannot, in the context, mean principles of natural justice. Again, Article 75 of that Constitution protects the freedom of movement within the Free City and the right to stay and to settle at any place, to acquire real property and to earn a living. It concludes by saying that this right shall not be curtailed without legal sanctions. Legal sanctions, in this context, can only mean sanctions of the City laws. Article 114 of the Weimar Constitution

same lines and expressed in almost the same language as Article 74 of ...g Constitution. Take the Japanese Constitution of 1946 from which ...e 21 is reputed to have been taken. Article 31 of that Constitution says :

> "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law."

Surely the words "except according to procedure established by law" in their application to the imposition of criminal penalty must mean State-made law and the same words in the same sentence in the same Article cannot, according to ordinary rules of construction of statutes, mean a different thing in their application to deprivation of life or liberty. I am aware that it is not right to construe one Constitution in the light of another and that is not my purpose when I refer to the other Constitutions ; but I do think that after reading the relevant provisions of other written Constitutions one sees quite clearly that there is no pressing special reason applicable to or inherent in written Constitutions which requires the importation of the principles of natural justice or of the American doctrine of due process of law into our Constitution. The several Constitutions referred to above have not adopted that American doctrine but have been content with leaving the life and liberty of their citizens to the care of the laws made by their Legislatures. It is no novelty if our Constitution has done the same. For all these reasons, in spite of the very able and attractive arguments of the learned counsel for the petitioner which I freely acknowledge, I am not convinced that there in any scope for the introduction into Article 21 of our Constitution of the doctrine of due process of law even as regards procedure. I may or may not like it, but that is the result of our Constitution as I understand it.

The learned Attorney-General has referred to certain debates in the Constituent Assembly on the original clause which has now become Article 21, not as evidence to be used in interpreting the language of Article 21 but as disclosing the historical background. His purpose, he says, is to show that the framers of our Constitution had the essential difference in the meaning of the phrases "due process of law" and "according to procedure established by law" clearly explained to them, that they knew that the former implied the supremacy of the judiciary and the latter the supremacy of the Legislature and with all that knowledge they deliberately agreed to reject the former expression and adopt the latter. As, in my opinion, it is possible to interpret the language of Article 21 on the ordinary rules of interpretation of statutes, I do not think it is at all necessary to refer to the debates. As I do not propose to refer to or rely on the debates for the purposes of this case, I express no opinion on the question of the admissibility or otherwise of the debates.

I now pass on to Article 22. The contention of learned counsel for the petitioner is that Article 21 by reason of the last few words, "according to procedure established by law" attracts the four requirements of the American procedural due process of law as summarised by Willis to which reference has been made earlier, and that those requirements, except to the extent they have been expressly abrogated or modified by Article 22, must be strictly followed before a person may be deprived of his life or personal liberties. I have already stated for reasons set forth above, that there is no scope for introducing any rule of natural justice or the American procedural due process of law or any underlying principle of our Code of Criminal Procedure into that Article. This being the conclusion I have arrived at, the major premise assumed by learned counsel for the petitioner is missing and this line of argument does not begin and cannot be accepted.

The learned Attorney-General, on the other hand, has at one stage of his argument, urged that Article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by Article 22 (4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also. The true position, as I apprehend it, lies between the two extreme views. Article 21, to my mind, gives protection to life and personal liberty to the extent therein mentioned. It does not recognise the right to life and personal liberty as an absolute right but delimits the ambit and scope of the right itself.

The absolute right is by the definition in that Article cut down by the risk of its being taken away in accordance with procedure established by law. It is this circumscribed right which is substantively protected by Article 21 as against the executive as well as the Legislature, for the Constitution has conditioned its deprivation by the necessity for a procedure established by law made by itself. While sub-clauses (2) to (6) of Article 19 have put a limit on the fundamental rights of a citizen, Articles 21 and 22 have put a limit on the power of the State given under Article 246 read with the legislative lists. Under our Constitution our life and personal liberty are balanced by restrictions on the rights of the citizens as laid down in Article 19 and by the checks put upon the State by Articles 21 and 22. Preventive detention deprives a person of his personal liberty as effectively as does punitive detention and, therefore, personal liberty, circumscribed as it is by the risk of its being taken away, requires protection against punitive as well as preventive detention. The language of Article 21 is quite general and is wide enough to give its limited protection to personal liberty against all forms of detention. It protects a person against preventive detention by the executive without the sanction of a law made by the Legislature. It prevents the Legislature from taking away a person's personal liberty except in accordance with procedure established by law, although such law is to be by itself. If, as contended by the learned Attorney-General and held by me, Article 19 only protects the rights of a free citizen as long as he is free and does not deal with total deprivation of personal liberty and if, as contended by the learned Attorney-General, Article 21 does not protect a person against preventive detention then where is the protection for life and personal liberty as substantive rights which the procedural provisions of Article 22 may protect? What is the use of procedural protection if there is no substantive right? In my judgment Article 21 protects the substantive rights by requiring a procedure and Article 22 gives the minimum procedural protection.

Clauses (1) and (2) of Article 22 lay down the procedure that has to be followed when a man is arrested. They ensure four things: (a) right to be informed regarding grounds of arrest, (b) right to consult, and to be defended by, a legal practitioner of his choice, (c) right to be produced before a Magistrate within 24 hours, and (d) freedom from detention beyond the said period except by order of the Magistrate. These four procedural requirements are very much similar to the requirements of the procedural due process of law as enumerated by Willis. Some of these salutary protections are also to be found in our Code of Criminal Procedure. If the procedure has already been prescribed by Article 21 incorporating the principles of natural justice or the principles underlying our Code of Criminal Procedure what was the necessity of repeating them in clauses (1) and (2) of Article 22? Why this unnecessary overlapping? The truth is that Article 21 does not prescribe any particular procedure but in defining the protection to life and personal liberty merely envisages or indicates the necessity for a procedure and Article 22 lays down the minimum rules of procedure that even Parliament cannot abrogate or overlook. This is so far as punitive detention is concerned. But clause (3) of Article 22 expressly provides that none of the procedure laid down in clauses (1) and (2) shall apply to an alien enemy or to a person who is arrested or detained under any law providing for preventive detention. It is thus expressly made clear that a detenu need not be produced before Magistrate and he is not to have the assistance of any lawyer for consultation or for defending him. Such being the express provision of our Constitution, nobody can question its widom. So I pass on.

Clauses (4), (5), (6) and (7) of Article 22 in terms relate to preventive detention. Article 246 authorises the appropriate Legislature to make a law for preventive detention in terms of entry 9 in List I and or entry 3 in List III of the Seventh Schedule. On this legislative power are imposed certain limitations by Article 22 (4) to (7). According to this the Legislature, whether it be Parliament or a State Legislature, is reminded that no law made by it for preventive detention shall authorise the detention of a person for a longer period than three months except

in two cases mentioned in sub-clauses (*a*) and (*b*). The proviso to sub-clause (*a*) and sub-clause (*b*) refer to a law made only by Parliament under clause (7). Under clause (7) it is Parliament alone and not any State Legislature that may prescribe what are specified in the three sub-clauses of that clause. Although a State Legislature may make a law for preventive detention in terms of entry 3 in List III of the Seventh Schedule no such law may authorise detention for more than three months unless the provisions of sub-clauses (*a*) and (*b*) of clause (4) sanction such detention. Even a law made by Parliament cannot authorise detention for more than three months unless it is a law made under the provisions of clause (7). In short, clause (4) of Article 22 provides a limitation on the legislative power as to the period of preventive detention. Apart from imposing a limitation on the legislative power, clause (4) also prescribes a procedure for detention for a period longer than three months by providing for an Advisory Board. Then comes clause (5). It lays down the procedure that has to be followed when a person is detained under any law providing for preventive detention, namely, (*a*) the grounds of the order of detention must be communicated to the detenu as soon as may be and (*b*) the detenu must be afforded the earliest opportunity of making a representation against the order. The first requirement takes the place of notice and the second that of a defence or hearing. These are the only compulsory procedural requirements laid down by our Constitution. There is nothing to prevent the Legislature from providing an elaborate procedure regulating preventive detention but it is not obliged to do so. If some procedure is provided as envisaged by Article 21 and the compulsory requirements of Article 22 are obeyed and carried out nobody can, under our Constitution, as I read it, complain of the law providing for preventive detention.

Learned counsel for the petitioner concedes that the four requirements of procedural due process summarised by Willis will have to be modified in their application to preventive detention. Thus he does not insist on a prior notice before arrest, for he recognises that such a requirement may frustrate the very object of preventive detention by giving an opportunity to the person in question to go underground. The provision in clause (5) for supplying grounds is a good substitute for notice. He also does not insist that the tribunal to judge the reasonableness of the detention should be a judicial tribunal. He will be satisfied if the tribunal or advisory board, as it is called in Article 22 of the Constitution, is an impartial body and goes into the mertis of the order of detention and its decision is binding on the executive Government. He insists that the detenu must have a reasonable and effective opportunity to put up his defence. He does not insist on the assistance of counsel, for that is expressly taken away by the Constitution itself. But he insists on what he calls an effective opportunity of being heard in person before an impartial tribunal which will be free to examine the grounds of his detention and whose decision should be binding alike on the detenu and the executive authority which detains. The claim may be reasonable but the question before the Court is not the reasonableness or otherwise of the provisions of Article 22 (4) to (7). Those provisions are not justiciable, for they are the provisions of the Constitution itself which is supreme over everybody. The Court can only seek to find out, on a proper construction, what protection has in fact been provided. The Constitution has provided for the giving of the grounds of detention although facts as distinguished from grounds may be withheld under clause (6) and the right of representation against the order of detention. It has provided for the duration of the detention. There the guaranteed fundamental procedural rights end. There is no provision for any trial before any tribunal. One cannot import the condition of a trial by any tribunal from the fact that a right of representation has been given. The right to make representation is nothing more than the right to "lodge objections" as provided by the Danzig Constitution and the Weimar Constitution. The representations made will no doubt be considered by the Government. It is said a prosecutor cannot be himself the judge. Ordinarily, the order of detention will in a great majority of cases be made by the District Magistrate or Sub-Divisional Officer or the Commissioner of Police. The representation of the detenu

goes to the Government. Why should it be assumed that a high government official at the seat of the government will not impartially consider the representation and judge the propriety of the order of detention made by local officials? Clause (5) does not imperatively provide for any oral representation which a hearing will entail. Indeed the exclusion of the provisions of clauses (1) and (2) negatives any idea of trial or oral defence. The Court may not, by temperament and training, like this at all but it cannot question the wisdom or the policy of the Constitution. In my judgment as regards preventive detention laws, the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate the minimum requirements laid down in Article 22 (4) to (7). There is no limitation as regards the substantive law. Therefore, a preventive detention law which provides some procedure and complies with the requirements of Article 22 (4) to (7) must be held to be a good law, however odious it may appear to the Court to be.

Learned counsel for the petitioner contends that the impugned Act does not comply with even the bare requirements of Article 22 (4) to (7). It is pointed out that section 3 of the Act does not lay down any objective test but leaves it to the authority to define and say whether a particular person comes within the legislative heads. In other words, it is contended that Parliament has not legislated at all but has delegated its legislative powers to the executive authorities. I do not think there is any substance in this contention. In the first place this is not an objection as to procedure but to substantive law which is not open to the Court's scrutiny. In the next place this contention overlooks the basic distinction between the delegation of power to make the law and the conferring of an authority and discretion as to its execution to be exercised under and in pursuance of the law. The impugned Act has specifically set forth an ascertainable standard by which the conduct of a particular person is to be judged by the detaining authority.

It is next urged that section 12 of the Act does not comply with the requirements of clause (7) of Article 22 for two reasons, namely :—

(i) that clause (7) contemplates a law prescribing the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months and then another law thereafter providing for preventing detention for a period longer than three months; and

(ii) that under clause (7) Parliament must prescribe both the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months.

As regards the first point I do not see why Parliament must make two laws, one laying down the principles for longer detention and another for detention for such longer period. It may be that a State cannot provide for longer detention until Parliament has made the law, but I can see no reason why Parliament cannot do both by the same Act. In fact, clause (4) (*b*) contemplates the detention itself to be in accordance with the provisions of any law made by Parliament under sub-clauses (*a*) and (*b*) of clause (7). Therefore, the detention can well be under the very law which the Parliament makes under sub-clauses (*a*) and (*b*) of clause (7). As to the second point the argument is that Parliament has a discretion under clause (7) to make a law and it is not obliged to make any law but when our Parliament chooses to make a law it must prescribe both the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months. I am unable to construe clause (7) (*a*) in the way suggested by learned counsel for the petitioner. It is an enabling provision empowering Parliament to prescribe two things. Parliament may prescribe either or both. If a father tells his delicate child that he may play table tennis and badminton but not the strenuous game of football, it obviously does not mean that the child, if he chooses to play at all, must play both table tennis and badminton. It is an option given to the child. Likewise, the Constitution gives to Parliament the power of prescribing two things. Parliament is not obliged to prescribe at all but if it chooses to prescribe it may prescribe either or both. Clause (7) (*a*), in my opinion,

has to be read distributively as follows: The Parliament may prescribe the circumstance under which a person may be detained for a period longer than three months and Parliament may prescribe the class or classes of cases in which a person may be detained for a period longer than three months. That appears to me to be consonant with sound rules of construction. Further, the circumstances and the class or classes of cases may conceivably coalesce. Indeed, the Full Bench case No. 1 of 1950 before the Calcutta High Court (*Kshitindra Narayan* v. *The Chief Secretary*), itself indicates that the same provision may be read as circumstances or as a classification. In that case learned counsel conceded that section 12 had prescribed the circumstances but his complaint was that it had not prescribed the class or classes of cases. The majority of the Court repelled this contention. One learned Judge, however, held that section 12 had prescribed the class or classes of cases but had not prescribed the circumstances. It is, therefore, clear that the classification itself may indicate the circumstances. Again, the classification may be on a variety of basis. It may be according to Provinces the detenus come from. It may be according to the age of the detenus. It may be according to the object they are supposed to have in view or according to the activities they are suspected to be engaged in. In this case Parliament has taken five out of the six legislative heads and divided them into two categories. The detenus are thus classified according to their suspected object or activities endangering the several matters specified in the section. I do not see why classification cannot be made on the footing of the objectives of the detenus falling in some of the legislative heads, for each legislative head has a specific connotation well understood in law. If I am correct that there has been a classification then the fact that a person falls within one or the other class may well be the circumstances under which he may be detained for a period longer than three months. I do not consider it right, as a matter of construction, to read any further limitation in clause (7) (*a*) of Article 22. In my judgment Parliament was not obliged under clause (7) to prescribe both circumstances and classes and in any case has in fact and substance prescribed both.

I am conscious that a law made by Parliament under Article 22 (7) will do away with the salutary safeguard of the opinion of an advisory board. But it must be remembered that our Constitution itself contemplates that in certain circumstances or for certain class or classes of detenus even the advisory board may not be safe and it has trusted Parliament to make a law for that purpose. Our preference for an advisory board should not blind us to this aspect of the matter. It is true that circumstances ordinarily relate to extraneous things, like riots, commotion, political or communal or some sort of abnormal situation and it is said that the framers of the Constitution had in mind some such situation when the advisory board might be done away with. It is also urged that they had in mind that the more dangerous types of detenus should be denied the privilege of the advisory board. I am free to confess that prescription of specific circumstances or a more rigid and definite specification of classes would have been better and more desirable. But that is crying for the ideal. The Constitution has not in terms put any such limitation as regards the circumstances or the class or classes of cases, and it is idle to speculate as to the intention of the constitution makers, who, by the way, are the very persons who made this law. It is not for the Court to improve upon or add to the Constitution. If the law duly made by Parliament is repugnant to good sense, public opinion will compel Parliament to alter it suitably.

Finally, an objection is taken that section 14 of the impugned Act takes away or abridges the right of the detenu to move this Court by appropriate proceedings. Both clauses (1) and (2) of Article 32 speak of enforcement of rights conferred by Part III. The right to move this Court is given to a person not for the sake of moving only but for moving the Court for the enforcement of some rights conferred by Part III and this Court has been given power to issue directions or orders or writs for the enforcement of any of such rights. In order, therefore, to attract the application of Article 32, the persons applying must first satisfy that he has

got a right under Part III which has to be enforced under Article 32. I have already said that Article 19 does not deal with the freedom of the person. I have also said that Articles 21 and 22 provide for protection by insisting on some procedure. Under Article 22 (5) the authority making the order of detention is enjoined, as soon as may be, to communicate to the detenu the grounds on which that order has been made. This provision has some purpose, namely, that the disclosure of the grounds will afford the detenu the opportunity of making a representation against the order. Supposing the authority does not give any grounds at all as distinct from facts referred to in clause (6). Surely, the detenu loses a fundamental right because he is prevented from making a representation against the order of the detention. Suppose the authority hands over to the detenu a piece of paper with some scribblings on it which do not amount to any ground at all for detention. Then also the detenu can legitimately complain that his right has been infringed. He can then come to the Court to get redress under Article 32, but he cannot show to the Court the piece of paper with the scribblings on it under section 14 of the Act and the Court cannot judge whether he has actually got the grounds which he is entitled to under Article 22 (5). In such a case the detenu may well complain that both his substantive right under Article 22 (5) as well his right to constitutional remedies under Article 32 have been infringed. He can complain of infringement of his remedial rights under Article 32, because he cannot show that there has been an infringement of his substantive right under Article 22 (5). It appears to me, therefore, that section 14 of the Act in so far as it prevents the detenu from disclosing to the Court the grounds communicated to him is not in conformity with Part III of the Constitution and is, therefore, void under Article 13 (2). That section, however, is clearly severable and cannot affect the whole Act. On this question the views of Meredith, C.J., and Das, J., of Patna in Criminal Miscellaneous No. 124 of 1950 (*Lalit Kumar Barman* v. *The State*) and the majority of the learned Judges of the Calcutta High Court in Full Bench Case No. 1 of 1950 (*Kshitendra Narayan* v. *The Chief Secretary*) appear to be correct and sound.

For the reasons I have given above, in my opinion, the impugned Act is a valid law except as to section 14 in so far as it prevents the grounds being disclosed to the Court. The petitioner before us does not complain that he has not got proper grounds. Further, the period of his detention under the impugned Act has not gone beyond three months and, in the circumstances, this application should, in my opinion, stand dismissed.

G.R./V.S. *Application dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Arumugam Chettiar (minor) and another .. *Petitioners* *

v.

K. R. S, Sevugan Chettiar and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 151 *and Order* 25, *rule* 1—*Application for security for costs—Suit held not to be* bona fide *at the initial stage—If a ground for ordering security for costs to be furnished—Section* 151 *if can be invoked.*

The mere fact that a suit is not held to be *bona fide* at the initial stage could not be a ground to hold that the plaintiffs are liable to furnish security for costs. Security for costs can be asked only under exceptional circumstances and it should be the exception and not the rule, and it must be based upon some established principles, not on the mere circumstance that the Court in its first impression finds a suit as not a *bona fide* suit.

In view of the fact that security for costs has been specifically dealt with under Order 25, rule 1, which Courts can order under the grounds and circumstances mentioned in that rule, it is not open ordinarily for courts to invoke section 151, Civil Procedure Code and direct security for costs to be furnished.

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* C.R.P. No. 789 of 1949. 17th March, 1950.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Devakottai, dated 16th April, 1949, in I.A. No. 274 of 1949 in O.S. No. 147 of 1948.

G. Jagadisa Aiyar for Petitioners.

R. Rangaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is against the order of the Subordinate Judge of Devakottai directing the petitioners to furnish security for costs of the suit. The petitioners claimed to be the illegitimate sons of one Karuppan Chettiar and instituted a suit for partition of the properties of Karuppan Chettiar claiming a share as the offspring of his continuously kept concubine. The parties are Sudras. The defendants are the sons of Karuppan Chettiar who resisted the suit on several grounds. The suit was instituted in *forma pauperis*, and the properties were valued at nearly Rs. 3 lakhs. Karuppan Chettiar died before the suit, and sometime before his death the petitioners' mother obtained an order from a Magistrate for maintenance on the footing that the petitioners were the children and that she, their mother, was the lawful wife of Karuppan Chettiar. Thereupon Karuppan Chettiar filed a suit for a declaration that the petitioners' mother was not his legally wedded wife; and that suit was decided in favour of Karuppan Chettiar in about August 1943. In the present suit, O.S. No. 147 of 1948, on the file of the Sub-Court, Devakottai, the respondents relied upon a registered partition deed dated 4th February, 1943 and alleged that Karuppan Chettiar became divided from them under that document and that the petitioners were made aware of the existence of the partition deed by notice sent to them as early as 29th November, 1943, that the fact of partition was also made clear in certain proceedings taken by the mother of the petitioners in execution for recovery of the maintenance ordered by the Magistrate, and that the plaintiffs' mother was fully aware of the partition claim set up by the respondents.

The respondents applied in I.A. No. 274 of 1949 under Order 25, rule 1 and section 151, Civil Procedure Code, directing the petitioners to furnish security for the costs of the suit, apparently on the ground that the suit was not a *bona fide* suit. The learned Judge agreeing with the contentions of the respondents directed the petitioners to furnish security for costs incurred and likely to be incurred by the respondents. Against this order the present revision petition is filed.

The learned Judge placed reliance on the fact that the petitioners' mother was fully aware of the partition, and that in spite of that knowledge, not a word about the partition deed was mentioned in the plaint, and that even after the respondents filed their written statement, no reply statement was filed regarding the partition, and that therefore the suit could not be said to be a *bona fide* suit. On the sole ground that the suit was not a *bona fide* suit, the learned Judge held that he was entitled under section 151, Civil Procedure Code, to exercise the inherent powers vested in the Court and directed security to be furnished relying upon a decision in *Chainrai Valiram* v. *The Sunday Times*[1].

It is contended on behalf of the petitioners that security for costs can only be awarded for the reasons and circumstances mentioned in Order 25, rule 1, and not on other grounds, and that in any event section 151 cannot be invoked in an application of this nature. Learned counsel cited *Bhairabendra Narain Deb* v. *Udai Narain Deb*[2], in support of his contention. Cuming J., with reference to the facts of that case which do not strictly come within the purview of Order 25, rule 1 observes as follows:

"With great respect it seems to me that it is very doubtful if the inherent power of the court can be called in aid in the present case. Had the Code been entirely silent on the point, then possibly the inherent power of the court might have been invoked, but when the Code does make certain provisions for the taking of security for costs from the plaintiff, it seems to me that in those cases and

1. A.I.R. 1932 Sind 33.

2. (1923) I.L.R. 50 Cal. 853 at 865.

those cases only may costs be taken from the plaintiff and that for security for costs to be demanded from the plaintiff the case must fall within the purview of Order 25, rule 1."

I am inclined to agree with these observations of the learned Judge, since the power given under section 151 can be invoked ordinarily only in cases where there is no specific provision made regarding any matter. In view of the fact that security for costs has been specifically dealt with under Order 25, rule 1, which courts can order under the grounds and circumstances mentioned in that rule, it is not open ordinarily for courts to invoke section 151, Civil Procedure Code and direct security for costs to be furnished.

The ground on which the security for costs has been ordered by the learned Subordinate Judge is that the suit is not a *bona fide* suit. The question is, how far the failure of the petitioners to file a reply statement to the allegations made by the respondents in their written statement that there was a partition deed and that the petitioners' mother was aware of it would be a circumstance in holding that suit is not a *bona fide* one. Even assuming that the suit is not a *bona fide* suit, is it open at this stage when parties have not gone to trial to consider whether the suit is *bona fide* or not? In my opinion, it was too early for the lower Court to consider the *bona fides* of the suit before hearing the plaintiffs and the evidence which they would place before the court to substantiate their claims. Obviously this is not a case coming under Order 25, rule 1, and it is not a case where such exceptional circumstances have been alleged or proved in order to invoke the inherent power of the Court provided for under section 151, though as I have already observed section 151 should not ordinarily be invoked, when a specific provision in the Code is available for the parties to rely upon for any suitable reliefs. It is not as if the Code does not contain any provision to penalise a party in such circumstances. When a court finds that a suit is not *bona fide* in the sense that it is false or vexatious, and when it is satisfied that the claim or defence is false or vexatious to the knowledge of the party by whom it has been put forward, the Court is entitled, under the provisions of section 35-A, Civil Procedure Code, to make an order for payment of costs by way of compensation in addition to the costs ordinarily allowable in such cases. The Judicial Commissioner of Sind in *Chainrai Valiram* v. *The Sunday Times*[1], takes a different view; but it may be pointed out that it was a case where he resorted to the inherent power under the peculiar circumstances of the case, and where he held that the plaintiff was a mere nominal plaintiff and was carrying on litigation for the sole benefit of another person. That is however not the case here, and the latest amendment of Order 25, rule 1 by the addition of sub-rule 4, brings cases in which an element of champerty or maintenance is proved within the purview of Order 25, rule 1 to entitle a court to direct security for costs if it is satisfied that such an element is present in the litigation before it. The present case is not a suit of that kind. The mere fact that a suit is not held to be *bona fide* at the initial stage could not be a ground to hold that the petitioners are liable to furnish security for costs. Security for costs can be asked only under exceptional circumstances, and it should be the exception and not the rule, and it must be based upon some established principles, not on the mere circumstance that the court in its first impression finds a suit as not a *bona fide* suit.

The order of the lower court is therefore erroneous and the learned Judge has acted with material irregularity in the exercise of his jurisdiction. The order is set aside, and the revision petition is allowed with costs.

K. C. *Petition allowed.*

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1. A.I.R. 1932 Sind 33.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Bonthala Baliah .. *Appellant**

v.

Santiveerappa Sivarudrappa Sringari and others .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *sections* 35, 38 *and* 50 (2)—*Majority of creditors not accepting scheme—Right to dismiss application by insolvent under section* 38—*Right to apply under section* 50 (2)—*When arises.*

Where a majority in number and three-fourths in value of all the creditors, whose debts were proved, do not resolve to accept a scheme of composition, a court would be justified in dismissing an application by the insolvent under sections 35 and 38 of the Provincial Insolvency Act.

Under section 50 (2) of the Provincial Insolvency Act a debtor's right to apply depends upon the existence of the composition or the scheme under the provisions of the Act.

Appeals against the orders of the District Court, Cuddappah, dated 22nd March, 1946, in I. A. Nos. 45 of 1943 and 13 of 1944 in I. P. No. 26 of 1939.

K. Umamaheswaram for Appellant.

C. Rangaswami Aiyangar, Alladi Kuppuswami and *P. Ramachandra Reddi* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—These two connected appeals arise out of orders passed by the District Judge of Cuddappah in insolvency. The insolvent filed I. A. No. 45 of 1943 under sections 35 and 38 of the Provincial Insolvency Act. It was alleged in the petition that the insolvent proposed to satisfy the creditors at the rate of a rupee for a rupee on the amounts of the debts due to them and therefore requested the Court to approve of his proposal and annul the adjudication. In the schedule annexed to the application the total amount of the debts was shown at Rs. 15,016-0-6. The progress of this application is disclosed in the B diary. After notices were served on all the creditors, the application was posted for enquiry to 15th December, 1943. Some of the creditors, respondents 2, 4, 5, 14 and 15 filed a counter stating that they would agree only if the amounts payable under the promissory notes in their favour and interest up to the date of payment were paid. The insolvent undertook to pay like that. The learned District Judge then adjourned the application to 17th January, 1944, for payment or deposit. The insolvent did not take advantage of this opportunity, and did not pay the amount within the time given. Instead, he filed applications under section 50 (2) against some creditors for expunging or reducing the debt due to them. The amount due to respondents 1, 4 and 14, who did not agree to the proposal, was more than one-fourth in value of the total amount of the debt due by the insolvent. The learned District Judge therefore dismissed the application filed under sections 35 and 38 of the Provincial Insolvency Act as also the applications filed under section 50 (2) on the ground that they were not maintainable in view of his dismissal of the main application. The insolvent has preferred C.M.A. No. 672 of 1946 against the order of the learned District Judge dismissing the application under sections 35 and 38 of the Provincial Insolvency Act, and C.M.A. No. 673 of 1946 against the order of the learned District Judge dismissing the application under section 50 (2) of the Act.

Mr. Umamaheswaram, the learned counsel for the appellant contended that the learned District Judge approved of the composition and was therefore wrong in dismissing the application filed under sections 35 and 38 of the Act. In regard to the application under section 50 (2) of the Act he argued that the existence of an approved composition was not a condition precedent for the maintainability of an application under that section. The first argument ignores the obvious facts in the case. From the aforesaid narration of the facts it is clear that the learned District Judge did not purport at any point of time to approve of the scheme put before him.

* A.A.O. Nos. 672 and 673 of 1946. 6th March, 1950.

Indeed, as the creditors opposed it, he gave a further opportunity to the insolvent by adjourning the matter to enable the insolvent to comply with the requirements of section 38, which he did not avail himself. In the circumstances, the learned Judge was right in dismissing the application on the ground that a majority in number and three-fourths in value of all the creditors whose debts were proved did not resolve to accept the proposal.

We cannot also agree with the learned counsel for the appellant in regard to his second contention. The material portion of section 50 of the Act reads :

"The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or a scheme, upon the application of the debtor."

Under this sub-section, a debtor's right to apply depends upon the existence of the composition or the scheme under the provisions of the Act. It is argued that a debtor could apply under section 50, even before the composition was approved of by the Court. A comparison of the provisions of sections 38 and 50 brings out the distinction between the proposal for composition and the approved composition. The principle also is apparent. Before the composition, the Official Receiver would be the person to represent the creditors whereas after the composition is accepted by the Court, the debtor is given the right to apply under the said section. The same view has been accepted in *Ganga Sahai* v. *Mukaram Ali Khan*[1]. In Ghosh on Provincial Insolvency Act, the principle underlying the section, is stated as follows :

"So long as insolvency exists, the insolvent cannot be allowed to challenge the correctness of the debts entered in the schedule, and, therefore, his application disputing the correctness of those debts and requesting the Court to enquire into the accounts of the creditors cannot be entertained. But when insolvency is annulled, as would be the case when the composition or scheme is accepted, he can apply for expunging or reducing a debt entered in the schedule."

We agree with the above statement of the law. If so, it follows that the learned District Judge rightly dismissed the application under section 50 (2), as the scheme was not approved by him.

In the result, C. M.A. No. 672 of 1946 is dismissed with the costs of respondents 4, 5 and 15, and C.M.A. No. 673 of 1946 is dismissed with the sole respondent's costs.

K. C. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE SOMASUNDARAM.

R. Muniswami Goundar (died) and another .. *Appellants**

v.

B. M. Shamanna Gouda and others .. *Respondents.*

Limitation Act (IX of 1908), Article 113—Scope of—"Date fixed"—Meaning—Agreement to sell pending suit—Starting point for suit to enforce specific performance of.

When the date is fixed, under the first part of column 3 of Article 113, Limitation Act, limitation begins to run forthwith as the date is certain. But where no such time is fixed and where the party against whom the limitation runs is not in a position to know of the occurrence of the contingency contemplated by the contract, time begins to run only when he has notice of the refusal of the performance. The words "dated fixed" are comprehensive to include a date which can be ascertained with reference to an event certain to happen.

An agreement to sell certain property pending a suit was in these terms : "As regards the balance of Rs. 2,400, since a suit has been pending concerning the same property, I shall receive it before the Sub-Registrar upon executing a sale deed the moment the suit is disposed of". On a question as to the starting point of limitation for a suit to enforce specific performance of the agreement,

Held : The parties under the document contemplated a date which may be ascertained with reference to an event certain to happen, that is disposal of the suit pending at the time of the agreement and that would be the starting point.

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1. A.I.R. 1926 All. 361.

* Appeal No. 518 of 1946. 16th December, 1949.

Appeal against the decree of the District Court, North Arcot, Vellore, dated 21st February, 1946, in O.S. No. 7 of 1945 (O.S. No. 61 of 1944, Court of the Subordinate Judge, Vellore).

T. K. Subramaniam Pillai for Appellants.

C. A. Vaidyalingam, O. Radhakrishnan, and *P. Rajeswaran* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal against the decree and judgment of the Court of the District Judge of North Arcot in O. S. No 7 of 1945, a suit for specific performance of a contract of sale. The facts are rather complicated, but it is necessary to give a resume for a correct appreciation of the contentions of the parties. One B. S. Muniswamiappa filed O. S. No. 125 of 1920 on the file of the District Court of C. and M. Station, Bangalore, to enforce his money claims against one China Muniswami Goundar and obtained a decree therein. The suit properties were brought to sale in execution of the decree and the decree-holder himself purchased the properties and took possession on 5th May, 1924. Manicka Goundar the son of China Muniswami Goundar preferred a claim in regard to his share in the suit properties. As the claim was allowed, Muniswami appa filed O.S. No. 12 of 1924 on the file of the Court of the Subordinate Judge of Vellore for a declaration that he was entitled to attach and bring the plaint properties to sale in execution of his decree. To that suit Manicka Goundar and China Muniswami Goundar were made parties. The suit was decreed. Meanwhile one A. P. Varadaraja Mudaliar obtained a decree against Manicka Goundar and China Muniswami Goundar in C. S. No. 834 of 1922. In execution of that decree the suit properties were brought to sale in the year 1927. Defendants 1 and 2 who are the legal representatives of Muniswamiappa preferred a claim petition but that was dismissed and one Krishnamurthi Aiyar purchased the properties in court sale. They filed O. S. No. 68 of 1929 on the file of the Court of the Subordinate Judge of Vellore for setting aside the claim order. The decree-holder Varadaraja Mudaliar, the auction-purchaser Krishnamurthi Aiyar, the judgment-debtors, China Muniswami Goundar and, as Manicka Goundar died, his son Subramania Goundar were made parties. The Subordinate Judge of Vellore set aside the claim order and upheld the title of defendants 1 and 2. Exhibit P-4 is the said judgment dated 27th October, 1930. The auction-purchaser preferred an appeal A. S. No. 34 of 1931 on the file of the Court of the District Judge of North Arcot. The appeal was disposed of on 26th January, 1933, and the decree of the Subordinate Judge was set aside. Pending the appeal, on 17th December, 1931, there was a partition between defendants 1 and 2 whereunder the suit properties fell to the share of the first defendant. On 26th April, 1932, *i.e.*, pending A. S. No. 34 of 1931, the first defendant and the plaintiff entered into an agreement dated 26th April, 1932. Under that agreement the first defendant agreed to sell the suit properties to the plaintiff for a sum of Rs. 5,500. The vendor received Rs. 3,100 in the manner mentioned in that document and he agreed to take the balance of Rs. 2,400 before the Sub-Registrar upon executing the sale deed on the disposal of the suit pending at that time. As the appeal was allowed Krishnamurthi Aiyar took possession of the property on 30th November, 1933, in execution of his decree after removal of the obstruction by the plaintiff. The first and second defendants preferred an appeal to the High Court against the decree in A. S. No. 34 of 1931, being S. A. No. 466 of 1933. As the title of the first defendant to suit property was negatived the plaintiff filed O. S. No. 40 of 1935 for recovery of the amount advanced by him under Exhibit P-5. The first defendant contended that that suit was premature as S. A. No. 466 of 1933 was pending. The suit was dismissed on the ground that it was premature. S. A. No. 466 of 1933 was allowed on 4th April, 1938, and the decree in O. S. No. 68 of 1929 was restored. The result is that the title of the first defendant was affirmed. The first defendant thereupon filed a petition dated 21st October, 1940, for restitution of the properties from Krishnamurthi Aiyar but that was dismissed as the third defendant, the mother of Subramania Goundar,

obstructed. Defendants 1 and 2 filed E. A. No. 105 of 1941 against China Muniswami third defendant and others for removal of obstruction, but it was dismissed. They filed O. S. No. 61 of 1942 on 23rd March, 1942, on the file of the Court of the Subordinate Judge of Vellore for setting aside that order. To that suit China Muniswami Goundar and third defendant, *i.e.*, the mother of Subramania Goundar were made parties. Pending the suit China Muniswami Goundar died and the fourth defendant was added as one of the legal representatives. Before the suit was disposed of, on 14th September, 1943, the plaintiff applied under Order 1, rule 10 of the Civil Procedure Code to be made a party to the suit and the main allegation made in the affidavit filed in support of the petition was that the parties to that suit were colluding to defraud his rights. Notice of that petition was served on the advocate for the first defendant and the third defendant on 14th September, 1943. That petition was returned for complying with certain requirements. Meanwhile, the parties to the suit rushed through a compromise and a compromise decree was passed on 20th September, 1943, whereunder the first and second defendants after receiving a sum of Rs. 5,000 gave up all their rights in the suit properties. R. Muniswami Goundar (the plaintiff) filed the present suit on 18th August, 1944, for specific performance of the agreement embodied in Exhibit P-5, dated 26th April, 1932.

The defendants contended *inter alia* that the suit was barred by limitation, that the agreement was affected by the principle of *lis pendens*, that the plaintiff having elected to file a suit for the refund of the purchase money was precluded from filing the suit for specific performance and that the third defendant acquired a right by adverse possession. The learned District Judge held on all the aforesaid points against the plaintiff and dismissed the suit. The plaintiff prefers the above appeal.

The main question in the appeal is whether the suit to enforce the agreement Exhibit P-5 is barred by limitation. The learned counsel for the appellant as well as the respondents agreed that Article 113 of the Indian Limitation Act applied. But counsel for the appellant argued that limitation would start only from the date when he had notice that the performance was refused, *i.e.*, the compromise decree in O. S. No. 61 of 1942, dated 20th September, 1943, whereas the learned counsel for the respondent contended that limitation would start to run from the date of the agreement itself, *i.e.*, 26th April, 1932. Exhibit P-5 is the agreement entered into between the parties on 26th April, 1932. The relevant portion of the agreement reads as follows :

"As regards the balance of Rs. 2,400 since a suit has been pending concerning the same property, I shall receive it before the Sub-Registrar upon executing a sale deed the moment suit is disposed of."

The parties therefore under this document contemplated a date which may be ascertained with reference to an event certain to happen. Whether the suit means the appeal then pending, *i.e.*, A. S. No. 34 of 1931, or is comprehensive enough to include a final determination of the suit by the highest court of appeal the dates of the disposal of the appeal and of such determination by the highest Court of appeal are ascertainable with certainty. Article 113 reads as follows :

"*Description of suit.*	*Period of limitation.*	*Time from which period begins to run.*
113. For specific performance of a contract.	Three years ..	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

The principle underlying this article is apparent. When the date is fixed under the first part of column 3, limitation begins to run forthwith as the date is certain. But where no such time is fixed and where the party against whom the limitation runs is not in a position to know of the occurrence of the contingency contemplated

by the contract, time begins to run only when he has notice of the refusal of the performance. The question is : what is the meaning to be attached to the words " date fixed " in the first part of column 3. Do they mean the date by calendar or are they comprehensive enough to include a date which can be ascertained with reference to an event certain to happen ? The principle applicable is the doctrine of *id certum est quod certum reddi potest.* This doctrine is stated in Broom's Legal Maxims, page 423 (10th edn.) :

" That certainty need not be ascertained at the time, for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first, when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty."

The language used in the aforesaid passage is wide enough to include a date which though at the time when the contract was made was not known but could be ascertained by an event which subsequently was certain of happening. In *Duncombe* v. *Brighton Club Co.*[1], the learned Judges had to construe the words " if such debt be payable by virtue of some written instrument at a certain time." Under section 28 of 3 & 4 Wm. 4, Chap. 42, a creditor would be entitled to interest only if the written instrument fixed a certain time for payment. Mellor, J., says at page 377 :

" It does not seem to be material whether that is done with reference to a named event on which payment is to be made, or by naming the day."

The following maxim found in Broom's Legal Maxims (5th edn., page 623) is approved :

" Although every estate for years must have a certain beginning and a certain end, albeit there appears to certainty of years in the lease, yet, if by reference to a certainty it may be made certain, it sufficeth."

In *Muhiuddin Ahmad* v. *Majlis Rai*[2], there was a contingent contract of sale of property. The vendor offered to sell and the vendee to buy contingent on the vendor's title being decreed in a suit pending. The decree in the suit having been in favour of the vendor's title, the vendee filed a suit for specific performance. Though in that case the suit was not barred, whether the first part of Article 113 or the second part was applied, the judgment indicates that the learned Judges were inclined to accept the date of the decree of the appellate Court on which the contract was contingent as the date fixed within the meaning of the first part of the third column. In *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabadrudu*[3], the facts are : three brothers *S*, *R*, and *K* and their father made an arrangement which amounted to a division of the family properties. The father and *R* and *K* continued, however, to live together. The father died first and then *R*, leaving him surviving *A* his widow and *B* his daughter. *A* and *B* did not claim *R's* share but were content with maintenance. There was, however, no surrender by *A* of her rights. *S* and *K* entered into an agreement between themselves to the effect that *K* should enjoy *R's* share and maintain *A* and *B*, *S* being given a small piece of land at once and that after *A's* death, *S* was to take half of *R's* share. *B* died unmarried in *A's* lifetime and *S* predeceased *A* who died in 1891. In a suit brought in 1901 by the son of *S* to recover one half share of *R's* property, Boddam, J., held that the agreement gave only a right to claim specific performance thereof when the reversion should fall in, which right became barred as it was not enforced within the statutory period after the death of the widow. At page 492 the learned Judge says—

" At the death of the widow, therefore, the plaintiff's only remedy in my opinion was to sue Krishnayya for specific performance of the contract made by Exhibit A. This right became barred within three years of May, 1891, when the widow died."

Though the question was not discussed, this can only be supported on the principle that in the contract the date was fixed with reference to an event, namely, the death of the widow which was certain to happen. The learned counsel for the appellant

1. (1875) 10 Q.B. Cases 371.
2. (1884) I.L.R. 6 All. 231.
3. (1907) 17 M.L.J. 505 : I.L.R. 30 Mad. 486

relied on *Kashi Prásad* v. *Chhabi Lal*[1], in support of his contention. The plaintiffs in that case made two usufructuary mortgages on 17th June, 1907. Subsequently they executed another usufructuary mortgage in favour of the defendants directing them to pay a portion of the consideration towards the earlier mortgages. As the defendants had failed to redeem the two earlier mortgages, the suit was filed for damages and also for a direction to the defendants to redeem the two earlier mortgages. The second relief was construed to be one for the specific performance of the agreement to discharge the earlier mortgages. So construing, the learned Judges applied Article 113 of the Indian Limitation Act. At page 411 the learned Judges held that the date fixed under Article 113 must be the date clearly mentioned in the contract, whether the said contract be oral or in writing and that the force of the word " fixed " implied that it should be fixed definitely and should not be left to be gathered from the surrounding circumstances of the case. As no date was fixed in that case they held that limitation would run only from the date of the refusal which was well within time. This decision does not help the appellant as we also agree that the date cannot be gathered from the surrounding circumstances but must be fixed in the contract itself.

The next decision cited is *Alopi Parshad* v. *Court of Wards*[2]. The contract in that case provided that *B* should finance *A's* litigation in respect of certain property and in return get certain share of the property after the passing of the decree. It also provided that if an appeal was preferred from the decree to the Privy Council, *B* would be entitled to a greater share. *B* brought a suit for the specific performance of the contract more than three years after the date of the decree but within three years of the refusal to perform the contract. The learned Judges held that the principle *certum est quod certum reddi potest* did not apply to the facts of that case as in their view the date could not be ascertained. At page 26 they observe :

" The plaintiffs were entitled to get their share after the decree which undoubtedly means when the decree becomes unassailable. On 10th May, 1925, the decree in favour of Saleem Mohammed Shah had not become unassailable. It was liable to be challenged in an appeal to the High Court, and on the decision of such an appeal, by an appeal to His Majesty in Council. The 10th May, 1925, cannot therefore be regarded as the date on which the plaintiffs became entitled to their share."

With great respect we cannot agree with these observations. In our view it would be enough if the date fixed in the contract is ascertainable with reference to an event certain to happen. Mr. Subramania Pillai relied upon a decision of a Division Bench of this Court in *Mallikarjuna* v. *Parthasaradhirao*[3]. Under the terms of the contract in that case, the vendor promised to execute the sale deed when both of his brothers (appellants 1 and 2) or one of them (the second appellant)—there was some discrepancy even on that point—who were students elsewhere returned to the village for the next vacation, *i.e.*, in May, June, 1935. The learned Judges held that the agreement was too indefinite to be regarded as fixing a date for the performance of the contract. It will be seen that there was no definite evidence in that case in regard to the contingency. Further, the contingency contemplated in that case was not an event certain to happen. It might be that neither of those brothers might return in May or June, and therefore obviously the aforesaid doctrine could not be applied.

We therefore hold that if the date can be ascertained with reference to an event certain to happen it will be a date fixed within the meaning of Article 113 of the Indian Limitation Act. In the present case the appeal (A. S. No. 34 of 1931) was disposed of on 26th January, 1933, and the suit was filed on 18th August, 1944 and therefore the suit is clearly barred under Article 113 of the Limitation Act. In the view we have taken on the question of limitation it is not necessary to consider the other questions raised by the learned counsel for the appellant.

In the result the appeal is dismissed with costs.

V. S. ——— *Appeal dismissed.*

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1. A.I.R. 1933 All. 410 (2).
2. A.I.R. 1938 Lah. 23.
3. (1943) 2 M.L.J. 584 : I.L.R. 1944 Mad. 742.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

The Public Prosecutor .. *Appellant**

v.

Chakala Chenna Chitambarappa .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 249 read with section 313 (1) (a)—Keeping soiled clothes within municipal limits—Washing done outside the municipal limits—Whether an offence.

The gist of the offence under section 249 and Schedule V (*a*) of the Madras District Municipalities Act, consists in washing soiled clothes and not in keeping them for the purpose of washing them. No licence is needed merely for the purpose of keeping soiled clothes the washing of which is done outside the municipal limits and therefore no offence would be committed in such a case.

Appeal against the order of the Court of the Additional Second Class Magistrate, Anantapur, in C. C. No. 900 of 1949.

The appellant in person.

N. Koteswara Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the State against the order of the Additional Second Class Magistrate of Anantapur acquitting the accused. The charge against the accused was that he failed to take out a licence during 1948-49 for keeping soiled clothes for washing and washed clothes without obtaining a licence under the Madras District Municipalities Act and thereby committed an offence punishable under section 249 read with section 313 (1) (*a*) of the Act. Section 249 (1) reads as follows :

"The Council may publish a notification in the district gazette and by beat of drum that no place within municipal limits or at a distance within three miles of such limits shall be used for one or more of the purposes specified in Schedule V without the (licence of the executive authority) and except in accordance with the conditions specified therein."

The relevant provision of law under which the offence is sought to be brought is clause (*a*) of Schedule V which is in the following words :

"Washing soiled clothes and keeping soiled clothes for the purpose of washing them, and washed clothes."

The question to be considered in this case is whether a licence is required even for keeping soiled clothes for washing when admittedly washing the soiled clothes took place outside the municipal limits. The trial Court put the construction upon this clause (*a*) that the licence is needed only for washing as well as keeping soiled clothes within the municipal limits and that no licence is needed merely for the purpose of keeping soiled clothes the washing of which is done outside the municipal limits.

The State has preferred an appeal against this order on the ground that the construction placed upon Schedule V (*a*) by the trial Court is not correct. I do not think the order of the Stationary Sub-Magistrate is wrong. A plain reading of the clause shows that to bring it under clause (*a*) of Schedule V it is necessary that washing also should take place within the municipal limits. The gist of the offence consists in washing soiled clothes and not in keeping them for the purpose of washing them without obtaining the requisite licence. It is not an offence merely to keep soiled clothes for the purpose of washing. If this construction is to be accepted every one that keeps soiled clothes for the purpose of washing them can be said to have committed an offence under section 249.

I think the reasonable construction is that it is only a person who washes the soiled clothes and keeps soiled clothes for the purpose of washing within the municipal limits without taking out a licence that can be said to have committed offence. In these circumstances I hold that the construction placed by the Magistrate is correct and is not liable to be revised. I do not therefore accept the appeal and the order of the lower Court is confirmed.

V.P.S. *Appeal dismissed.*

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* Cr. A. No. 808 of 1949. 29th March, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

F. X. D. Pinto and another .. *Appellants**

v.

Sheenappa Malli and others .. *Respondents.*

Mortgage—Usufructuary—Clause for redemption within a time—Construction.

A usufructuary mortgage contained the following terms: "This deed of conditional sale is executed by us under the terms that the clay contained in the said property will be given to you alone and therefore, if the clay contained in the said property becomes useful to you, you shall obtain all the clay contained in the said property for Rs. 3,000 . . . . In case we fail to sell the said clay jointly along with you to others within two years from this date, by the end of the two years from this date, if we pay this mortgage amount Rs. 7,500 to you, you shall obtain that amount and the said property shall be returned to us with a reconveyance executed with our expenses ".

On a construction of the deed of mortgage,

Held : That apart from the clog on the equity of redemption which the clause in question will entail, if permitted, on the facts and circumstances of the case, the mortgagees not having at any time intimated to the mortgagors the decision to treat the sale of clay as concluded before the issue of notice by the mortgagor offering to redeem the mortgage, the mortgagees are precluded from pleading this clause to resist the demand for redemption. Hence to a suit for redemption of such a mortgage, there can be no defence. Further it will be highly inequitable to direct specific performance of the agreement after the mortgagors have exercised their right of obtaining redemption on payment of the full amount of the mortgage money.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, passed in O. S. No. 1 of 1944, dated 13th November, 1945.

K. Y. Adiga and *K. Vittal Rao* for Appellants.

K. Srinivasa Rao and *T. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit for redemption of a usufructuary mortgage for Rs. 7,500 executed on the 20th March, 1941, by plaintiffs 2 to 4 and defendants 3 and 4 along with others who formed an undivided Aliyasanthana family in favour of defendants 1 and 2. The first plaintiff claims under a deed of simple mortgage executed on the 1st March, 1943, by the mortgagors under the first deed for Rs. 8,000 reserving thereunder a sum of Rs. 7,500 to be paid to defendants 1 and 2 in satisfaction of the amount due under the mortgage in their favour. The learned Subordinate Judge of South Kanara passed a decree for redemption and mesne profits substantially as prayed for by the plaintiffs. Defendants 1 and 2 are the appellants before us. This appeal, however, relates mainly to the claim made by the appellants-mortgagees based on some of the clauses in the mortgage deed to the clay in the mortgaged lands. As the decision of the appeal depends entirely on a construction of the material clauses of the mortgage deed, it is necessary to extract them :

" This deed of conditional sale is executed by us under the terms that the clay contained in the said property will be given to you alone and therefore, if the clay contained in the said property becomes useful to you, you shall obtain all the clay contained in the said property for Rs. 3,000 (Rupees three thousand) and the said amount of Rs. 3,000 shall be adjusted by you towards the payment of the portion of this mortgage amount payable to you. If you do not want the said clay, the said clay shall be sold to others jointly by us and yourself within two years from this date and that amount shall be paid to you towards the payment of the portion of this mortgage amount. In case we fail to sell the said clay jointly along with you to others within two years from this date, by the end of the two years from this date, if we pay this mortgage amount of Rs. 7,500 to you, you shall obtain that amount and the said property shall be returned to us with a reconveyance executed with our expenses. In that manner, if we do not pay the said mortgage amount, you shall after two years from this date sell the said clay to others by public auction, and the amount obtained in that manner shall be kept by you towards the payment of the portion of this mortgage amount. In that manner, for selling the clay, you shall be fully entitled. As mentioned above, in case we fail to pay the mort-

*Appeal No. 561 of 1946. 25th January, 1950.

gage amount relating to this, if, at the end of March, 1946, we pay to you in one lump sum the mortgage amount found due to you as mentioned above, the said property shall be returned to us after executing a reconveyance with our expense."

It was not seriously contended by the learned Advocate-General who appeared for the appellants that there was a completed sale of the clay in favour of the appellants for Rs. 3,000 on the date of the mortgage itself. Such a contention would be in the teeth of the express provisions which follow which clearly contemplate that the sale has not been concluded. There then remain two alternative constructions which can plausibly be placed on the recitals. One is that the mortgagors shall sell the clay to the mortgagees for the fixed sum of Rs. 3,000 whenever the mortgagees required them to do so. The other construction is that the mortgagees should have a right of pre-emption, *i.e.*, the right of a first refusal but with the super-added condition that the price shall be Rs. 3,000. In other words, if the mortgagors chose to sell the clay, they should first offer it to the mortgagees at the fixed price of Rs. 3,000.

In our opinion, if the first construction is adopted, then the clause will be in the nature of a clog on the equity of redemption. In *Rangayya Chetti* v. *Raghavacharlu*[1], on a consideration of the leading English cases on the subject Ramesam and Reilly, JJ., held that if a mortgagee as a term of the mortgage enters into a contract to purchase or stipulates for an option to purchase any part of or interest in the mortgaged premises, there would be a clog on redemption. This view is supported by the observations of Lord McNaughten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation*[2], and an earlier decision in *Noakes & Co.* v. *Rice*[3], as well as the later decision in *Kreglinger case*[4]. The rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of a portion of the mortgaged property or a part thereof is absolute.

If, on the other hand, the clause is treated as embodying a contract for pre-emption, it is not a case of absolute option. There is some divergence of judicial opinion whether such a contract would in all circumstances amount to a clog on redemption. But in the present case, it is not necessary to finally pronounce on this question, because unless the mortgagors make up their minds to sell, the right of pre-emption does not arise. It was not alleged in this case that the mortgagors attempted to or did sell the clay to any one else. The first plaintiff by the notice, dated 3rd March, 1943, offered to pay the entire amount of Rs. 7,500 and obtain redemption. In our opinion, though something may be said for a contract of pre-emption under which the mortgagees would have the right of first refusal, but the price is that which is either agreed upon between the parties or the market price, here we have a contract of pre-emption one of the terms of which is that the mortgagors shall not only give the mortgagees the first right of refusal, but they are further bound to sell, in case the mortgagees require, at a fixed price even though it be not the proper price on the date of the sale. Such a contract for pre-emption would be clearly a clog on the equity of redemption.

Apart from this objection on the ground that this clause offends the rule against clogs on the equity of redemption, on the facts and circumstances in the case, we consider that the appellants not having at any time intimated to the mortgagors the decision to treat the sale of clay as concluded before the issue of the notice by the first plaintiff offering to redeem, they are precluded thereafter from pleading this cluase to resist the demand for redemption. This is a suit for redemption and to that suit there is really no defence on the part of the appellant. Their claim in the written statement is virtually a claim for specific performance of an agreement contained in the mortgage. It will be highly inequitable to direct specific performance of this agreement after the mortgagors have exercised their right of obtaining redemption on payment of the full amount of the mortgage money.

1. (1928) 56 M.L.J. 318: I.L.R. 52 Mad. 300.
2. (1904) A.C. 323.
3. (1902) A.C. 24.
4. (1914) A. C. 25.

For all these reasons, we agree with the Court below that the plaintiffs were perfectly right in tendering the sum of Rs. 7,500 to redeem the mortgage. No other question was raised before us. The appeal therefore is dismissed with the costs of the plaintiffs and defendants 3 and 4.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRA REDDI.

T. N. Venkataraman and others .. *Petitioners**

v.

Pushkalammal .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 177 *and Madras Hindu (Bigamy Prevention and Divorce) Act (VI of* 1949), *section* 4—*Venue of trial of offence.*

The word 'ordinarily' in section 177 of the Criminal Procedure Code must be taken to mean 'except in the cases provided hereinafter to the contrary' so that the ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the Court which has jurisdiction to try the offence.

Hence it is only that Court within whose jurisdiction that an offence of bigamy under section 4 of the Madras Act VI of 1949 was committed that could try the accused charged with that offence and the residence of the offender does not confer jurisdiction upon a Court to try an offence that took place outside its jurisdiction.

So, where the offence of bigamy under section 4 of the Act was committed at Trivandrum, Capital of Travancore State, which is outside the jurisdiction of the First Additional First Class Magistrate at Trichinopoly, the latter Court has no jurisdiction to try the offence.

Case-law discussed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C. C. No. 900 of 1949 of the First Additional First Class Magistrate, Trichinopoly.

C. M. Alagirisami for *S. Ramachandra Aiyar* for Petitioners.

G. Gopalaswami for Respondent.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the State.

The Court made the following

ORDER.—This petition raises a question relating to jurisdiction of the First Additional First Class Magistrate of Trichinopoly to try an offence under section 4 of Madras Act VI of 1949 said to have been committed at Trivandrum. The complainant is the first wife of the first accused, the fourth accused being his second wife while accused 2 and 3 are his paternal uncle and aunt respectively. The first wife filed a complaint in the Court of the First Additional First Class Magistrate alleging that the first accused married her on 25th May, 1942, that he subsequently abandoned her and married the fourth accused who belongs to Travancore State at Trivandrum on 30th June, 1949, and thereby committed an offence under section 4 of the said Act and that the second and third accused abetted the first and fourth accused in the commission of the said offence.

The petitioners herein raised an objection before the trial Magistrate that he had no jurisdiction to try the case as the offence of bigamy is alleged to have been committed at Trivandrum. This objection was overruled by the trial Magistrate on the ground that the case falls within the exception to the general rule that every offence shall ordinarily be enquired into and tried by the Court within the local limits of whose jurisdiction it was committed. Section 4 of Act VI of 1949 reads thus:

"Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnised after the commencement of this Act between a man and woman either of whom has a spouse living at the time of such solemnisation shall be void, whether the marriage is solemnised within or outside the Province of Madras."

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* Cr.M.P. No. 3181 of 1949. 14th April, 1950.

This section declares the second marriage of a man or woman either of whose spouse is living at the time of the second marriage void. But it does not provide for the venue of the trial of the offence committed thereunder nor is there any other provision in the Act which deals with the jurisdiction of Courts to try offences committed under the Act. We have therefore to turn to the provisions of the Criminal Procedure Code for this purpose.

The relevant provisions of the Code which deal with the jurisdiction of Courts to try offences are contained in Chapter XV of the Code. Section 177 of the Code provides that:

> "every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed".

The only other section relevant for the purpose of this case is section 188 which is in the following words:

> "When a subject of an Indian State commits an offence at any place without and beyond the limits of India or . . . . provided that (notwithstanding anything in any of the preceding sections of this Chapter) no charge as to any such offence shall be inquired into in India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in India; and, where there is no Political Agent, the sanction of the (appropriate Government) shall be required."

Obviously this section has no application to the case under reference because it is not the case of the prosecution that the requisite certificate under this proviso has been obtained for inquiring into the offence at a place other than the one where the offence was committed.

So I have to consider only the applicability of section 177 of the Code to this case. The only question that falls to be decided is whether the expression "ordinarily be inquired into" implies that under certain extraordinary circumstances the Court has jurisdiction to try offences which are not committed within its cognizance.

This expression has been the subject of several judicial decisions both of this Court and of the other High Courts. In *Mst. Bhagwatia* v. *King-Emperor*[1], the accused was committed to sessions to take his trial for an offence under section 494 in respect of a marriage that took place outside the territorial jurisdiction of that Court. In an application to quash the committal order a Bench of the Patna High Court, laying down the principle that the proper Court to try a charge of the offence of bigamy is the Court within whose jurisdiction the offence was committed, set aside the order of committal. This ruling was followed in *Emperor* v. *Govardhan Ridkaran*[2], which laid down that the word "ordinarily" in section 177 must be taken to mean "except in the cases provided hereinafter to the contrary." To the same effect is the ruling in *Ramnarain* v. *Emperor*[3]. The charge against the accused in the cited case was that he took or enticed away one Ranganayaki whom he knew to be a married woman from her lawful guardian from the Madras Presidency with the intent specified in section 494, retained her at Bombay with the same intent and committed adultery. Their Lordships agreed with the contention raised on behalf of the accused that the taking and enticing, if there was any, took place in Madras Presidency and the Magistrate in Bombay had no jurisdiction to try the offence and interpreted the word "ordinarily" in section 177 as except otherwise provided for in this Code.

Coming to our own Court, in In re *Kochunni Elaya Nair*[4], it was observed at page 18 by Spencer, J., who was one of the members of the Bench as follows:

> "The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the court which has jurisdiction to try the offence. See section 177 of the Criminal Procedure Code."

It must be observed that there are no special provisions as to the trial of offences in the Code under section 494. As I have already stated Madras Act VI of 1949

1. (1924) I.L.R. 3 Pat. 417.
2. A.I.R. 1928 Bom. 140.
3. I.L.R. (1937) Bom. 245.
4. (1921) 41 M.L.J. 441: I.L.R. 45 Mad. 14.

does not make any provision for the trial of offences committed under the Act. In *In re Verghese*[1] it was laid down by Yahya Ali J., that an offence of criminal breach of trust by sub-pledging the jewels in a Native State by a pledgee of British India can only be tried in that Native State and the British Indian Court would get jurisdiction to try that charge only when it is certified by the Political Agent of the State or other prescribed authority as laid down by section 188 of the Code.

The same principle is reiterated in *Antony D'Silva, In re*[2]. In that case certain persons of South Kanara District were charged under section 420 of the Indian Penal Code for selling to a resident of Travancore some lottery tickets and thereby inducing the buyer of the tickets to part with money without running a lottery. It was held down by the learned Judges (Happell and Govindarajachari, JJ.,) that the accused persons should be tried only in the Travancore State where the purchaser was deceived and made to part with his money and therefore the offence of cheating committed.

I express my respectful agreement with the principle laid down in the decisions referred to above and hold that it is only that Court within whose jurisdiction the offence of bigamy was committed that could try the accused charged with that offence and that the residence of the offender does not confer jurisdiction upon a Court to try an offence that took place outside its jurisdiction.

In this case admittedly the marriage took place at Trivandrum, Capital of Travancore State, which is outside the jurisdiction of the First Additional First Class Magistrate of Trichinopoly.

I therefore hold that that Court has no jurisdiction to try accused 1 and 4 who are alleged to have committed the offence of bigamy under section 4 of Madras Act VI of 1949. Hence the proceedings against accused 1 and 4 are quashed.

As regards accused 2 and 3 who are charged with abetment of the offence of bigamy, we have no evidence as to the place and nature of abetment committed by them, as, so far, no evidence has been taken. I do not therefore propose to quash the proceedings against accused 2 and 3. They will take their trial for the offences charged.

V.P.S. — *Proceedings quashed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Arasappa Pillai and others .. *Appellants**

v.

V. Thandavan Pillai and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 28-A (introduced by Act XXV of 1948)—Whether applicable to cases of insolvency of a manager other than father of joint Hindu family.

Section 28-A of the Provincial Insolvency Act introduced by Act XXV of 1948, would not apply to cases of insolvency of a manager other than the father of a joint Hindu family.

Ramasastrulu v. *Balakrishna Rao*, (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.), *Virupaksha Reddi* v. *Chandalal Siva Reddi*, (1943) 2 M.L.J. 87 : I.L.R. 1944 Mad. 212 relied on.

Venkata Reddi v. *Suryanarayanamurthi*, (1947) 2 M.L.J. 507 not followed.

Appeal against the District Court, Mathurai dated 12th August, 1948, and passed in A. S. No. 211 of 1947 preferred against the decree of the Court of the Subordinate Judge of Mathurai dated 18th April, 1947, and passed in O. S. No. 57 of 1946.

T. M. Ramaswami Aiyar for Appellants.

M. R. Narayanaswami and *K. Vaitheeswaran* for Respondents.

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1. (1947) 1 M.L.J. 277.
2. (1948) 2 M.L.J. 132.

*S.A. No. 2331 of 1948. 15th March, 1950.

The Court delivered the following

JUDGMENT.—The short question for determination in this appeal which evoked a long argument of two days in full and the better part of a third is whether Act XXV of 1948 applies to cases of insolvency of a manager other than the father of a Hindu joint family. I feel highly indebted to counsel for their forcible and pointed and in no sense unnecessarily prolonged argument. The lower appellate Court has answered the question in the negative and the appellants assail the answer as erroneous.

The primary matter for consideration is the language of the body of new section 28-A together with the second proviso thereto and not the first of Act V of 1920 which has come in by reason of Act XXV of 1948. In the body of the new section the crucial words are "for his own benefit" and in the relevant proviso the material words are the words of reference to the 28th day of July, 1942. That date is the date of the judgment of a Full Bench of this Court reported in *Ramasastrulu* v. *Balakrishna Rao*[1] which throw out an expression of trust on the part of the Full Bench that the Central Legislature would bring the Provincial Insolvency Act and the Presidency Towns Insolvency Act into line in respect of the difference between them that the latter contains section 52 (2) (*b*) for which there is no counterpart in the former. The trust so expressed has been fulfilled by the insertion of section 28-A in the Provincial Insolvency Act in terms *verbatim et litteratim* identical with those of section 52 (2) (*b*) of the Presidency Towns Insolvency Act.

Looking at the words "for his own benefit" occurring in the body of the section it *prima facie* strikes one that they can have reference only to a father-manager and not to a manager other than the father. To use the language of Leach, C.J., in the Full Bench judgment in *Ramasastrulu* v. *Balakrishna Rao*[1]:

"The powers of a father-manager are greater than the powers of a manager who is not the father of the other coparceners, because the father has power not only to sell family property in order to discharge a family liability, but also the right to sell his sons' interest in the family estate to discharge his own personal debts, provided that they have not been incurred for any immoral or illegal purposes. . . . . A father's power to sell his sons' property must be taken to be a power falling within section 52 (2) (*b*), Presidency Towns Insolvency Act, but the power of a manager who is not the father of the other coparceners to sell family assets to meet a family liability is not a power which he can exercise for his exclusive benefit, and section 52 (2) (*b*) may not apply in such a case".

Then again, in *Virupaksha Reddi* v. *Chanalal Siva Reddi*[2], in which Krishnaswami Ayyangar, J. who had been himself a party to the Full Bench ruling, delivered the judgment of the Court consisting of himself and Mockett, J., it is observed at page 215 of the report that while the father's power being a power which he could exercise for his own benefit within section 52 (2) (*b*) of the Presidency Towns Insolvency Act, would vest in the Official Assignee, the manager's power would not, as his power is exercisable for the benefit of the family and not for his own. I realise that the observations in the one case as well as in the other which I have extracted are *obiter*: but they undoubtedly tend to support the *prima facie* construction above indicated of the language of the statute with which we are concerned, which is modelled upon the language of the corresponding section of the Presidency Towns Insolvency Act.

As against these observations my attention has been drawn by learned counsel for the appellants to a sentence in the judgment of Gentle, C.J., on behalf of the Court consisting of himself and Govindarajachari, J. in the case reported in *Venkata Reddi* v. *Suryanarayanamurthi*[3] which runs thus:

"At the time of the sale it was ordinarily believed that the power, held by a manager of a joint Hindu family and also by a father, who was a member of a joint Hindu family with his sons, to sell the family property in circumstances permitted by the Hindu law devolved on the Official Receiver, under the Provincial Insolvency Act *as undoubtedly it does pursuant to section* 52 (2) (*b*) *of the Presidency Towns Insolvency Act*".

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1. (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.).
2. (1943) 2 M.L.J. 87: I.L.R. 1944 Mad. 212.
3. (1947) 2 M.L.J. 507.

The clause of the sentence underlined (italicised) by me is stressed by counsel as entitled to great weight as an expression of opinion of a judge of ample experience on the Original Side of this Court as well as of the High Court at Calcutta. As between the two sets of observations referred to I have no hesitation in preferring the former to the latter as more consonant to the actual normal meaning of the words "for his own benefit" in the statute.

I may also notice that these words which have been copied into the Presidency Towns Insolvency Act from section 38 of the English Bankruptcy Act have been in England interpreted as meaning "for his own exclusive benefit" in a case reported in *In re Taylor's Settlement Trust*[1]. That case is referred to in Williams on Bankruptcy, 16th Edition at page 266 in these terms :

> "Where a settlor by a voluntary settlement directing his trustees to accumulate and invest income reserved to himself power to require the whole of the income for any year, or the whole income remaining uninvested, to be paid as to one half to himself and as to one half to a lady who afterwards became his wife, Eve, J., held that the power was indivisible and could not be exercised by the settlor for his own benefit within the meaning of sub-section (*b*), and, in consequence, that his capacity to exercise it did not pass to his trustee in bankruptcy".

It is clear that as ruled by the Privy Council in *Trimble* v. *Hill*[2].

> "Where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the Colony."

The same principle, in my opinion, applies to the construction of section 52 (2) (*b*) of the Presidency Towns Insolvency Act by courts in this country in so far as the corresponding terms of section 38 of the English Bankruptcy Act have been construed in a particular manner by English Courts. It is argued for the appellants relying on the observation of Krishnan, J., in the Full Bench ruling in *Seetharama Chettiar* v. *Official Receiver, Tanjore*[3], that a general power of appointment under the English law is a very different thing in law from the power of the Hindu father or manager under the Hindu law. In making that observation the learned Judge was dealing with the argument before the court that a power could never be treated as property in view of the English ruling in *Ex parte Gilchrist, In re Armstrong*[4]. That does not, I am clear, invalidate the process of interpretation that I am adopting of the words "for his own benefit" in section 52 (2) (*b*) of the Presidency Towns Insolvency Act with the aid of decisions on the meaning of the same words in the corresponding section of the English Bankruptcy Act.

It is contended for the appellant that there are decisions of this Court in *Rangayya Chettiar* v. *Thanikachala Mudali*[5], (of a single Judge, Subramania Ayyar, J.) and in *Nunnu Setti* v. *Chidaraboyina*[6] of a Bench (Bashyam Ayyangar and Moore, JJ.) which interpreting the words "for his benefit" in section 30 of the Insolvent Debtors Act, 11 and 12 Victoria, Chapter 21 sections 7, 30 have held them to be of sufficient amplitude to cover the power of a manager who is not the father to sell the interests of his coparceners for purposes binding upon the coparcenary. It is urged that there is no substantial difference between those words "for his benefit" and the words "for his own benefit" which occur in section 52 (2) (*b*) of the Presidency Towns Insolvency Act and in the new section 28-A of the Provincial Insolvency Act. Whether the learned Judges in those cases did or did not mean a distinction between the two sets of words—and I am prepared to assume that they did not mean any such distinction—there is no doubting the fact that a course of decisions under section 266 of the Civil Procedure Code then in existence (section 60 of the present Code) illustrated by *Jagabhai Lalubhai* v. *Vajbhukandas Jagjivandas*[7] and *Sardarmal* v. *Aranvayal Sabapathy*[8] entered into the reasoning of the learned Judges in their interpretation of the words "for his benefit" in section 30 of the Insolvent Debtors Act there in question.

1. (1929) 1 Ch. 435.
2. (1879) 5 A.C. 342.
3. (1926) 51 M.L.J. 269 : I.L.R. 49 Mad. 849 at 855 (F.B.).
4. (1886) 17 Q.B.D. 521.
5. (1895) I.L.R. 19 Mad. 74.
6. (1902) I.L.R. 26 Mad. 214.
7. (1886) I.L.R. 11 Bom. 37.
8. (1896) I.L.R. 21 Bom. 205.

The relevancy of that course of decisions under a different statute to the interpretation of the Presidency Towns Insolvency Act has been negatived by the Privy Council in their decision in *Sat Narain* v. *Behari Lal*[1], in no uncertain terms. Says Sir John Edge in delivering the judgment of their Lordships at page 11 of the report:

"Cases which have arisen under section 266 of the Code of Civil Procedure, 1882, or under section 60 of the Code of Civil Procedure, 1908, depended on different considerations, and decisions in cases under those sections are likely to mislead a court which has to construe the Presidency Towns Insolvency Act, 1909".

His Lordship further observes at page 12 of the report:

"Their Lordships do not intend to say one word which might have the effect of disturbing and raising doubts as to decisions under section 266 of the Code of Civil Procedure, 1882, or under section 60 of the present Code but they must deal with the matter upon the words of the statute which has to be applied in this case."

Moreover, while their Lordships in fact refer to *Rangayya Chetti* v. *Thanikachala Mudali*[2], *Nunnu Setti* v. *Chidaraboyina*[3] and *Fakirchand Motichand* v. *Hurrukchand*[4], in the course of their judgment, it is only to put them aside as cases decided under a different statute as appears from their Lordships' observations to be found at page 23 of the report. As Curgenven, J., remarks in *Official Receiver, Ananthapur* v. *Ramachandrappa*[5] referring to the following observation of Bashyam Ayyangar, J. in *Nunnu Setti* v. *Chidaraboyina*[3]:

"If the question were res integra and not covered by a course of judicial decisions, bearing upon the corresponding expression occurring in section 266 of the Civil Procedure Code (new section 60) I should entertain considerable doubt as to whether a power which, under the Hindu Law, a managing member of a joint Hindu family has over the interests and shares of the junior members in the family propery, is within the meaning of section 30 of the Insolvency Act, a power vested in the insolvent which he can lawfully exercise for his benefit".

"Since the Privy Council have now deprecated the practice of deriving an analogy from section 266 of the Civil Procedure Code and have upon this ground among others disposed of the cases which stood in the learned Judge's way, this observation is entitled to much weight as an expression of Justice Bashyam Ayyangar's personal opinion".

Mr. Ramaswami Ayyar for the appellants has in support of the appeal also relied upon the reference to 28th day of July 1942 in the second proviso to section 28-A of the Provincial Insolvency Act as indicating that since that is the date of the decision in *Ramasastrulu* v. *Balakrishna Rao*[6] which was itself concerned with the right of a manager of a joint Hindu family not the father, to sell family assets to discharge debts which are payable out of the joint estate as or as not property within section 2 (*d*) of the Provincial Insolvency Act, it follows that the Legislature had in mind cases of managers, not fathers, as well as cases of father-managers in enacting section 28-A. He has also drawn my attention in particular to the observation at page 94 of *Ramasastrulu* v. *Balakrishna Rao*[6] which is as follows:

"If we are to have regard to the judgments of the Privy Council in the Lahore cases, as we must, we must hold that under the Provincial Insolvency Act the manager's power to sell does not vest in the Official Receiver".

As regards the argument founded upon the reference to the date in the proviso I am not prepared to say that *prima facie* it is without force. At the same time as observed by Lord Halsbury, L.C., in his speech in the House of Lords in the case in *West Derby Union* v. *Metropolitan Life Assurance Society*[7], a proviso cannot be so read as to suggest that the previous part of the section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the previous words of the section itself. So to read, rules his Lordship, would certainly be a very serious invasion upon any rule of construction by which any document, whether an act of Parliament or anything else, has ever been construed, and one should

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1. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
2. (1895) I.L.R. 19 Mad. 74.
3. (1902) I.L.R. 26 Mad. 214.
4. (1883) I.L.R. 7 Bom. 438.
5. (1928) 55 M.L.J. 721: I.L.R. 52 Mad. 246 at 251.
6. (1942) 2 M.L.J. 457: I.L.R. 1943 Mad. 83 (F.B.).
7. (1897) A.C. 647 at 651.

be very much averse indeed to lend any countenance to such a mode of construing a proviso.

Then as regards the argument founded upon the observation of Leach, C.J. at page 94 of *Ramasastrulu* v. *Balakrishna Rao*[1], I am perfectly clear that the learned Judge did not mean to say going back upon the view already expressed by him at pages 90 and 91 of the report and referred to in the foregoing part of this judgment, anything to the effect that under the Presidency Towns Insolvency Act the manager's power to sell would vest by reason of section 52 (2) (*b*), while under the Provincial Insolvency Act it would not so vest for want of a similar provision.

I have refrained from entering into any detailed discussion such as has been attempted at the hearing by counsel on both sides of the case law prior to the enactment of Act XXV of 1948, except in so far as strictly necessary to the interpretation of the words of section 28-A which that Act has introduced into the Provincial Insolvency Act V of 1920. In my opinion, such a discussion is not, except to the extent indicated herein relevant to the interpretation of the statute with which I am concerned. I may add that the view taken by me accords with that expressed in Mayne on Hindu Law and Usage, latest Edition, paragraph 350 and 350 (*a*) at pages 442 to 446.

In the result, the second appeal fails and is dismissed with costs.

No leave.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

Rasa Koundan and another .. *Appellants**

v.

Janaki Ammal and another .. *Respondents.*

Madras Hindu Religious Endowments Act (*II of* 1927) (*as amended by Act V of* 1929)—*Section* 44-A—*Enfranchisement of devadasi inam comprising both warams—Effect—Adverse possession against inamdar held before enfranchisement—If available to resist suit for possession by the grantee after the enfranchisement.*

After the enactment of section 44-A of the Madras Hindu Religious Endowments Act the Government disannexed in 1931 certain lands which were held by the plaintiff's predecessors-in-title as devadasi service inam for rendering service in a temple and granted a title deed to the plaintiff. The inam grant in question consisted of both the warams. The plaintiff's suit for possession was resisted by the defendants on the ground that they had acquired title by adverse possession.

Held : The inam title deed of 1931 created a fresh title in the plaintiff and the defendants cannot resist the suit for possession and rely on long possession which they had when the service tenure subsisted, as the title, if any, which was extinguished under the law of limitation is not the title on which the plaintiff is now suing to recover.

Venkata Jagannadha v. *Veerabadrayya*, (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643 (P.C.) relied on.

Maddela Yenadi v. *Maddela Ramalakshmamma*, (1946) 1 M.L.J. 85 considered and not approved.

Per Viswanatha Sastri, J.—If on the date of the enfranchisement a person had acquired no title as against the Government (by sixty years adverse possession) to the land and the inam is resumed and the land granted by the Government under a title deed, he would have no right of action against the grantee. The rights which he might have acquired against the inamdar before the enfranchisement are wiped out by the enfranchisement sanctioned by section 44-A of the Act which involves a resumption and re-grant of the land.

Appeal against the decree of the District Court, Salem, in A. S. No. 325 of 1945, preferred against the decree of the Court of the District Munsif, Sankaridrug at Salem in O.S. No. 411 of 1942.

D. Ramaswami Aiyangar for the Appellants.

T. Krishna Rao for Respondents.

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1. (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.).

*S.A. No. 1713 of 1947. 6th February, 1950.

In pursuance of an order of reference by Panchapagesa Sastri, J., this appeal coming on for hearing, the Court delivered the following

JUDGMENTS: *Satyanarayana Rao, J.*—Defendants 1 and 3 are the appellants in this second appeal. The lands in suit of the extent of 5 acres 20 cents were held by the plaintiff's predecessors as Devadasi service inam for rendering service in a temple. After the enactment of section 44-A by the Madras Hindu Religious Endowments Amendment Act (Madras Act V of 1929) the Government disannexed the inam from the service and granted a title deed to the plaintiff on 13th April, 1931, which is marked as Exhibit P-1 in the case. The plaintiff instituted the suit for recovery of possession of the property from the defendants who resisted it on the ground that they had acquired title to the lands by adverse possession. Without referring to the long history of the previous proceedings in the suit it would be sufficient for the purpose of disposing of this appeal to state that, on an issue remitted for trial by the District Court, it has now been finally determined that the inam grant consisted of both the warams. The only question that remains for disposal in this second appeal is the effect of the enfranchisement proceedings of the year 1931 on the title of the plaintiff. The contention urged on behalf of the plaintiff in the court below and which found favour with the learned District Judge is that the inam title deed of 1931 created a fresh title and that the defendants could not resist the suit for possession and rely on long possession which they held when the service tenure subsisted as the title, if any, which was then extinguished under the law of limitation is not the title on which the plaintiff is now seeking to recover possession of the property. It has also been found by the courts below—and it is not disputed before us—that the defendants failed to establish a title by prescription as against the Government as they were not in possession for the required statutory period of sixty years. The case has, therefore, to be considered on the footing that the inam grant in favour of the plaintiff's predecessors-in-title comprised both the warams and that the grant is a service grant which was recognised in the inam proceedings of 1860 by the issue of a title deed—title deed No. 33—and that the defendants' only defence is long possession at a time when the service tenure subsisted. If, as contended by the plaintiff, she had acquired a fresh title under the enfranchisement proceedings of 1931 the defendants' prescriptive title which commenced and which was perfected when service tenure was subsisting would be of no avail as it is not that title on which the plaintiff is now relying to seek to recover possession of the property.

It is no doubt true that an enfranchisement of an inam does not always imply a resumption of the original grant and a re-grant of the property. In order to determine in a given case the effect of an enfranchisement on the title to the property, one has to examine the tenure on which the land was previously held and which was sought to be altered or substituted by a new tenure by the enfranchisement proceedings. If, as in the case of karnam service inam, the lands constitute emoluments attached to the office or as remuneration for the service and annexed to it, the enjoyment of the property follows the title to the office or the liability to render service. The succession to the service may be governed by the ordinary principles of the personal law of the parties, Hindu law as in the present case or may be governed by the Hindu law as modified by statute as in the case of karnam service inam lands. In the case of karnam service inams, it may be mentioned that the only statutory modification is that the claimant has to show that he is entitled to succeed to the office under the Hindu law on the principle of primogeniture but that by itself would not give him an automatic right to the office. His right has further to be recognised and an appointment to the office must be made by the Government because the statute relating to hereditary village officers lays down certain qualifications for a person to get himself appointed to the office even though he may be in the line of succession. In the other cases of service tenures, the succession to the tenure is governed by the ordinary rules of the personal law unless there are statutory modifications; and on principle the emolument or property annexed to the service in either case follows the office or the service as the case may be.

The title, therefore, to the enjoyment of the property rests not upon any independent title to the property but upon the right to the office or the service. There may be other classes of cases where a person holds property hereditarily but with an obligation attached to it to render certain services. In such a case, the title to the property is regulated by the personal law of the parties and wherever the property follows the obligation which is attached to that property also follows so that the title in such a case to the property and the right to enjoyment does not depend upon the right to the office or the duty to render service. To the latter classes of cases the decision in *Narayanna* v. *Chengalamma* (*Chittedipaliem case*)[1] belongs. To the former class the decision of the Judicial Committee in *Musti Venkatajagannadha* v. *Musti Veerabadrayya*[2] belongs. In *Chittedipaliem case*[1], the dispute was whether the widow in whose favour an inam title was granted in 1865 after the inam was disannexed from service, acquired an absolute title to the property which was the subject-matter of the inam title deed or whether she held the property as a widow succeeding to her husband's estate. If it was her absolute property, the devolution would be different and would not follow the line of succession to the husband's estate. If however the title acquired under the Inam title deed is not a fresh title but only a confirmation of the previous title which the husband held and which devolved upon her under the Hindu law the property would devolve after her death upon her husband's heirs. As the obligation to render service was merely an obligation attached to property it was held, having regard to the nature of the paliem tenure that the enfranchisement in favour of the widow did not confer upon her a fresh title to the lands. The unsettled paliems, it may be mentioned, which were considered in that case were never brought under Regulation XXV of 1802 and were never settled, but notwithstanding that fact they stood exactly in the same position as regards the title to the property as the Zamindaris which were dealt with under that Regulation. So far as the proprietary rights are concerned, therefore, the unsettled paliems and the settled zamindaris stood on equal footing as was pointed both in *Narayanna* v. *Chengalamma*[1] and also in *Venkata Jagannadha* v. *Veerabhadrayya*[2]. It was at one time thought—and it was the view of Justice Bhashyam Aiyangar—that enfranchisement did not imply a resumption and a re-grant and that it was always a confirmation of an earlier title. This was the view taken by him, dissenting from the earlier Full Bench ruling in *Venkata* v. *Rama*[3] in the well known case of *Gunnaiyan* v. *Kamakchi Aiyar*[4]. His view was based largely upon an examination of the various regulations and also upon the decision in the Paliem case in *Narayanna* v. *Chengalamma*[1]. This decision was confirmed by a Full Bench of this court in *Lakshmipathi* v. *Bommireddipalli Chalamayya*[5]. When the matter went up to the Privy Council in *Venkata Jagannada* v. *Veerabadrayya*[2], the whole question was re-examined and it was held that *Venkata* v. *Rama*[3] was rightly decided and that the view of Bashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakchi Aiyar*[4] was erroneous. The decision in *Narayanna* v. *Chengalamma*[1] was explained by their Lordships of the Judicial Committee as standing on an entirely different footing from a case where the lands were attached to a service tenure like the Karnam's office which was then under consideration. It was pointed out by their Lordships :

"When a Palayam was abolished in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed by a zamindar. It was different with regard to the case of a karnam. A hereditary right in a karnam or his family can only, at the utmost, be said to constitute a certain *spes* (as he has only a right to get himself selected to the office) among persons within the area of selection of those eligible for the office . . . . The power of selection rests with the administrative officials, who alone are judges of the eligibility of the karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands follow the office *ex necessitate*. Otherwise the holder of the lands might be some person other than the holder of the office as already pointed out. The analogy fails."

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1. (1887) I.L.R. 10 Mad. 1.
2. (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643 (P.C.).
3. (1885) I.L.R. 8 Mad. 249 (F.B.).
4. (1903) I.L.R. 26 Mad. 339.
5. (1907) 17 M.L.J. 101 : I.L.R. 30 Mad. 434 (F.B.).

It is now contended on behalf of the appellants that the present case falls within the principle of *Narayanna* v. *Chengalamma*[1] and that it differs from the decision in *Venkata Jagannadha* v. *Veerabadrayya*[2] as there is no question of any selection of an heir to a Devadasi as in the case of a Karnam's office. The language of section 44-A makes it quite clear that the inam constitutes remuneration for the service to be performed by Devadasis and that it was annexed to that service by the Government. This view of the section is also supported in the present case by the facts themselves, for we find that in the inam proceedings of 1862 the entry in the Inam Fair Register, Exhibit P-7 (*a*) shows that this inam was treated as a service inam to be continued to the pagoda so long as the service continued. In the light of the finding now reached by the Courts below that the grant comprises the land and not merely the melwaram, it must follow that the service tenure was attached not only to the melwaram, but also the kudiwaram. The Government, therefore, by the enfranchisement proceedings of 1931, disannexed the inam, that is, both the warams from the service to which they were subject up to that date ; the result of which was to place the land at the absolute disposal of the Government. They could have done anything with it—either granted the kudiwaram and the melwaram to some other person or might have continued the kudiwaram in the previous holder but subject to the payment of quit rent. It is the latter alternative that the Government elected to follow, having regard to their policy that long possession held by an inamdar should not be disturbed. In these circumstances, the only conclusion possible is that the enfranchisement created a fresh title to the land under the inam title deed of 1931. It is not as if the holder, i.e., the plaintiff and her predecessors, held the kudiwaram interest in the land under an independent title without reference to the Government and it was that title which the defendants had acquired under the law of prescription. The title to the melwaram and the title to the kudiwaram in the present case were held on the same footing from the Government, in the first instance under a service tenure and when it was put an end to, or, in other words, was resumed, the land must be taken to have been re-granted to the holder on payment of quit rent as stated in the inam title deed.

Section 44-A, clause (1), provides for various kinds of grants. The first clause relates to grants of land ; the second clause relates to grants of melwaram alone and the third clause relates to grants partly of lands and partly of assignment of revenue. For all these kinds of grants provision is made to enfranchise and to grant an appropriate title deed. Of course the quit rent levied has to be paid to the temple for whose benefit the inam was originally granted. The argument now is that notwithstanding these provisions under clause (6) of section 44-A the right of a person who had acquired title by prescription are protected. Sub-clause (6) states :

> "No order passed under sub-sections (1), (2) and (3) shall operate as a bar to the trial of any suit or issue relating to the right to enjoy the land or assignment of land revenue or produce derived from land as the case may be."

It is difficult to read into this clause an exception in favour of and for the benefit of a person who had acquired title by prescription. It may be that this clause was intended to clear doubts regarding jurisdiction of civil courts or it may be that, though the enfranchisement was effected rightly, the grant of title deed really enures to the benefit of some other person than the grantee and there may be other questions which it is not possible for the Government to determine in a summary proceeding of the kind contemplated by section 44-A. It was intended by this clause to leave open all such questions to be fought out in a regularly instituted suit in a civil court. It is inconceivable, and it is impossible in my opinion, to think or to read into this section a saving of the rights in favour of a person claiming that he had acquired title to the property by adverse possession. I say it is impossible because the title which was acquired by prescription and which by the law of limitation operating as a statutory conveyance was the title to the kudi-

1. (1887) I.L.R. 10 Mad. 1.
2. (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643 (P.C.).

waram held on service tenure which the predecessor-in-title of the plaintiff possessed in the inam. That tenure was now put an end to by a competent authority and there is an end of the title of the defendants. That title cannot be revived and is not intended to be revived by anything that is stated in clause (6) of the section. Unless there is an express provision and a clear intention to save such rights, one cannot read into the sub-clause permitting a right of suit an exception in favour of such rights. It is therefore impossible for the defendants to sustain the plea that their title by adverse possession would be of avail even against the title which the plaintiff had derived under the inam title deed of 1931. It cannot be disputed that by disannexing the service from the land in 1931 which is an act of enfranchisement the land became available to the Government, freed from any previous title which was not available against the Government and it was at their absolute disposal and they could have granted it, as stated already, to any person. The inam title deed therefore recognised the right of the plaintiff to the kudivaram as well as the melwaram in the properties subject to the payment of the quit rent mentioned in the title deed. In my opinion, therefore, if the distinction between the title to the property and the title to office and service which the property follows for enjoyment by the holder of the office or the person rendering the service is kept in mind there is no difficulty in determining the question when and under what circumstances an enfranchisement of a service inam by Government would have the effect of creating a fresh title upon the grantee. The rules framed by the local Government under the Act also make it clear that when an enfranchisement is made under this section the old title deed should be cancelled and a new title deed should be granted and that is what has been done in this case. The old title deed 33 was cancelled and in its stead new title deed 3 was granted to the plaintiff.

Reference was made in the course of the arguments to a decision of Justice Chandrasekhara Aiyar sitting as a single Judge reported in *Maddela Yenadi* v. *Maddela Ramalakshmamma*[1], in which the learned Judge if I may say so with respect laid down very broadly that as regards the Devadasi service inams there is no rule that the enfranchisement under section 44-A now made extinguishes the old title and creates a new one. The learned Judge observes that the rule that the enfranchisement of service inam implies a resumption and a re-grant does not apply to all service inams irrespective of their nature. One need not quarrel with this statement of the law because, as has been pointed out already, it is not in every case that the enfranchisement has the effect of resumption and re-grant. It depends upon, no doubt the extent of the grant and the tenure on which the inam was held. If the grant was only of the melwaram, the kudiwaram interest having already been vested in the grantee, the enfranchisement would have no effect upon the kudiwaram interest in the land. The grantee and his or her successors would continue to hold the kudiwaram interest in the same right as before and enfranchisement does not touch it. Again, the service may be an obligation merely attached to the property and it may follow the title to the property as in the case of Paliem tenures, or, as in the present case, it might depend upon the title to the service or the office, in which case if the service is put an end to and a title deed is granted that title would operate as a fresh grant. The extent of the re-grant has to be determined with reference to what was originally granted as an inam because it was only what was granted by the Government that the Government are entitled to resume and re-grant. If the grant was of the fullest extent, that is the land itself, it would be perfectly open to them to put an end to the entire grant. All these questions have to be answered with reference to the facts of each case and no exception, therefore, can be taken to the statement of one learned Judge that in all cases it cannot be said that the enfranchisement has the effect of operating as a resumption and a re-grant. But with reference to the learned Judge's observation in the case regarding the Devadasi service inams, it is not clear even from the printed records in the case whether the grant in that case was of the land itself or whether it was of melwaram alone. If it was of melwaram alone, it may be that most of the

1. (1946) 1 M.L.J. 85.

remarks of the learned Judge would be justified as the enfranchisement would not have the effect, to any extent, of touching kudiwaram interest in the land. If, on the other hand, the learned Judge intended to lay down that, notwithstanding the clear language of section 44-A indicating that the land was attached to the service and was annexed to it, the effect of enfranchisement in such a case would not have the effect of creating a fresh title, I must respectfully differ from the view of the learned Judge. The learned Judge also observed that most of the decisions which were quoted before him related to inams held by village officers and the view that enfranchisement in such cases had the effect of operating as resumption and a re-grant was justified by some rule of public policy. I do not think, however, that in disposing of the case in *Venkata Jagannadha* v. *Veerabadrayya*[1], the Judicial Committee rested their decision on any rule of public policy. It was merely based upon the nature of the title to the property which was always dependent upon the right to the office. If the right to the office was terminated by enfranchisement the right to the properties also followed suit and the grant subsequently made would confer a fresh title upon the grantee. The learned Judge also refers to the language of section 44-A, sub-clause (6) as supporting his view. For the reasons stated already with reference to this clause, I fail to see how this clause supports the view that enfranchisement does not extinguish the old title and create a new title. In my judgment, the decision of the learned District Judge in the present case that the plaintiff had acquired a fresh title under the inam proceedings of 1931 and that she is entitled to a decree for possession of the properties is perfectly justified.

The result is that the second appeal fails and is dismissed with costs.

Viswanatha Sastri, J.—The case having been referred to a Bench at the instance of Panchapagesa Sastri, J., on account of the importance of the question of law involved, I would add a few words of my own.

Section 44-A of Madras Act II of 1927 was inserted by section 2 of the Amending Act V of 1929, with a view to discourage and abolish the institution of Devadasis, the Legislature having been of the opinion that the dedication of young girls for service in Hindu temples had been attended with results injurious to the community and degrading to the individuals concerned. Under the section, the Provincial Government is enjoined to enfranchise lands held by Devadasis as remuneration for their services, that is to say, free the lands from the condition of service and make a fresh grant thereof subject to the levying of rent or quit rent or as prescribed in the section. The inam with which we are concerned in the present case is a Devadasi inam granted to the predecessors-in-title of the plaintiff as remuneration for the performance of services in a Hindu temple. The original grant was, as is now found, on the admission of the parties, of the land itself and not merely of the assessment or the land revenue. The final order of the Inam Commissioner dated 26th June, 1862, was to the effect that the lands of the extent of 5 acres 56 cents were to be continued to the pagoda so long as the service in the temple was rendered by the grantees and their descendants. In 1931, the Government, purporting to act under section 44-A of Act II of 1927, enfranchised the inam and granted a title deed Exhibit P-1 to the plaintiff. It is now found by the Courts below, and this conclusion is not disputed that the defendants and their 'predecessors-in-title' had acquired by prescription a right to a permanent tenancy as against the inamdars prior to 1931. It is also found that the defendants had not acquired a title against the Government by adverse possession for a period of sixty years. The question for our decision is whether the title of the defendants, such as it was, was extinguished by reason of the enfranchisement proceedings which resulted in the issue of a fresh title deed Exhibit P-1 by the Provincial Government in favour of the plaintiff in 1931 or whether on the strength of their long possession before 1931 they could resist the plaintiff's claim based on Exhibit P-1.

It is now settled that, in the case of service inams, enfranchisement consists in the giving up of the Government's rights in the lands previously held on service

1. (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643 (P.C.).

tenure on payment of such quit rent as may be fixed and in disannexing the land from the office and the services incidental thereto. The title deed issued by the Inam Commissioner purports to grant the land to the plaintiff as a freehold or absolute property. *Ex facie* it is a fresh grant of the land though the previous service holder happens to be the grantee. In *Venkata Jagannadha* v. *Veerabadrayya*[1] the Judicial Committee held, approving of the earlier decisions of this Court and overruling the later decisions, a reference to which is unnecessary in view of the definite pronouncement of the Board, that on the enfranchisement of karnam service inam lands, by the imposition of a quit rent in lieu of services and the grant of an inam title deed confirming the lands to the grantee, his representatives and assigns, the lands so enfranchised and confirmed, became the absolute property of the grantee and were free from any claims on the part of the other members of the grantee's family. In other words, it was held that there was an extinction of the antecedent tenure and title on which the lands were held and a fresh grant of the lands by the Government as the lawful owner thereof, to the new grantee. The usual form of the title deed to which Exhibit P-1 in the present case conforms will be found at page 648 of the report in *Venkata Jagannadha* v. *Veerabadrayya*[1]. This decision of the Judicial Committee was followed by this Court in *Gouri Kantan* v. *Ramamurthi*[2], where Wallace, J., held that the enfranchisement of a service inam and the issue of an inam title deed created a fresh title in the grantee. This case is, in my opinion, decisive against the appellants. Wallace, J., decided that persons in the position of the present appellants who claim adversely to the *ex facie* import of the inam title deed granted as a result of enfranchisement, cannot succeed on the strength of a prescriptive title unless they show that, by adverse possession against the Government for sixty years prior to the enfranchisement and the grant of freehold title, they had acquired a prescriptive title to the service inam lands. All that the defendants have shown here is a prescriptive title to a permanent tenancy against the holder of the office but not as against the Government on the date of Exhibit P-1. In *Ramanna* v. *Venkatanarayana*[3], Devadoss, J., following the decision of the Privy Council in *Venkata Jagannadha* v. *Veerabadrayya*[1], held that the effect of enfranchisement of a karnam service inam was to do away with the rights and titles to the property acquired before the date of the enfranchisement. The learned Judge expressed his view in these terms :

> "When the Government resumes a service inam all the interests of persons who have acquired title prior to the date of enfranchisement cease to have any effect, and the person in whose name title is made out after enfranchisement gets it free of the interests which other persons had in the property before the date of enfranchisement."

This statement of the law may have to be qualified to some extent with reference to cases where third persons had acquired a prescriptive title to the lands by adverse possession as against the Government itself for over sixty years prior to the enfranchisement proceedings.

Chandrasekhara Aiyar, J., in *Maddela Yenadi* v. *Maddela Ramalakshmamma*[4], held that the rule that where a service inam is resumed there is an extinction of the original title and a re-grant which constitutes the root of a fresh title did not apply to a Devadasi inam and held that its enfranchisement under section 44-A of Madras Act II of 1927 had not the effect of extinguishing the antecedent title to the lands resumed or of creating a fresh title in the grantee. There is no indication in the judgment of the learned Judge as to how or on what basis service inams should be differentiated for the purpose of applying or departing from the rule referred to by him. The learned Judge, though he does not refer to the previous decisions, must have had them in mind when he made this observation. As a statement of the law applicable to service inams other than a karnam service inam which the learned Judge excludes from consideration, it is, in my opinion, too wide and must be taken subject to the qualifications and limitations pointed out in the judgment just now delivered by my learned brother. The effect of enfranchisement depends

1. (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643 (P.C.).
2. (1924) 46 M.L.J. 482.
3. (1926) 52 M.L.J. 52.
4. (1946) 1 M.L.J. 85.

on the nature and extent of the original grant, *i.e.*, whether it was of the land itself or the assessment alone and the nature of the tenure on which the land was held. The appellants, however, rely on this decision which, according to them, rules the present case which relates to a Devadasi inam. I am unable, however, to accept it as a correct statement of the law in this respect.

There is a distinction between personal inams and inams granted subject to the obligation of a service on the one hand and inams granted as the remuneration of an office, that is to say, for the rendering of services in connection with public religious or charitable institutions or for services of a public nature like karnam service. In the case of service inams like the present, the land goes with and follows the office and is an emolument of the office. Section 44-A of Act II of 1927 speaks of inam lands as the remuneration for the services, the lands being granted in respect of or annexed to such services. The office, involving as it does, the duty to perform the service, might devolve according to the personal law of the incumbent subject, however, to statutory provisions. The land follows the devolution of the office. In the case of a Devadasi inam the ordinary personal law governs the succession to the office and there is no need for a recognition or approval by the Government on each devolution of the office just as there is in the case of a karnam service inam where the devolution of the office is subject to the law of primogeniture, the possession of certain statutory qualifications and the recognition and acceptance by the Government of the office-holder. In either case the land is annexed to and follows the devolution of the office. If the Government, the owner of the land, does not require the service, it is open to it to resume the land, or in other words, to disannex the office from the inam. In such cases there is a resumption and re-grant. Where however property is held as a personal inam with an obligation of rendering service, the property devolves on the heirs and successors of the grantee and the obligation attached to the ownership of property goes with it. The right to enjoy the property does not go with any office and the right devolves under the ordinary law. To this class belonged zamindaris and paliems. See the *Marangapuri case*[1]. In the case of estates of large magnitude which carried with them an obligation on the part of the grantees to render some kind of police or military service, the Government released the grantees from the obligation of service by taking action under Regulation XXV of 1802 and permanently settling the peshcush. In the case of estates which had not been settled under Regulation XXV of 1802 like the Chittedipaliem which was the subject-matter of the decision in *Narayana* v. *Chengalammal*[2], the Government brought about the same result by resorting to the procedure under the inam settlement. In either case there was a dispensing with the obligation of service on the part of the grantee or his descendant and there was no question of resumption or re-grant or the acquisition of a fresh title by the grantee. There was only a confirmation of the previous title and the property continues to devolve by the ordinary law of inheritance. The abolition of the service does not make any difference in the devolution of the property according to the ordinary law of inheritance. In the case of personal inams or grants subject to a mere obligation of rendering services, enfranchisement involves a mere release of the service obligation and of the reversionary rights of the Government. In the case of a service-inam *which* is enfranchised there is a resumption by the Government and a re-grant of it though, in practice and as a matter of policy, the holder of the office at the time of enfranchisement is usually chosen as the grantee. At the time of the inam settlement, holders of personal inams, whether hereditary or conditional in their terms, were allowed to convert their obligation by way of services and reduce their tenure into a permanent freehold with full powers of alienation, upon reasonable terms involving a payment in commutation of the reversionary rights of the Government. In the case of service inams, the theory has been that the ownership is always with the Government, the office-holder merely enjoying the income as his emoluments or wages. The right of the office-holder to the enjoyment of the usufruct of the land is co-extensive with the duration or tenure of his office and

1. (1874) L.R. 1 I.A. 283 (P.C.).
2. (1886) I.L.R. 10 Mad. 1.

consistently with this theory, if the office is detached from the land and there is an enfranchisement of the service inam, it has the effect of a resumption and re-grant to the person named in the inam title deed. In the present case the original inam grant was of the land itself and the grantee had no independent right to the kudiwaram interest. The land with both waram rights had been granted on a service tenure. When the service tenure was put an end to and the land was resumed, the resumption operated on both the warams. So did the fresh grant of 1931, Exhibit P-1. The power of the Government to remove an office-holder and resume the land is assumed to exist and so long as the land is enjoyed as a remuneration for the performance of the duties of the office, the officer-holder has not got the full dominion over the land. It is for this reason that a series of decisions of this Court culminating in the decision of the Full Bench in *Anjaneyalu* v. *Sri Venugopal Rice Mill Co., Ltd.*[1], took the view that service inam lands forming the emoluments of an office attached to a temple, were not alienable or liable to be attached and sold in execution of a decree against the inamdar. The Government would have a right to resume possession of such service inam land on its alienation by the office-holder. The Government could resume the inam if by prescription against the office-holder a stranger had acquired title to the inam lands. The decision of the Judicial Committee in *Venkata Jagannadha* v. *Veerabadrayya*[2] no doubt related to a karnam service inam where the eligibility of a person for the office was the subject of statutory enactment, but their Lordships did not rest their conclusion on this ground alone. Rather they stressed the general principle that the land was appurtenant to and an appanage of the office, inalienable by the office-holder and designed to be the emolument of the office in whosoever hands the office might pass at the instance of the Revenue authorities. The office-holders in a temple who enjoy inam lands as remuneration for their services are more or less in the same position. They are subject to the disciplinary control of the trustees and are liable to be removed for misconduct. The office is one which has got duties attached to it in the performance of which the public are interested and there is no difference in principle between the office now in question and a karnam's office. A Devadasi inam is really a service inam and the service at least in legal theory, if not in actual practice, is as much a religious service in connection with the temple as the service of an archaka, a paricharaka, a piper or other hereditary temple servants.

Chandrasekhara Aiyar, J., in the decision already cited and appellants in their arguments in this case, relied upon section 44-A, sub-section (6) of Act II of 1927 which has been reproduced in the judgment of my learned brother. I fail to see how this provision supports the conclusion of the learned Judge or the contention of the appellants. Section 44-A is a comprehensive statement, with some modifications of the relevant Standing Order of the Board of Revenue with reference to the enfranchisement of inams and the result of such enfranchisement. Act VIII of 1869 enacted that title deeds issued by the Government through the inam Commissioner were not meant to deprive, limit, encumber or destroy the rights of any description of holders or occupiers of land or to affect the interest of any person other than the holder of the inam. Section 44-A, sub-section (6) is an analogous provision. If, for instance, by a mistake the title deed had been issued to a wrong person, it is open to the person lawfully entitled to have the error rectified by a suit. If a person had a right of permanent occupancy in the land in his own right, only the melwaram or the assessment having been granted in inam and subsequently resumed by the Government, he could sue to establish his rights as against the grantee of the fresh inam title deed after enfranchisement, if the latter asserts title to both warams. If on the date of the enfranchisement a person had acquired no title as against the Government to the land and the inam is resumed and the land granted by Government under a title deed, he would have no right of action against the grantee. The rights which he might have acquired as against the inamdar before the enfranchise-

1. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.).

2. (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643 (P.C.).

ment are wiped out by the enfranchisement sanctioned by section 44-A of the Act which involves a resumption and re-grant of the land.

For these reasons, I agree with my learned brother in his conclusion.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAYUDU.

M. R. Venkataraman .. *Petitioner.**

Criminal Procedure Code (V of 1898), section 491—Complaint against detention under Madras Act XXIII of 1949—High Court holding detention under the Act illegal after 26th January, 1950—Power of Court to direct the State to pay the detenu the costs of the Habeas Corpus *application.*

In an application under section 491, Criminal Procedure Code, complaining against a detention under Madras Act XXIII of 1949, the High Court held that the detention under that Act was illegal after the 26th of January, 1950. On the question whether the High Court had under such circumstances power to direct the State to pay the detenu the costs of the application,

Held : The High Court has no inherent power to award costs in such a proceeding which is of a criminal nature.

Case-law discussed

Desirability of High Court framing rules similar to Order 35 of the Supreme Court Rules in regard to procedure to be followed in applications under Article 226 of the Constitution, pointed out.

Petition under section 491, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue of directions in the nature of *Habeas Corpus* for the production of the petitioner before the High Court for being set at liberty.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioner.

The Government Prosecutor (*S. Govind Swaminathan*) for the State.

The Order of the Court was made by

Govinda Menon, J.—At the close of delivery of our judgment, the learned counsel for the petitioner submitted that in view of the circumstance that the application has been practically allowed, as in our opinion the detention of the petitioner under Madras Act XXIII of 1949 after the 26th January, 1950, was illegal, the State should be directed to pay the costs of this application. Arguments were heard as to the powers of this Court to award costs in matters like this and since the point raised is bereft of authority in the Indian Courts—at least, no Indian decision was brought to our notice, we reserved judgment on the question of costs alone.

Order 35, rule 5 of the Supreme Court Rules which came into operation on the 26th January, 1950, is to the following effect :

"In disposing of any such rule, the Court may in its discretion make such order for costs as it may consider just."

Rules 1 to 5 of Order 35 deal with applications in the nature of *Habeas Corpus* provided for under Article 32 of the Constitution of India and rules 6 to 10 deal with Mandamus, Prohibition, *Certiorari*, *Quo warranto*, etc., applications. From this it is clear that the Supreme Court, when hearing an application under Article 32 has the power to make such orders as to costs as the Court thinks fit. So far as the Madras High Court is concerned, no such rule has yet been framed and in the absence of any such provision, the learned counsel for the petitioner lays emphasis on the inherent powers of the Court to award costs. In *Sankaralinga Mudaliar* v. *Narayana Mudaliar*[1], a Full Bench had to consider whether the High Court has jurisdiction to grant costs in criminal cases except where the Code of Criminal

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*Cr.M.P. No. 283 of 1950. 4th April, 1950.

1. (1922) 43 M.L.J. 369 : I.L.R. 45 Mad. 913 (F.B.).

Procedure makes express provision and the conclusion arrived at by the learned Judges was that it has no such jurisdiction. Relying upon the maxim *expressio unius est exclusio alterius*, Schwabe, C.J., in his judgment has noted the provisions of the Criminal Procedure Code where the power to award costs is expressly provided for and came to the conclusion that as the Code gives specific right of granting costs in certain instances, it excludes any other right of granting costs, though the learned Chief Justice, following the decision in *Guardians of West Ham Union* v. *Churchwardens, etc., of St. Matthew, Bethnal Green*[1] and In re *Bombay Civil Fund Act*, 1882: *Pringle* v. *Secretary of State for India*[2], was of the view that though a Court may have inherent power to grant costs such a power must always be restricted and limited to this; that if the power of granting costs in any kind of proceeding is provided for in some way by statute, the Court cannot, by invoking its inherent powers, extend the powers which have been granted to it by the statute. Coutts-Trotter, J., referred to the judgment of Hardwicke, L.C., in *Corporation of Burford* v. *Lenthall*[3] and held that Courts of Equity in England always asserted their possession of such jurisdiction and constantly used it. But he also held that in England the common law Courts did not attempt to assert any such inherent jurisdiction, though the House of Lords in *Guardians of West Ham Union* v. *Churchwardens, etc., of St. Matthew, Bethnal Green*[1] held that the House has such power. Such being the case, if the present application was founded on section 491 of the Code of Criminal Procedure, this Court would have no power to award costs. But it is contended that since the application is under Article 226 of the Constitution of India which corresponds to Article 32 relating to the powers of the Supreme Court and since the Supreme Court has made rules investing the power to grant costs, this Court must also do likewise. It cannot be disputed that the High Court has power to frame rules to award costs in such matters. But the question is whether, without any such express rule being framed after the coming into operation of the Constitution there is an inherent power vested in the High Court to act in that manner. Their Lordships of the Judicial Committee in *Ryots of Garbhanda* v. *Zamindar of Parlakimedi*[4] have laid down that the Madras Supreme Court Charter (1800), clause 8 invested the Supreme Court with the powers exercised by the King's Bench in England but such powers are restricted in their application to the City of Madras and therefore the High Court had no power to issue a writ outside the Presidency town. In *Mathen* v. *District Magistrate, Trivandrum*[5], the Judicial Committee has also held that the High Court has no jurisdiction to issue the Common Law Writ of *Habeas Corpus* in cases falling within section 491 of the Code of Criminal Procedure and since section 491 enables the High Court to issue such writs within the limits of its appellate jurisdiction the power to issue common law writ must be deemed to have been impliedly taken away. In view of these authorities it is abundantly clear that this Court has not inherited all the powers which the Court of King's Bench in England at common law has especially since the 26th January, 1950, the power to issue writs has been conferred by an Article of the Constitution.

Granting that the Common Law power was vested in the High Court to issue the writ prior to 26th January, 1950, and it continued therafter, the question is whether there was an inherent power to award costs at Common Law vested in the King's Bench in England. At page 332 of Crown Practice by Short and Miller, 2nd edition, we find the following observation:

> "In dealing with cases on *habeas corpus* the courts have now power in civil cases to award costs by virtue of Judicature Act, 1890, section 5.
>
> Even where the Court may not be able to award costs generally, they may give the functionary obeying the writ the expenses of bringing up the prisoner."

The question was considered by a Division Bench of the Queen's Bench Division in the *Queen* v. *Jones*[6], whee Cave, J., after considering the previous authorities, makes the following observation:

1. (1896) A.C. 477.
2. (1888) 40 Ch. D. 288.
3. (1743) 2 Atk. 550.
4. (1943) 2 M.L.J. 254: L.R. 70 I.A. 129: I.L.R. 1944 Mad. 457 (P.C.).
5. (1939) 2 M.L.J. 406: L.R. 66 I.A. 222: I.L.R. 1939 Mad. 744 (P.C.).
6. (1894) 2 Q.B.D. 382.

"The result, therefore, is that the power is given to the Court for the first time by the Supreme Court of Judicature Act, 1890, to award costs when granting an order for a *habeas corpus*."

The learned Judge held that prior to that date there was no such power to award costs. Collins, J., who was the other Judge constituting the Division Bench was also of the same view. This decision is cited in Volume 9, Halsbury's Laws of England, Hailsham Edition, in the foot-note at page 727, where the learned author observes as follows:

"In criminal cases the courts formerly had no power to award costs on *habeas corpus*. In civil cases the costs of a successful applicant for a writ of *habeas corpus* were sometimes awarded . . . . Now, however, the court has power under section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49) to award costs to the successful party on an application for a writ of *Habeas Corpus*."

The authorities cited are *R.* v. *Jones*[1], and *R.* v. *Woodhouse*[2]. On the other hand in *Dodd's case*[3], it is stated that where an inhabitant of Jersey had been imprisoned there for serving upon another inhabitant process in an English action under the Common Law Procedure Act, it was held that the imprisonment was unlawful, and that the prisoner was entitled to be discharged on a *habeas corpus*. It was further held that the Court has authority to give to the functionary who brings up a prisoner in obedience to a writ of *habeas corpus* at common law the expenses of so doing, but *not his general costs*.

The cases adverted to by me above were all instances in which an application for a writ of *habeas Corpus* was either granted or refused. But in *Rex* v. *Woodhouse*[2] the Court of Appeal held, following *Reg.* v. *London County Justices*[4], that the King's Bench Division has jurisdiction to give costs to the successful applicant in a *certiorari* application. Therein the power to give costs was based upon the inherent common law right. We have already referred to the decision of the House of Lords in *Guardians of West Ham Union* v. *Churchwarden, etc. of St. Matthew, Bethnal Green*[5], and In re *Bombay Civil Fund Act*, 1882 : *Pringle* v. *Secretary of State for India*[6], where it has been held that inherent power exists under certain circumstances to award costs. But as we have already remarked, there was no such inherent power to award costs where the right of *habeas corpus* was in a criminal case. The question therefore is whether, in the present case, we are issuing a writ in a criminal case or in any other matter. The detention complained of was under Madras Act XXIII of 1949 which though not punitive was preventive in character. The petitioner's detention was considered necessary, because in the opinion of the Government of the State he was acting, or about to act, or likely to act, in a manner prejudicial to public safety or the maintenance of public order in the Province. It cannot be seriously contended that such a detention would not be to prevent a crime. If that is so, the case is one of a criminal nature and it seems to me that even if this Court has inherited all the powers of the King's Bench Division apart from the statute, there is no inherent power to award costs in this criminal case. In *Venkatachala Thevar*, In re[7] and *Venkataraman*, In re[8] it has been held that since orders passed under section 491 of the Criminal Procedure Code are in the nature of criminal proceedings, there can be no right of appeal to the Federal Court as it then existed. The true nature of a proceeding by *habeas corpus* should be determined by its object and as under sections 107 and 108 of the Criminal Procedure Code proceedings against a person who is bound to keep the peace are considered to be of criminal nature, likewise detentions to prevent a crime are also in the nature of a warning than of a present punishment. It is also interesting to note that a Full Bench of the Allahabad High Court in *Basudeva* v. *Rex*[9] has held that the Court has no power to award costs in *habeas corpus* proceedings because such proceedings are criminal in nature. It seems to us therefore that this Court has no inherent

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1. (1894) 2 Q.B.D. 382.
2. (1906) 2 K.B.D. 501 C.A.
3. (1858) 44 E.R. 1087.
4. (1894) 1 Q.B.D. 453.
5. (1896) A.C. 477.
6. (1888) 40 Ch.D. 288.
7. (1948) 2 M.L.J. 76.
8. (1948) 2 M.L.J. 513.
9. (1949) A.L.J. 397.

power to award costs in a proceeding which is in essence criminal in nature and we therefore decline to accede to the request of the petitioner's counsel.

We think it desirable that rules similar to Order 35 of the Supreme Court Rules may be framed by this Court providing for procedure to be followed in application under Article 226 of the Constitution.

V. S. ——— *Prayer for costs not granted.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE PANCHAPAGESA SASTRI AND MR. JUSTICE CHANDRA REDDI.

In the matter of the Dravida Nadu, a Tamil Weekly, Kancheepuram.

C. N. Annadurai .. *Petitioner**

v.

The Government of the Province of Madras .. *Respondent.*

Press (Emergency Powers) Act (XXIII of 1931), *section* 4 (1) (h) *and Explanation* (4)—*Scope—Question whether writing in a newspaper contained words of the nature described in section* 4 (1) (*h*)—*Tests for determining—Denouncing* " *brahmanism* "—*If falls under section—Benefit of doubt—Right to.*

For deciding whether a newspaper which has been ordered to deposit a security did or did not contain any words of the nature described in section 4 (1) (*h*) of the Press (Emergency Powers) Act, 1931, the Court should consider the writing as a whole in a fair, free and liberal spirit without attaching undue weight to isolated passages, sentences or phrases. The Court should gather the general effect which the whole composition is likely to produce upon persons who may be normally expected to read the newspaper in question. Flamboyant and exaggerated language and violence of expression ought to be certainly taken into account, but they can never be conclusive in determining whether the writing as a whole falls within the ambit of the enactment.

On an application to set aside an order directing security to be deposited by a newspaper the Court is not concerned with the tenability of the opinions expressed by the writer of the offending article. In all controversial matters, there is bound to be two opposing opinions and it is not the province of the Court to examine the soundness or otherwise of the reasons which the writer may give in support of a particular view. The question—and the only question—is to find out if there is anything in the article which tends directly or indirectly to promote feelings of enmity and hatred between different classes.

Where the writer is denouncing the system of " brahmanism " which he says should be destroyed, it cannot be said that the writing will fall under section 4 (1) (*h*) of the Act.

Where a writer sets out to ventilate the grievances of a class or community there is *ex necessiti* a likelihood of criticising adversely the action of the class or community which is alleged to be taking an unfair advantage. In all such cases it would be wrong to say that a writing which ventilates the grievances of a particular class or community would fall within the mischief of the enactment. When there is nothing in the language to excite hatred or contempt of persons, Explanation (4) to section 4 (1) (*h*) would cover the case.

As the security provisions of the Press Act are in a sense penal, the benefit of the doubt, if there is any, should always be given to the person against whom action is taken.

[The order of Government directing deposit of security by the petitioner was set aside.]

A. Dorairaj and *F. Jagannathan* for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) (instructed by the Government Solicitor) for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is the editor and publisher of " Dravida Nadu ", a Tamil Weekly which is printed at and issued from Kancheepuram. He seeks to set aside the order of the Provincial Government, dated 25th May, 1949, directing him to deposit with the District Magistrate, Chingleput, on or before the 25th June, 1949, security to the amount of Rs. 3,000. The order was passed in exercise of the powers conferred by section 7 (3) of the Indian Press (Emergency Powers) Act, 1931, on the ground that the issues of the petitioner's journal dated 4th April, 1948

* O. P. No. 293 of 1949. 4th November, 1949.

and 18th April, 1948, contained matter of the nature described in section 4 (1) (*h*) of the said Act. A translation in English of the offending passages from the two issues mentioned above was appended to the order. This application has been made under section 23 of the Act and what this Court has to decide is whether the newspaper in respect of which the order was made did or did not contain any words of the nature described in section 4 (1) (*h*) of the Act.

The words which fall within the scope of section 4 (1) (*h*) are words which

> " tend directly or indirectly to promote feelings of enmity or hatred between different classes of His Majesty's subjects."

Explanation 4 which has to be read along with the main provision is as follows :

> " Words pointing out, without malicious intention and with an honest view to their removal matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects shall not be deemed to be words of the nature described in clause (*h*) of this sub-section."

It is well established that on an application like this the Court should consider the writing as a whole in a fair, free and liberal spirit, without attaching undue weight to isolated passages, sentences or phrases. The Court should gather the general effect which the whole composition is likely to produce upon persons who may be normally expected to read the newspaper in question. Flamboyant and exaggerated language and violence of expression ought to be certainly taken into account, but they can never be conclusive in determining whether the writing as a whole falls within the ambit of the enactment.

In the appendix to the order of the Government two extracts are given from two articles published on the two dates mentioned in the order. The first is from an article under the caption " Gandhi Ramaswami and Periyar Ramaswami ". It is a fairly long article but only certain passages from it have been extracted in the appendix. We have been taken through the entire article and the learned Advocate-General appearing for the Government has not also confined himself to the extracts appended to the Government Order. The occasion for the article is indisputably clear. It is the election of Sri Omandur Ramaswami Reddiar as the leader of the Congress Legislative Party in April, 1948. The rival candidate was Sri T. Prakasam. The article starts with a praise of the good qualities of Ramaswami Reddiar and then poses the question : Why was there any opposition to such a man ? The writer draws pointed attention to the fact that the opposition to him did not come from another political party, but it arose within his own party. The circumstance would not be strange by itself if the ground of opposition was that he was not a desirable person or that his policy was not acceptable. This part of the article may be summed up in the following words of the writer:

> " There has been opposition without any reason—under circumstances in which no reason has been given out openly—to a leader admitted by the people of the land to be the good man in the party governing the land. His character has not been suspected ; his policy has not been attacked, no alternative policy has been formulated. Still there is rivalry—is it rivalry . . . . Why ? "

The rest of the article is devoted to an analysis of events and circumstances with a view to demonstrate that the opposition was due to the intrigue and the " communal frenzy " of a selfish group in the Congress Legislative Party consisting of Brahmins. The writer refers to an alleged incident which took place immediately on the announcement of the success of Ramaswami Reddiar. There were people assembled outside who are alleged to have cried out " Down with Brahmins ". The writer says that cry was due to the idea among the people that the Brahmins were responsible for the contest, and in his opinion the people were right. He asserts that the contest took place only on the issue of Brahmin and Non-Brahmin. According to him, there is a group who belong to the same party as Omandur Reddiar who thought that however great he might be, if he did not help the domination of Brahmins, he must be removed from office and another should be installed in his place who will be of use to them. The conclusion of the article refers to " Dravida Ramaswami " evidently referring to Sri E. V. Ramaswami Naicker. The writer says :

"If in spite of belonging to the same group and kinship being claimed on the basis of recognising the same flag and belonging to the same party, if in spite of worthy persons praising him as the Gandhi of Tamilnad, it should happen that the intrigue and the amazing enmity and communal frenzy of a selfish group will keep on attacking him, then we ask in what way is the Congress Ramaswami in any far better position than the Dravida Ramaswami".

The writer laments that enmity should have been stirred up even against a person like Ramaswami Reddiar who delighted and felt proud in calling all Brahmins as well as Non-Brahmins as the sons of India.

After reading the article in its entirety, we are unable to follow the argument of the learned Advocate-General that there is in it an attack on the entire community of Brahmins, whether they belonged to the Congress Legislature Party or not. He tried to maintain his contention by arguing that the Brahmin members of the Congress Legislature were representatives of that community. It is impossible for us to accept this argument, because it is opposed to the facts. There are no separate constituencies for Brahmins and the Congress party does not set up any candidates as representatives of any community. All the Congress members of the Legislature were elected on a common ticket as professing the ideals of the Congress. Simply because some of the members happened to belong to one community, it will be hardly accurate to say that they are there as representatives of their community. It is a matter of common knowledge that on some matters the elected members of the Brahmin community may be holding opinions on certain social matters opposed to a large section of the Brahmin community. We fail to see in the article any attack on the Brahmin community as such. Again and again there is reference to a group within the Congress party which was determined to oust Ramaswami Reddiar from the leadership, because he would not be of assistance to their selfish ends. It may be that this group is according to the writer composed of Brahmins. But it is difficult to hold that on this ground the article would tend directly or indirectly to promote enmity and hatred between the Brahmins and the Non-Brahmins in general.

The second article is even longer than the first, though the extract appended to the Government Order is confined to the last few paragraphs. It is a dissertation on communalism. The learned Advocate-General very properly conceded that the major portion of the article, particularly in the beginning is in no way offensive. A few passages will suffice to show the trend of the article :—

"We are forty crores of human beings—but we got divided into four thousand castes, got split and became ruined. We quarrelled among ourselves saying 'your caste is high; my community is superior; you are inferior; you belong to low caste' and became ruined. The foreigner took advantage of this. So long as this wretched caste difference exists in this country, the country will not improve.

Only on account of the useless caste difference did our country remain as a slave under the white man all these days.

Tamilians must cast off caste difference completely.

Only one caste— . . . . Only one God . . . . . There should be unity among us. There should be no communalism."

The writer then traces the fight for social justice and says that the word "communalist" is being used to decry persons working for the cause of social justice. He refers to the fact that in Hindu Society the vast majority are Non-Brahmins and a minority are Brahmins, but that the majority were treating the minority as members of a superior caste according to the authority of the Shastras and according to the customs and manners and that on account of this situation the majority did not get equal rights and facilities in educational, industrial, economical, political, religious and other fields, whereas the minority community, namely, the Brahmins have made great advance in all the fields. The Brahmins who thought that the demand for communal justice would lead to the undermining of their power styled the persons who demanded justice as communalists. So the writer says and he develops that idea giving extracts from other newspapers like "Dinasari" and "Viduthalai". The writer next pleads for destroying the system which has for the last several thousands of years spread and struck root

and has rendered the majority community "born slaves" and "walking corpses". It is here that he uses the word "Parpaneeyam" translated as "Brahmanism". He hastens to assure that he and those who hold opinions similar to him have no hatred against the Brahmins and they are opposing only the system, namely, "Brahmanism" because it is on account of this, several troubles have arisen in the body politic. Strong language is used to portray the evils of Brahmanism. The following are typical passages :—

"As a result of *Parpaneeyam*, the big Dravida community lies broken and scattered (the members of it) have become born slaves, talking dumb persons and walking corpses. Devoid of the feeling of sensibility, it (the Dravida community) has become a plumpy and insignificant being. Those who have studied the medical science say that if the father has syphilis, the child that is born will become blind. How can a blind infant know the delightful sight of the Kuvalayam (white Indian water-lily)? Likewise, the Dravida community is afflicted by the syphilis called Parpaneeyam".

The concluding portion of the article indicates how the system can be destroyed. It can be destroyed only if there is unity, discipline, courage and self-respect in the majority community. The writer asserts that no sensible person can come forward to support Parpaneeyam by giving reasons. "What is called Parpaneeyam is a system which like Brittanism must be destroyed." Finally there is an exhortation not to be afraid of abuse by interested persons. There is a reference to Mahatmaji's death, and the article ends with the following words :

"When a great man has given up his life for the sake of truth, what if we lose ordinary fame and position. It is no loss. The country will get deliverance."

On an application like this the Court is not concerned with the tenability of the opinions expressed by the writer of the offending article. In all controversial matters, there is bound to be two opposing opinions and it is not the province of the Court to examine the soundness or otherwise of the reasons which the writer may give in support of a particular view. The question—and the only question—is to find out if there is anything in the article which tends directly or indirectly to promote feelings of enmity and hatred between different classes. The learned Advocate-General conceded that if instead of the word Parpaneeyam (Brahmanism) the writer had used the expression "caste system", then the article would not come within the scope of section 4 (1) (*h*) of the Act. But he contends that the reference to the system as Brahmanism brings it within the mischief of the enactment. Undoubtedly the writer proceeds on a division of the community into two groups, the minority group of Brahmins and the majority group of Non-Brahmins, and though in the beginning of the article, there is a reference to innumerable castes and the desirability of having only one caste, in the last portion of the article, the antithesis is between the Brahmins on the one side and the members of the other castes on the other side. But what we think, on a reading of the entire article, is that he is denouncing the system, whether it is called caste system or Brahmanism which has led to the superior position in society of the Brahmins. Nowhere in the article does the writer say that the Brahmins of the present day have actually done anything. His complaint is that the system "has in the last several thousands of years" spread and struck root. He expressly says that he has no hatred against the Brahmins as individuals and states in the clearest of terms in more than one place that it is the system which should be destroyed. There is no incitement anywhere of the Non-Brahmins to act in any inimical way or to inspire them with hatred against the Brahmins. As one of us put it from the Bench during the course of the arguments, according to the writer the only way of destroying the system is for the majority community to cast off their inferiority complex and to cultivate unity, discipline and self-respect. Except the passage which we have already cited, there are no other passages in which the language is extravagant and violent.

When a writer sets out to ventilate the grievances of a class or community there is *ex necessiti* a likelihood of criticising adversely the action of the class or community which is alleged to have taken an unfair advantage. In all such cases it would be wrong to say that a writing which ventilates the grievances of a particular class or community would fall within the mischief of the enactment. Dealing with the provisions of the Indian Press Act, 1910 and referring to explanation 2 to

section 4 (1) of that Act, their Lordships of the Judicial Committee in *Besant* v. *Advocate-General, Madras*[1], observed as follows :

> "The balancing of important political considerations which is effected by adding Explanation 2 to the enacting words, which are found in the earlier part of the section has its analogy in sections 124-A and 153-A of the Indian Penal Code. The language is not precisely the same, but there is the same delicate balancing of two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform . . . . The utmost that can be said is that the addition of the Explanation with its apparent repetition of the positive enactment in the guise of a qualification of the Explanation shows an almost meticulous care to balance the two considerations, prominence being given to the first consideration in the first part of the section, and to the second in the Explanation.
>
> In applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony."

More apposite to the present case are the observations as regards the question of hatred or contempt of a class or a section. It was argued that the object of the article before them was to attack the system, not a class or section. They say,—

> "It may be assumed, for the purposes of this case, that there may be reference to a class or section of His Majesty's subjects so couched as to show that the attack is merely upon a school of opinion, and that unless the language is such as to excite hatred or contempt of persons, it may escape condemnation. But assuming this, the appellant remains face to face with the difficulty that there is language used in certain of the articles which may legitimately be construed as tending by inference or suggestion to excite hatred or contempt in such a fashion that it may become personal.
>
> It may well be that the primary object was a legitimate attack upon a system, but unless care is taken it becomes difficult to make a fierce attack upon a system without conveying some imputation upon the class which the system makes or which carries the system into practice. And it must be remembered that those words in clause (*c*) which refer to the hatred or contempt of a class or section are not limited by Explanation II, and that there has been in this respect some departure from the policy of the Penal Code, which superadded, a qualifying Explanation which has not found place in the Press Act."

It is necessary to say at once that there is no longer the departure from the provisions of the Penal Code (section 153-A) in the Indian Press (Emergency Powers) Act. Explanation 4 to section 4 substantially reproduces the Explanation to section 153-A of the Indian Penal Code.

Even if we were to hold that there has been in the article a fierce attack upon the system which, according to the writer, has resulted in the subordination of the majority community by a small minority, we do not find any imputation upon the minority class, *i.e.*, the Brahmins. There is in our opinion no language to excite hatred or contempt of persons. Explanation 4, in our view, would very much cover a case like the present. The learned Advocate-General conceded that the writer does not call upon the Non-Brahmins to take any action against the Brahmins which is likely to injure them.

Enmity and hatred are strong words. In a world of conflicting claims, it would be manifestly unfair to characterise every expression of dissatisfaction and every ventilation of grievances as tending to the promotion of enmity and hatred. To point out facts and circumstances to serve as an incentive to unity among the members of one class is not to create hatred or enmity between classes. It is true that here and there there are sentences and phrases which are not moderate and occasionally are provocative. The use of the word "Parpaneeyam" is also certainly unhappy. But as the security provisions of the Press Act are in a sense penal, the benefit of the doubt, if there is any, should always be given to the person against whom action is taken. This is a case in which even if there be a doubt, the benefit should go to the petitioner.

A few decisions were cited before us, but we do not think any useful purpose will be served by discussing them as our decision must almost entirely depend upon the language of the particular offending articles.

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1. (1919) 37 M.L.J. 139 : L.R. 46 I.A. 176 : I.L.R. 43 Mad. 146 at 163 (P.C.).

We hold that the articles in question do not contain words of the nature described in section 4 (1) (*h*) read with Explanation 4 of the Indian Press (Emergency Powers) Act and set aside the order of the Provincial Government directing the petitioner to deposit security to the amount of Rs. 3,000.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Mooka Naicker .. *Appellant**

v.

A. K. Venkatasami Naidu and another .. *Respondents.*

Decree—Stay of execution on deposit into Court of decree amount—Decree-holder unable to furnish security and not drawing it out—Interest on decree amount, if ceases to run.

The appellant as a condition of obtaining an order for stay of execution of a decree agains which he had filed an appeal, was asked by the Court to deposit the amount of the decree which the decree-holder was directed to take out on furnishing security. The decree-holder could not furnish the security and did not take out the money. On the question whether interest would cease to run on the amount deposited from the date when it was deposited in Court,

Held, that there was undoubtedly the order of the Court under which the judgment-debtor made the deposit, but the order was one which on his invitation the Court made and as a condition of the indulgence which the order meant, the Court directed that he should pay the money into Court for the respondent to draw it out, on furnishing of security. The fact the decree-holder was unable to draw it out, could not in the nature or the reason of the thing disentitle the decree-holder to interest on the amount deposited.

Periakaruppan Chettiar v. *Veerappa Chettiar*, (1943) 2 M.L.J. 441 : I.L.R. 1944 Mad. 336, followed.

Appeal against the order of the Court of the Subordinate Judge, Sivaganga, dated 8th April, 1948, in E.P. No. 77 of 1947 in O.S. No. 64 of 1943, Sub-Court, Mathurai.

A. Sundaram Aiyar for Appellant.

K. Veeraswami for Respondents.

The Court delivered the following

JUDGMENT.—In this case the appellant as a condition of obtaining an order of stay of execution of a certain decree against which he had filed an appeal in this Court was asked by this Court to make a deposit of the amount of the decree of the Court below which the respondent before me, the decree-holder, was directed to take out on furnishing security. The respondent could not furnish security, and did not take out the money. It was contended in the execution petition (filed after the disposal of the appeal against the decree) out of which this appeal arises, that interest ceased to run with the deposit of the amount of the decree of the Court below by the appellant as a condition of the stay order made pending the disposal of the appeal against the decree itself. The contention was negatived by the Court below but is repeated here. There is authority of this Court binding upon me, the decision of a Bench reported in *Periakaruppan Chettiar* v. *Veerappa Chettiar*[1], which concludes this matter against the appellant. In the ruling cited, it was pointed out that

"It would weigh very heavily on an impecunious decree-holder if at the instance of a well-to-do judgment-debtor he should be put in the position of losing interest for no other reason except that he had not the means to furnish security."

It was therefore held in circumstances very similar to those of the present case that the judgment-debtor was not entitled to claim that the running of interest ceased with the fact of his deposit on account of the failure of the decree-holder to draw out the amount on furnishing security.

* A. A. O. No. 310 of 1948. 7th March, 1950.

1. (1943) 2 M.L.J 441 : I.L.R 1944 Mad. 336.

It is contended by Mr. Sundaram Aiyar for the appellant that this is not a case of mere voluntary payment by him which might mean that interest might not cease to run, but the case of a payment which his client made under the stay order on an invitation by the decree-holder, the respondent, to his client to pay the amount into Court. I am not prepared to say that merely because the respondent was a party to the order of Court which directed the deposit and the security that he invited the appellant to pay the money into Court. Of course in the case of voluntary payments it is not disputed by the learned counsel for the appellant that interest ceases to run. For instance in the case in *Sitaramayya* v. *Venkanna*[1], it was held that,

"Where, though there was no application for execution pending, the defendant obtained a stay, on condition that security was to be given to the Court for the decree amount and instead of furnishing security he chose to deposit the decree amount in cash, on a reversal of the decree he was not entitled to claim any interest on the amount deposited."

It was pointed out that there was no scope for the application of the principle embodied in section 144, Civil Procedure Code, because the deposit of the money was something which the defendant there made of his own volition and not because of any direction of the Court. If the respondent had suffered any loss, say their Lordships, the blame must rest with him. That case has no strict application to the case on hand ; but the principle deducible from it is that in the case of voluntary payments there cannot be any contention that interest ceases to run on account of such deposits, even as there cannot be a contention that interest is claimable in restitution on reversal of the decree under which a voluntary deposit is made by the judgment-debtor. The deposit in the present case may not be voluntary in the sense that the judgment-debtor made the deposit of the amount in Court without any order of Court. There was undoubtedly the order of the Court under which he made the deposit, but the order was one which on his invitation the Court made, and as a condition of the indulgence which the order meant, the Court directed that he should pay the money into Court for the respondent to draw out on furnishing security. The fact that the respondent was unable to draw it out, as has been pointed out by Mockett, J., in the ruling in *Periakaruppan Chettiar* v. *Veerappa Chettiar*[2], already referred to, cannot in the nature or the reason of the thing disentitle the decree-holder to interest on the amount deposited.

In the circumstances the appeal fails and is dismissed with costs.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDY.

C. M. Raghavan and another .. *Accused.**

Criminal Procedure Code (V of 1898), sections 342 and 205—Omission to examine under section 342 an accused whose presence has been dispensed with under section 205—Trial, if vitiated.

The failure to examine the accused personally as required by section 342, Criminal Procedure Code, does not vitiate the trial when his personal attendance has been dispensed with under section 205, Criminal Procedure Code, and whose counsel has filed a statement on his behalf.

Emperor v. *Jaffer Cassum Musa*, A.I.R. 1934 Bom. 212, followed.

Ishwar Das v. *Bhagwan Das*, A.I.R. 1934 All. 693 (2), dissented from.

Case referred for the Orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge, North Malabar, in his letter No. 287 of 1949, dated 17th December, 1949.

S. V. Venkatasubramaniam for Accused.

The Government Prosecutor (*S. Govind Swaminathan*) for the Public Prosecutor (*V. L. Ethiraj*) for the State.

1. (1941) 2 M.L.J. 768.
2. (1943) 2 M.L.J. 441 : I.L.R. 1944 Mad. 336.

* Cr. R. C. No. 32 of 1950. (Case Referred No. 2 of 1950.) 12th April, 1950.

The Court made the following

ORDER.—This reference made by the Sessions Judge of North Malabar raises the question whether omission to examine the accused under section 342 of the Criminal Procedure Code who was permitted to appear by counsel under section 205, Criminal Procedure Code and whose counsel filed a statement on his behalf vitiates the trial.

The accused in the case was charged under section 323, Indian Penal Code, before a Bench of First Class Magistrates. In the course of the trial the first accused was granted exemption from personal attendance under section 205, Criminal Procedure Code, as he was employed as a Havildar Clerk at Bombay. The Bench Magistrates believed the prosecution evidence that the first accused along with the second accused caused simple hurt to P.W. 1 and convicted the accused of an offence under section 323, Indian Penal Code.

Both the accused filed a revision petition before the Sessions Judge against the conviction and sentence passed upon them by the First Class Bench, contending that the conviction of the petitioners was illegal as the first accused was not questioned under section 342, Indian Penal Code. Accepting the contention of the petitioners the Sessions Judge has made this reference recommending the quashing of the conviction of the petitioners.

In support of the view that the non-examination of the accused under section 342 of the Criminal Procedure Code vitiates the trial and that the accused are therefore entitled to an acquittal he relies on a number of decisions which I will presently refer to.

Reference is made to *Nataraja* v. *Devasigamani*[1]. It has been laid down in that case by Sundaram Chetti, J., that failure to examine the accused under section 342, Criminal Procedure Code, after examination of the prosecution witnesses and before he is called upon to enter his defence vitiates the trial, as the provisions of section 342 which are mandatory should be strictly complied with. It has also been held that what is contemplated under section 342 is the oral statement of the accused and the filing of the written statement after the closing of the prosecution evidence does not amount to an examination within the meaning of section 342, Criminal Procedure Code.

In *Pramatha Nath Mukerjee* v. *Emperor*[2], it has been held that non-compliance with the provisions of section 342, Criminal Procedure Code, vitiates the trial even when the accused is not in any way prejudiced and that it is the duty of the Magistrates to examine the accused under section 342, Criminal Procedure Code, after the examination, cross-examination and re-examination of the prosecution witnesses.

This decision is based upon a ruling of a Bench of that Court in *Mazahar Ali* v. *Emperor*[3]. At page 522 of the same report Rankin, J., observes :

> "In the case of an accused, who is in no difficulty in understanding the proceedings, a question addressed to his counsel in his hearing and answered by his counsel in his hearing may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section, but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character."

In In re *Nainamalai Konan*[4], it is stated that an omission to question the accused generally on the case after the prosecution witnesses were examined makes the conviction of the accused illegal and a written statement filed by the accused cannot be substituted for the examination of the accused under section 342, Criminal Procedure Code, which is mandatory.

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1. A.I.R. 1931 Mad. 241.
2. (1923) I.L.R. 50 Cal. 518.
3. (1922) I.L.R. 50 Cal. 223.
4. (1921) 14 L.W. 418.

In *Mahomed Hussain* v. *Emperor*[1], it has been laid down that section 263, Criminal Procedure Code, is governed by section 342 and that there must be an examination of the accused in all warrant cases and that the words if any in section 263 do not apply to warrant cases.

In *Karamdin* v. *The Crown*[2], Tek Chand, J., laid down that section 342, Criminal Procedure Code, would apply to summons cases also and that non-compliance therewith would be fatal to the trial of the case.

It must be observed that none of these cases deals with the question whether failure to examine the accused under section 342, Criminal Procedure Code, vitiates the trial when his presence is dispensed with under section 205, Criminal Procedure Code.

Another decision referred to in the order of reference is the one in In re *Annamalai Mudali*[3]. In that case it has been laid down by a Bench of this Court that every failure to comply strictly with the provisions of section 342, Criminal Procedure Code, does not render the conviction of the accused illegal unless it has in fact occasioned a failure of justice and that section 537 of the Code cures such an irregularity. It is also stated there that it is the duty of the Court to satisfy itself that the accused explains or has an opportunity to explain the circumstances from which an adverse inference could be drawn against him either through his statements or by answers to questions or by both.

In this connection it would be useful to refer to a judgment of their Lordships of the Judicial Committee in *Kotayya* v. *King-Emperor*[4]. In that case one of the questions that had to be considered by their Lordships was whether the breach of the proviso to section 162, Criminal Procedure Code, would result in the trial becoming invalid when the accused was not prejudiced in any way. Their Lordships answered in the negative.

Dealing with the contention of Mr. Pritt, learned counsel for the accused based upon certain rulings, one of which was in In re *Maruda Muthu Vannian*[5], which laid down, that failure to examine an accused after further cross-examination of the prosecution witnesses, even though he was examined before the framing of the charge was fatal to the validity of the trial and that section 537 of the same Code would not cure such an irregularity, their Lordships stated that that argument was based upon too narrow a view of the operation of section 537.

It is clear from the last two decisions that it is not every case of non-compliance with the provisions of section 342, Criminal Procedure Code, that vitiates the trial leading to the quashing of the conviction of the accused person.

The only decision referred to by the Sessions Judge in this case which has a direct bearing on the present case is the one reported in *Ishwar Das* v. *Bhagwan Das*[6]. The ruling in *Adeluddin* v. *Emperor*[7], referred to by the Sessions Judge has not much bearing on the question to be decided in this case.

No doubt the ruling in *Ishwar Das* v. *Bhagwan Das*[6] supports the case for the reference. In that case a Bench of Special Magistrates who dispensed with the presence of the accused under section 205, Criminal Procedure Code, directed the accused under section 205 (2) of the Code to appear in person to give an explanation under section 342 of the Code. In an application in revision against that order it was laid down by a single Judge of the Allahabad High Court that under section 342 it was compulsory on the part of the Magistrate to examine the accused for the reason that the provision of law was in furtherance of justice and to enable the Court to decide the issue in a criminal case. He also stated that,

1. (1914) I.L.R. 41 Cal. 743.
2. (1933) I.L.R. 15 Lah. 60.
3. (1940) 2 M.L.J. 39 : I.L.R. 1940 Mad. 514.
4. (1947) 1 M.L.J. 219 : L.R. 74 I.A. 65 : I.L.R. 1948 Mad. 1 (P.C.).
5. (1922) 43 M.L.J. 402 : I.L.R. 45 Mad. 820.
6. A.I.R. 1934 All. 693 (2).
7. A.I.R. 1945 Cal. 482.

"These provisions indicate that the Legislature intends that the statement should be a personal statement made by the accused and not a statement made on his behalf by an advocate. A statement made by an advocate is merely hearsay and the Court may ask questions from the advocate on which the advocate has no instructions. Moreover the Court may desire to note the appearance of the accused and his manner when the accused replies to the question asked."

The learned Judge who decided that case declined to follow a ruling of the Rangoon High Court in *Maung Po Nyein* v. *Haka Singh*[1], which holds the contrary view and explained away a decision of a Bench of the Bombay High Court in *Dorabshah* v. *Emperor*[2], stating that the decision dealt with summons cases under sections 242 and 243 and that it was entirely a different matter from the statement made under section 342, Criminal Procedure Code.

For the reasons to be stated presently I express my respectful disagreement with this view of the learned Judge.

In *Dorabshah* v. *Emperor*[2], the question that arose for consideration was whether the Court could act on the plea of guilty of an estate manager of the accused. One of the principles laid down in that case was that where the Court had dispensed with the personal attendance of the accused under section 205, the Court could act on the plea given by his counsel in a summons case. In reaching that conclusion the learned Judges relied on a number of English decisions in which under similar circumstances it was held that an accused could appear and plead by counsel or attorney. In the course of the judgment it was observed at page 219 by Fawcett, J. :

"Then again under section 366, in a case where the accused's personal attendance has been dispensed with, he need not even attend to hear judgment, if the sentence is one of fine or he is acquitted, and if his pleader is present at the delivery of the judgment. Having regard to these provisions I think it is clear that in a case where the Court has allowed an accused to appear by a pleader it must be taken that such appearance involves the performance of all acts that devolve upon the accused in the course of the trial, unless the Magistrate thinks it necessary or desirable that the accused himself should be present for any particular purpose, such as for examination by the Court under section 342 or pleading to a charge under section 255. In such a case I cannot see any sufficient ground, in spite of the fact that sections 242 and 243 speak of the accused only, for holding that his pleader may not make the necessary answers and plead guilty or not guilty on his behalf."

Referring to a statement of law made by Batty, J., in *Emperor* v. *Sursing Mathuradas*[3], the learned Judge (Fawcett, J.) observed that in that particular case the accused was present at the time when the pleader gave his plea and that it was a different case from the one he had before him and that the dictum of Batty, J., was too widely expressed if it was meant to apply to a case falling under section 205, Criminal Procedure Code. A careful reading of this judgment leaves no dubt in my mind that this case would equally apply to a warrant case also and there is no force in the distinction sought to be made by Bennet, J., in *Ishwar Das* v. *Bhagwan Das*[4].

Section 242, Criminal Procedure Code, lays down that

"When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a charge."

The relevant portion of section 342 runs thus :—

"The Court . . . . . shall for the purpose aforesaid question him, generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

It is evident from a comparison of both the provisions of law that stating the particulars of the offence to the accused and asking him if he has any cause to show why he should not be convicted under section 242 are as imperative as questioning the accused generally on the case under section 342.

1. (1926) I.L.R. 4 Rang. 506.
2. A.I.R. 1926 Bom. 218 : I.L.R. 50 Bom.
3. (1904) 6 Bom.L.R. 861.
4. A.I.R. 1934 All. 693 (2).

I therefore think that the decision in *Dorabshah* v. *Emperor*[1] applies with equal force to warrant cases also.

The principle enunciated in this case was followed by a Bench of the Bombay High Court in *Emperor* v. *Jaffar Cassum Musa*[2]. It was laid down in that case that where the Magistrate dispensed with the personal attendance of the accused who is permitted to appear by counsel he need not question the accused personally under section 342 which must be read subject to the provisions of section 205. With respect, I agree with the view taken by the learned Judges in this decision.

The principle laid down in *Maung Po Nyein* v. *Haka Singh*[3] is in consonance with the view taken in both the Bombay cases.

Apart from the decisions cited above, an examination of the provisions of section 205, Criminal Procedure Code, leads me to the same conclusion. Section 205, Criminal Procedure Code, is in the following terms :

"1. Whenever a Magistrate issues a summons, he may, if he sees reasons so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

2. But the Magistrate inquiring into or trying the case may in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and if necessary, enforce such attendance in manner hereinbefore provided."

Under sub-section (2) it is in the discretion of the trial Magistrate to direct the accused to appear in person whose personal attendance is dispensed with under sub-section (1) of section 205. If the Legislature intended to make it obligatory on the part of the trial Magistrate to examine the accused under section 342 even when his personal attendance was dispensed with, it would not have expressed itself in the wording of sub-section (2). It looks to me that the intendment of sub-section (2) is to vest the discretion in the Magistrate to direct the accused to be present whenever he thinks it necessary either for questioning him under section 342 or for any other purpose. It is for the Magistrate to consider whether it is necessary to direct the personal attendance of the accused who was exempted under section 205, Criminal Procedure Code, for questioning him under section 342 of the Code and if he does not insist on the appearance of the accused in Court for that purpose the trial cannot be rendered illegal.

I therefore hold that failure to examine the accused personally as required by section 342, Criminal Procedure Code, does not vitiate the trial when his personal attendance is dispensed with under section 205, Criminal Procedure Code. So there is no illegality in the trial of the case which entitles the accused to an acquittal.

For these reasons, the reference cannot be accepted. The papers are returned.

V. S. ——— *Reference not accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

K. J. Verghese .. *Petitioner.**

Madras Town Nuisances Act (III of 1889), section 3 (12)—Offence under—Uttering loudly indecent words in public—If constitutes indecent behaviour.

Uttering loudly abusive and indecent words in public though undoubtedly is bad manners and may constitute bad behaviour, it is doubtful if it is indecent behaviour within the meaning of that term in clause (12) of section 3 of the Madras Town Nuisances Act and as such a person who utters them should be given the benefit of doubt and cannot be convicted of an offence under section 3 (12) of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint

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1. A.I.R. 1926 Bom. 218 : I.L.R. 50 Bom. 250.
2. A.I.R. 1934 Bom. 212.
3. (1926) I.L.R. 4 Rang. 506.

*Cr.R.C. No. 1228 of 1949. (Cr.R.P. No. 1159 of 1949.) 21st April, 1950.

Magistrate of Coonoor, dated 23rd May, 1949, in C. A. No. 7 of 1949, preferred against the order in C. C. No. 1545 of 1948, Stationary Sub-Magistrate of Coonoor.

T. M. Kasturi and *A. K. Sriraman* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Public Prosecutor (*V. L. Ethiraj*) for the State.

The Court made the following

ORDER.—The petitioner has been found guilty by the Stationary Sub-Magistrate, Coonoor, for an offence under section 3 (12) of the Madras Town Nuisances Act and sentenced to a fine of Rs. 20.

Section 3 (12) deals with disorderly or indecent behaviour in any public place. The indecent behaviour that is attributed to the petitioner who is a Municipal Councillor is that while going on a public road he uttered in loud tones the following words :

> "It appears some fellow—let his mother and wife be ravished—informed the Sub-Inspector that Bahadur Khan (referring to the second accused) should be arrested. Can they—fellows who ravish mothers—pluck a hair."

The question now is whether this will constitute indecent behaviour.

It is contended by Mr. Kasturi that it is at best only abusive or indecent words uttered and this does not constitute behaviour. The term "behaviour" is not defined. But the Oxford Dictionary gives the meaning as deportment or manners. Uttering these words in public undoubtedly is bad manners and though it may constitute bad behaviour, it is doubtful if it is indecent behaviour within the meaning of that term in clause (12) of section 3. In my opinion the question is not free from doubt and the benefit of that doubt must go to the accused.

The conviction and sentence are set aside and the accused is acquitted. The fine, if paid, will be refunded.

V. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Ponnuswami and another .. *Petitioners.**

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949), section 4 (2)—Solemnized—Meaning of—Tying of a thali in a temple in the presence of the Idol—Validity of marriage—If an offence when done by a man during the subsistence of an earlier marriage.

The word "solemnized" in section 4 (2) of the Madras Hindu (Bigamy Prevention and Divorce) Act, cannot be said to imply the performance of a marriage before a priest who has authority for performing marriages. Any such requirement is not contemplated under the Hindu Law to constitute a valid marriage. The word "solemnized" only means performed or conducted. Tying of a thali in a temple in the presence of the Idol is one of the forms of marriage known to Hindu Law and in no sense can such a marriage be said to be an invalid one. Hence where a man whose marriage with a woman is subsisting ties a thali round the neck of another woman in a temple, they are both of them guilty of an offence under section 4 (2) of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the 2nd Presidency Magistrate, G.T., Madras, dated 17th December, 1949, in C.C. No. 2520 of 1949.

A. Dorairaj for Petitioners.

The Government Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—In this case the two petitioners have been convicted of an offence under section 4 (2) of the Madras Hindu (Bigamy Prevention and Divorce) Act

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* Cr.R.C. No. 150 of 1950. (Cr.R.P. No. 137 of 1950.) 31st March, 1950.

(VI of 1949) and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 50 or one month simple imprisonment in default. The case against the petitioners is that the first accused married the second accused while his marriage with the complainant was subsisting. He married the complainant on 30th June, 1947, and having abandoned her after ill-treating her, he married the second accused on 2nd May, 1949, thereby committing an offence under section 4 (2) of Act VI of 1949.

The plea of the accused was that there was no second marriage as spoken to by the prosecution witnesses.

In support of the prosecution case P.Ws. 2 and 3 who witnessed the marriage in the Mallikeswaran Koil, were examined. According to these two witnesses the first accused tied the thali round the neck of the second accused in the temple in the presence of the Idol.

The evidence of these two witnesses was believed by the trial Court and the conviction of the petitioners based thereon.

It is argued in this petition that the evidence on record is not sufficient for convicting the petitioners and that in any event since the marriage was not solemnized as contemplated under section 4 (2) of the Act no offence can be said to have been committed by the accused. According to the petitioners' counsel, if the marriage was not performed in the presence of a priest clothed with authority, the marriage is not a valid one and therefore no offence can be said to have been committed. I do not think I can accept either of these two contentions.

So far as the evidence is concerned the trial Court which had seen the witnesses and watched their demeanour has chosen to accept their evidence. There are no reasonable grounds for taking a different view of the evidence. I therefore see no reason to disturb the finding as regards the guilt of the accused.

As regards the second contention, *viz.*, that unless the marriage took place in the presence of a priest who is clothed with authority, it cannot be said to be a valid one, I do not think there is any basis for it. According to the learned counsel for the petitioner, the word "solemnized" in section 4 (2) of the Act implies the performance of marriages before a priest who has authority for performing marriages. There is no warrant for this proposition. I do not think that any such requirement is contemplated under the Hindu law to constitute a valid marriage. The word "solemnized" only means, performed or conducted. See *Queen-Empress* v. *Paul*[1]. Under the Hindu law it is not necessary that a marriage should take place in the presence of a priest or any person who is clothed with authority. Tying of a thali in the presence of an idol is one of the forms of marriage known to Hindu law and in no sense can such a marriage be said to be an invalid one. I therefore find that the petitioners were rightly convicted of an offence under section 4 (2) of the Act.

The only question to be considered now is whether the sentence of Rs. 50 is excessive having regard to the status of the petitioners. The first accused is a porter working in a railway station. I therefore think that the ends of justice will be met if each of them is sentenced to a fine of Rs. 25. In other respects the petition is dismissed.

V. S. —————— *Petition dismissed. Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRA REDDI.

Reddy Rajaratnam Reddi .. *Petitioner.**

Penal Code (XLV of 1860), section 108, Explanation IV—Abetment of an abetment which is ineffective—If an offence.

The abetment of an abetment is an offence though the second abetment is ineffective. The expression "abetment of such abetment" in the latter half of Explanation IV to section 108 would include also the instigation of a person who refuses to instigate the commission of an offence.

1. (1896) I.L.R. 20 Mad. 12.

*Crl.M.P. No. 59 of 1950. 12th April, 1950.

Srilal Chamaria v. *Emperor*, (1918) I.L.R. 46 Cal. 607, followed.

Petition praying that, in the circumstances stated therein, the High Court will be pleased to quash the order of commitment dated 29th December, 1949, in P. R. C. No. 11 of 1949, Stationary Sub-Magistrate's Court, Kurnool.

P. Basi Reddy and *M. S. Sethu* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the State.

The Court made the following

ORDER.—This is a petition to quash the commitment of the petitioner for an offence under section 302, Indian Penal Code read with section 115, Indian Penal Code in P.R.C. No. 11 of 1949 by the Stationary Sub-Magistrate, Kurnool. The charge against the petitioner is that he approached P.W. 1 a doctor with a request to provide him with poison to enable him to kill his mistress with a view to get at her properties. The prosecution case is that one Veeramma who is P.W. 5 in the case has been the mistress of the accused for some years. She has two children, a daughter and a son, and the son being a minor, a court guardian was appointed for the property. The accused who has been on intimate terms with Veeramma and managing her affairs conceived the idea of getting at the property by doing away with her. For that purpose he approached P.W. 1 a doctor practising in Kurnool with a request to supply him with poison and promised to pay him a sum of Rs. 2,000 if the poison asked for was given to him. In spite of the refusal of P.W. 1 to comply with the request of the accused, the latter persisted in his attempt. P.W. 1 reported the matter to the Deputy Superintendent of Police, P.W. 6 on 10th August, 1949, who passed on the information to P. W. 7, the local Sub-Inspector of Police. P. W. 7 in order to trap the accused deputed a constable P.W. 2 to go to the house of P.W. 1's dispensary and keep himself inside to overhear the conversation between P.W. 1 and the accused. Accordingly on 12th August, 1949, P.W. 2 went to the dispensary of P.W. 1 but the accused did not turn up that day. Next day again he went and remained behind the screen in the same apartment. That day the accused went to the house of P.W. 1 to repeat his request and the doctor as usual refused to comply with it. This was overheard by P.W. 2 who went back to P.W. 7 and reported what had happened. Subsequently the accused was arrested and a charge-sheet was filed against him for an offence under section 302 read with section 117, Indian Penal Code.

The accused pleaded that he never approached the doctor, P. W. 1, for poison with intent to kill P. W. 5, that P. W. 1 was giving false evidence at the instance of P. W. 5's brother-in-law and other relations of his and that he was not guilty of the offence with which he is charged.

Finding that the accused instigated the doctor to abet the accused in the commission of the offence of murder of P. W. 5, the Stationary Sub-Magistrate, Kurnool, committed the accused to sessions to take his trial on a charge under section 302, Indian Penal Code, read with section 115, Indian Penal Code. The accused has preferred this petition to quash the commitment.

In this petition it is argued on his behalf that the prosecution evidence on the face of it is incredible and secondly even assuming all that is stated by the prosecution witnesses were true, it does not constitute an offence under section 302, read with section 115, Indian Penal Code. Whether the prosecution evidence in the case is such as would commend itself to the trial Judge does not arise for consideration in this petition. So I do not propose to express any opinion on the question of credibility of the prosecution witnesses.

The answer to the second contention rests mainly on the construction of sections 107 and 108, Indian Penal Code. Section 107, Indian Penal Code, provides that a person abets the doing of a thing, who instigates any person to do that thing.

The other portions of that section need not detain me as they have no bearing on the question for consideration before me. Section 108 reads thus :

> " A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor."

Explanation (2) to that section is as follows :

> " To constitute the offence of abetment it is not necessary that the act abetted should be committed, or the effect requisite to constitute the offence should be caused."

The question before me really turns on the interpretation of Explanation (4) to section 108. Explanation (4) provides that the abetment of an offence being an offence, the abetment of such an abetment is also an offence. Explanation (2) lays down that to constitute the offence of abetment it is neither necessary that the act abetted should be committed nor that necessary effect should be produced. In other words a person who incites another to commit an offence is guilty of the offence of abetment irrespective of the result. The gist of the offence under this Explanation is the intention of the wrong doer.

The point for consideration is whether the expression "abetment of such an abetment" in the latter half of Explanation (4) includes also the instigation of a person who refuses to instigate the commission of an offence. Mr. Basi Reddi, the learned counsel for the petitioner, contends that there can be no abetment of an abetment when the person sought to be abetted refuses to abet the commission of a crime. In support of his contention he cites a passage from Mayne's Criminal Law at page 239 (4th Edn.).

> " Thus if *A* asks *B* to go to a place and instigate *C* to commit an offence, *A* commits no offence (unless it be under section 120-B) until *C* is instigated by *B* and when *B* does so, *A's* offence is complete at the place where the instigation takes place."

On the other hand reliance is placed on *Srilal Chamaria* v. *Emperor*[1], by the learned Public Prosecutor. In that case the accused one Srilal who was the clerk of one Bilas Roy against whom a complaint for trespass, house-breaking and theft was filed approached one Karuna Bhusan Banerjee, the Bench Clerk and Interpreter of the Court of the Fifth Presidency Magistrate, Calcutta, with the offer of a bribe for the Magistrate. At first Karuna refused, but when the accused persisted, Karuna reported this to the Chief Presidency Magistrate, who in consultation with the Commissioner of Police laid a trap for the appellant. In pursuance of this decision Karuna arranged with Srilal for the payment of a bribe on a particular day and informed the police of that. On the appointed day the Inspector concealed himself behind the screen and saw what transpired between Karuna and Srilal and arrested Srilal when money was handed over to Karuna.

The question that arose in that case was whether these facts constituted an offence under section 161 read with section 116, Indian Penal Code. It was held that Srilal was guilty of the abetment of bribery under section 161 read with section 116, Indian Penal Code.

On a difference of opinion between the two Judges that constituted the Bench Richardson, J., and Shams-Ul-Huda, J., as to the view to be taken of the evidence on record, the matter was referred to a third Judge, Fletcher, J., who agreed with the finding of Richardson, J., that Srilal Chamaria, the accused in the case, instigated Karuna to induce the Magistrate to accept the bribe and thereby committed the offence under section 161, Indian Penal Code, read with section 116, Indian Penal Code, by abetting the abetment of an offence within the meaning of Explanation (4) to section 108.

But all the three Judges were agreed on the question as to the interpretation of the expression " Abetment of such an abetment " occurring in Explanation (4) to section 108. Referring to the Illustration under Explanation (4) to section 108, Richardson, J., observes at page 618 as follows :

> " If '*B*' instigates *C* and *Z* is murdered there is no difficulty. It is not disputed that *A* is punishable, but how is he punishable except under section 109 for abetment of murder ? If *B* instigates *C*

1. (1918) I.L.R. 46 Cal. 607.

but *C* refuses to murder *Z* it is similarly not disputed that *A* is punishable but he can only be punished under section 116, again for abetment of murder.

Then comes the case which approaches the present case. *B* refused to instigate *C* and *Z* is not murdered. *A* is still guilty of abetment of murder just as he was before. *A's* criminality is under the Code the same in all three cases. Explanation (2) of section 108 applies when *B* does not instigate *C* just as much as when *C* does not murder *Z*. The result would be the same, however, long the chain may be between *A* and *Z*.

In this view, the abetment of an abetment of an offence is no more and no less than the abetment of that offence. If the second abetment is not committed Explanation (2) applies. This seems to be the only intelligible way of interpreting the language used. The words mean—when the abetment of an offence is punishable under section 109 or under section 116 the abetment of such an abetment is also punishable under one or other of those sections as the case may be."

On this question as I have already observed Shams-ul-Huda, J., also took the same view. The following passage from the judgment of the learned Judge at page 627 is apposite :

"It has been contended that under Explanation (4) of section 108 of the Penal Code the abetment of an abetment means the abetment of an act which subsequently ripens into an actual abetment of the principal and not an abetment or incitement merely to incite another when that other has not at all been incited. In other words it is urged that without Karuna inciting the Magistrate the abetment of Karuna by Srilal did not amount to abetment of an abetment. The language of Explanation (4) is not very clear . . . . . Having regard to the nature of the charge in this case, the only form of abetment we need consider is abetment by instigation . . . . I would therefore substitute the word 'abetment' by the word 'instigation' and put the question in this form. Was there in this case an instigation of an instigation? Having regard to the definition of the word 'abetment' as including both the abetment of an offence as well as the abetment of an act which if committed, would be an offence, the question is whether there was on the part of Srilal an instigation of an actual instigation by Karuna, which instigation amounted to an offence, or the instigation of an act which if committed, would have amounted to an offence. It is clear there was in this case no instigation of an actual instigation but if the prosecution story is true, Karuna was instigated to do an act which, if committed, would have been an offence."

Referring to the passage from Mayne's Criminal Law (4th Edn.) at page 239 which I have already alluded to, the learned Judge stated that expression of opinion was not found in the author's own edition of the book, nor was any authority cited for that proposition.

The third Judge Fletcher, J., who took the same view as the other two learned Judges on this question stated in the course of his judgment that,

" the words 'when the abetment of an offence is an offence' do not mean 'when an abetment of an offence is actually committed.' They mean when the abetment of an offence is by definition or description an offence under the Code, that is, when an abetment of an offence is punishable under section 109 or section 116 or some other provision of the Code, then the abetment of such an abetment is also an offence."

I express my respectful agreement with the principle laid down in this decision.

In *Empress* v. *Troylukhonath Chowdhry*[1], the accused sought the aid of one Cummins who was a godown keeper of a firm known as Messrs. Mackenzie, Lyall & Co., for committing theft of some hardware belonging to his master. Cummins who did not fall in with this plan informed his master of the same and laid a trap for the accused. In pursuance of this arrangement with his master Cummins aided the accused in carrying out his object. The accused was charged with theft of goods belonging to the company. But the accused was convicted under section 116, Indian Penal Code, on the ground that he instigated Cummins to do that which if committed would have been an offence and which falls under Explanation (4) to section 108, Indian Penal Code. The learned Judges stated that inasmuch as Explanation (2) constituted an offence of abetment, it was not necessary that the act abetted should be committed.

The principle laid down in *Srilal Chamaria* v. *Emperor*[2], was reiterated in *Ghazi Khan* v. *Emperor*[3]. In that case one Sher Khan, in order to help a relation of his charged with making a false charge against one Kalandar, wrote a letter to one Razvi Khan to approach the doctor who had to make a report in connection with the charge against Sher Khan's relation and induce him to make a favourable report. Accordingly, Razvi Khan approached the servant of the doctor and offered some

1. (1878) I.L.R. 4 Cal. 366.
2. (1918) I.L.R. 46 Cal. 607.
3. A.I.R. 1934 Pesh. 110.

money to be given to the doctor for making a favourable report. The servant refused to take the money saying that the Master would not accept the bribe. This matter having been brought to the notice of the police, Razvi Khan along with Sher Khan was prosecuted for instigating the servant of the doctor to instigate the doctor to accept the bribe. Razvi Khan was found guilty of abetting an unsuccessful attempt to induce a public servant to accept an illegal gratification while Sher Khan was found guilty of abetment of abetment and both of them were convicted under section 161, Indian Penal Code, read with section 116, Indian Penal Code, though Razvi Khan made only an unsuccessful attempt to instigate the servant of the doctor to instigate the doctor to accept a bribe.

In *The Empress* v. *Mt. Bakhtawar*[1] referred to both in Ratanlal's Law of Crimes and Sir Hari Singh Gour's Penal Law of India, the facts as can be gathered from the text books are that the accused approached a native doctor with a request to supply her with medicine for the purpose of poisoning her son-in-law, but the doctor refused to comply with her request. She was prosecuted for an attempt to murder her son-in-law an offence punishable under section 307, Indian Penal Code. It was held that the offence committed by her was not an attempt to murder as it was a mere act by way of preparation to commit an offence and was not a transaction which would necessarily have ended in murder if not interrupted, but such an act might be held to be an instigating of the native doctor to abet the accused in the commission of the murder, and with reference to Explanation (4) to section 108, Indian Penal Code, might have been punished under section 116, Indian Penal Code, read with section 302 of the same Code. This case is cited with approval in both these text books (*see* Gour's Penal Law of India, 5th edn., pages 414 and 415 and also Ratanlal's Law of Crimes, 16th Edn., page 239). This decision is *ad-idem* with the present case. A passage from the Penal Law of India by Gour dealing with Explanation (2) to section 108, Indian Penal Code, at page 412 of the same edition may be usefully extracted :

"........ abetment depends upon the instigation and not upon the effect it has upon another. As was observed in a case 'the offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is actually done by the person whom he abets ....' The offence of abetment is complete with the instigation, notwithstanding that the person abetted refuses to do the thing or doing it the expected result does not follow, or the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should be caused by them."

Dealing with Explanation (4) the author states at page 413, paragraph 993 that the abetment of an abetment is an offence when the principal abetment was an offence. *Such* would be the case where a third person intervenes between the abettor and the actor. In such a case all that is required is that the substantive abetment must be the abetment of an offence. It is not necessary that such offence should be committed. Then the author refers with approval to the case in *Empress* v. *Troylukhonath Chowdry*[2], which I have already referred to.

At page 241 of Mayne's Criminal Law of India it is stated that a person instigates a crime who incites and suggests to another to do it or impresses upon his mind certain statements whether true or false with the intention of inducing him to commit a crime. Another passage at page 242 in the same text book is that it is equally an offence to instigate *A* to instigate *C* and so on indefinitely provided the object ultimately is to arrive at somebody who will be influenced to the commission of the crime. Reference may be made to what the author says at page 243 :

"The offence of abetment by instigation is complete as soon as the abettor has incited another to commit a crime whether the latter consents or not or whether having consented he does the crime."

In the light of these decisions cited above, and the passages in the various text books and after a careful examination of the provisions of section 107 and Explanations (2) and (4) to section 108, Indian Penal Code, I have come to the conclusion that the abetment of an abetment is an offence though the second abetment

1. P.R. 24 of 1882. 2. (1878) I.L.R. 4 Cal. 366.

is ineffective, although at first the argument on behalf of the petitioner that no offence is committed when the second abetment was abortive looked very plausible. In this view of the matter I consider that the passage in Mayne's Criminal Law of India at page 239 relied on by the learned counsel for the petitioner is not of much importance.

For these reasons I hold that the petitioner would be guilty of an offence under section 302 read with section 116, Indian Penal Code, if the prosecution case were to be believed.

As regards the next contention advanced on behalf of the petitioner I do not want to express any opinion at this stage as it is likely to prejudice the trial of the case. It is for the Sessions Court to see whether the prosecution evidence can be accepted having regard to the circumstances of the case. There are therefore no grounds to quash the commitment of the petitioner and the petition is dismissed.

V. S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BALAKRISHNA AYYAR.

Balasubramania Chettiar .. *Appellant* *

v.

AL. VR. ST. Veerappa Chettiar and another .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946), section 4 (1) (b)—Applicability —Suit to set aside sale for arrears of rent on the ground of fraud.

In a suit to set aside a sale for arrears of rent on the ground of fraud and material irregularity there is no claim for eviction involved and section 4 of the Madras Tenants and Ryots Protection Act would not apply to such a suit. Though as a consequence of the suit being dismissed, the plaintiff will have to quit the land and be evicted if he is not willing to leave the land of his own accord, there is no such claim for eviction involved in the suit.

Appeals under clause 15 of the Letters Patent against the judgment and decree of Wadsworth, J., dated 13th December, 1946, in S.A. Nos. 1868 and 1869 of 1946, preferred to the High Court against the decrees of the Subordinate Judge's Court, Madura, in A.S. Nos. 108 and 107 of 1945 (O.S. Nos. 327 and 328 of 1943, District Munsif Court, Periyakulam).

B. C. Seshachala Aiyar and *V. N. Jagannadha Rao* for Appellant.

R. Kesava Aiyangar for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—The plaintiff appellant in these appeals sought to have the sale, brought about by his landlord for arrears of rent, set aside on the ground of fraud and material irregularity. Both the Courts below held against him and found that he had shown no cause for setting aside the sale. The suits were dismissed and in appeal the dismissals were confirmed. Then the plaintiff preferred second appeals to this Court.

Before the matter came on for consideration by Wadsworth, J., in second appeal, Madras Act XVII of 1946 had been passed, which required all suits to be stayed

"which were (*a*) for the eviction of tenants from their holdings or land . . . . . in which a claim for such eviction was involved . . . . . . or (*b*) in which the sale of the holding of a tenant or ryot for recovery of rent is claimed."

The learned Judge did not think that there were any merits in the second appeals as far as the questions in issue in the suits were concerned ; and he did not consider that section 4 of the Act applied. As, however, the applicability of section 4 had not been considered by this Court in any decided cases, the legislation being of very recent origin, he, in dismissing the appeal, granted a certificate for leave to appeal under the Letters Patent.

* L.P.A. Nos. 5 and 6 of 1947. 8th March, 1950.

A preliminary point has been raised as to whether second appeals lie ; but we do not think that there is any substance in that objection. It is not necessary for us to state our reasons, in view of the opinion we are expressing on the point raised in the appeals.

We agree with the learned Judge (Wadsworth, J.) that there is no substance in the second appeals. With regard to the applicability of section 4, we are satisfied that in the suits no claims for eviction are involved. As the suits were for setting aside sales already held, the sales were good and binding until set aside. It may be true that as a consequence of the suits being dismissed, the appellant will have to quit the land and be evicted if he is not willing to leave the land of his own accord ; but there was no such claim for eviction involved in the suits. Moreover [*vide* sub-clause (*b*) of section 4 (1)] there was no claim in the suits for the sale of the holding for recovery of rent, the suits being to set aside sales already held.

The appeals are dismissed with costs in L.P.A. No. 6 of 1947 only.

V. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAYUDU.

In the matter of Pillalamarri Venkateswarlu, a detenu in the Central Jail at Cuddalore.

The District Magistrate, Guntur and another .. *Respondents.**

Constitution of India, Article 226—*Power of High Court to issue writs in the nature of* habeas corpus—*Privileges of Members of Parliament—Extent of freedom from arrest—Madras Maintenance of Public Order Act* (*XXIII of* 1949) *and Preventive Detention Act* (*IV of* 1950)—*Validity.*

Article 226 of the Indian Constitution provides the High Court with all the powers which a High Court of Justice in England has under the Common Law for the issuing of prerogative writs. The High Court has the power to issue in appropriate cases, even to the Government, directions, orders or writs including writs in the nature of *habeas corpus*, etc., for the enforcement of any of the rights conferred by Part III of the Constitution of India, namely, Fundamental Rights and for any other purpose. If the arrest and detention of a person contravened the rights, privileges or immunities which he enjoyed as a member of the Madras Legislature, the High Court would issue the writ and direct his release.

A member of the Legislature cannot have immunity from arrest in the case of a preventive detention order.

Sections 2, 3, 4, 4-A and 15 of Madras Act XXIII of 1949, are repugnant and inconsistent with the Fundamental Rights provision in Part III of the Constitution and a person detained under that Act is entitled to be released.

[No opinion was expressed on the validity or otherwise of detention under sub-section (1) of section 3 of the Preventive Detention Act (IV of 1950) (Central).]

Petition under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of *habeas corpus* for production before the High Court, Madras, of the person of Pillalamarri Venkateswarlu, a detenu in the Central Jail at Cuddalore to be dealt with according to law and direct that he be set at liberty.

A. Ramachandran for *Messrs. Row and Reddy*, Advocates for Petitioner.

The Government Prosecutor *S. Govind Swaminathan* for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the State.

The Order of the Court was made by

Govinda Menon, J.—Sri Pillalamarri Venkateswarlu, M.L.A., was a member of the Madras Legislative Assembly constituted under the Government of India Act, 1935, having been elected to that body, by the general labour constituency of the districts of Krishna, Guntur and West Godavari in the General Elections

* Cr.M.P. No. 2059 of 1949. 27th March, 1950.

held in or about March, 1946. He continued to represent this constituency in the Madras Legislature until he was arrested in pursuance of an order issued under the provisions of the Madras Maintenance of Public Order Act. He was arrested on 7th November, 1948, subsequent to the declaration as illegal, of the communist party, of which he was avowedly an active member. Since that date, it is stated by him in his affidavit, that he has been in illegal detention in the Central Jail at Cuddalore.

By Article 382 of the Indian Constitution until the Houses of the Legislature of each State specified in Part A of the first schedule have been duly constituted and summoned to meet for the first session under the provisions of the Constitution the Houses of the Legislature of the corresponding Province functioning immediately before the commencement of the Constitution shall exercise the powers and perform the duties conferred by the provisions of the Constitution of the Houses of the Legislature of such State. Therefore it is clear that subsequent to the inauguration of the Republic of India, on 26th January this year, that body which functioned prior to that date as the Legislative Assembly of the Province of Madras *ipso facto* on the strength of Article 382 continues to be one of the Houses of the Legislature for the State of Madras. It is, therefore, evident that every member of that Legislative Assembly straightaway became a member of the new Houses of the Legislature, and as such Sri Venkateswarlu who was a member of the previous Legislative Assembly became on the 26th, and continues to be thereafter, a member of the Madras Legislative Assembly. This fact cannot, and is not disputed for the reason that in his affidavit Sri Venkateswarlu states that he has received a notice dated 31st January, 1950, setting out the agenda for the Madras State Legislative Assembly from 11th February, 1950, till 13th February, 1950, and issued by the Secretary of the Madras Legislature. This notice summons Sri Venkateswarlu to attend the meeting of the Legislature on 11th February, 1950. But it is alleged that on account of his detention he is not in a position to attend the Legislature and therefore applies to this Court under Article 226 of the Constitution of India for an order directing him to be released from the unlawful custody or at least for a direction that he may be allowed to attend the Legislature after taking whatever precautions that may be necessary in the circumstances of the case.

This application was made on the 21st July, 1949, and the reasons alleged at that time were that his detention under the Madras Maintenance of Public Order Act, in force then, was illegal and that he was entitled to be released forthwith. As the same could not be disposed of until the 26th January, a fresh petition Crl. M.P. No. 305 of 1950, was filed setting forth additional grounds as well, and stating that the earlier application should be expedited. We, therefore, directed that Crl. M. P. No. 2059 of 1949 be expedited and heard. Though the original application was under section 491 of the Criminal Procedure Code, we are invited to dispose of it under the powers conferred on this Court under Article 226 of the Constitution of India as the latter provision has superseded all provisions of the Criminal Procedure Code which gave power and authority to the High Court to issue writs in the nature of *habeas corpus*.

The chief ground on which we are asked to release the petitioner is that as a member of the Madras Legislative Assembly he enjoys the privileges, rights and immunities which a member of the House of Commons of the United Kingdom enjoys in accordance with the practice and procedure obtaining in the Parliament at Westminster. That it is so is evident from Article 194 of the Indian Constitution which in sub-clause 3 lays down that

> "The powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution."

It is conceded that the Legislature has, by law, not defined or laid down anything with regard to the powers, privileges and immunities of a member of the Legislative Assembly until now and that being so, according to the provisions of sub-clause (3) we have to take it that at present every member of the Legislature of the Madras

State has all the powers, privileges and immunities which a member of the House of Commons at Westminster is entitled to. It is, therefore, incumbent upon us to find out what exactly are the powers, privileges and immunities of a Member of Parliament on 26th January, 1950 and that would resolve the question at issue in this petition.

At the outset there was some doubt as to whether this Court has power to issue writs such as *habeas corpus*, etc., when the point in dispute is regarding the rights, privileges and immunities of a Member of the House of Legislature; for it was thought that matters like that should be within the sole purview and jurisdiction of the Speaker of the Legislative Assembly. We therefore had to find out whether in the United Kingdom, the High Court of Justice ever entertained, and interfered in, matters like that where the privilege or immunity of a Member of Parliament was sought to be disputed. The case-law on the subject reveals the fact that in England the High Court of Justice has vested in it, the right of interfering when the right, privilege or immunity of a Member of Parliament has been infringed.

In *Goudy* v. *Duncombe*[1], Pollack, C.B., had to consider a question of this nature and the learned Chief Baron decided that the privilege of a Member of Parliament from arrest on *ca. sa.* exists for forty days before and forty days after a meeting of Parliament. The rule of privilege is the same in the case of a dissolution as in that of a prorogation. What happened in that case was that the defendant therein had been arrested in execution for default in payment of a debt secured by a Judge's order and that defendant happened to be a Member of Parliament. On an application made by him to Williams, J., the learned Judge discharged him from custody. He was arrested on 2nd September, 1847. On 3rd September a summons was taken out for his discharge before Williams, J., on the ground that he was privileged from arrest. It appeared that on 28th July, 1847, he had been elected Member of Parliament for the borough of Finsbury. On 13th August there appeared in the London Gazette, an order of the Queen in Council by which Parliament was prorogued to 12th October. Williams, J., ordered the discharge of the defendant from custody on 7th September. On an application to set aside the discharge order, Pollack, C.B., reviewed the previous authorities on the subject and considered the observations contained in Blackstone's Commentaries (Volume 1, page 165) as well as the passage in Bacon's Abr., tit. " Privileges ". He also considered various other authorities cited before the Court and the opinion of the Court was that whatever might have been the convenient period in the earlier days, a period of forty days before and after the meeting of the Parliament had for about two centuries at least been considered the convenient or the actual time to be allowed. Therefore the learned Chief Baron on behalf of the Court was of opinion that Williams, J., rightly ordered the discharge and the order was confirmed.

This decision clearly shows that when Parliamentary right, privilege or immunity is infringed by the arrest of a member of Parliament it is open to Court to interfere and set the matter aright. Article 226 of the Indian Constitution provided us with all the powers which a High Court of Justice in England has under the Common Law for the issuing of prerogative writs. We have the power to issue, in appropriate cases, even to the Government, directions, orders or writs including writs in the nature of *habeas corpus*, etc., for the enforcement of any of the rights conferred by Part III, namely, Fundamental Rights, and for any other purpose. In such circumstances, if we are satisfied that the arrest and detention of the petitioner herein contravened the rights, privileges or immunities which he enjoyed as a member of the Madras Legislature, we would very, unhesitatingly issue the writ and direct his release as had been done by the English Court.

In addition to the judgment of Pollack, C.B., to which reference has already been made, there is an earlier decision reported in *Holiday et Al* v. *Colonel Pitt*[2]. There, it was held that Members of Parliament have privilege of return after its dissolution. They may be discharged on motion without filing common bill.

1. (1847) 1 Ex. 430 : 154 E.R. 183. 2. 2 Strange 986 : 93 E.R. 985.

Even in that case, nobody thought of disputing the right of the High Court to enforce the rights, privileges and immunities of a Member of Parliament when justice demanded it. In view of these two authorities, we have no hesitation in holding that this Court has the power to interfere when necessity suggests or occasion demands in appropriate cases.

The question, therefore, arises as to what are the privileges and immunities of a Member of Parliament from being arrested. Useful guidance in this respect can be got from Anson's Law and Custom of the Constitution edited by Sir Maurice Gwyer, Vol. 1, at page 163, where it is stated thus :

"The first of these is freedom from arrest for the persons of members during the continuance of session, and for forty days before its commencement and after its conclusion."

The object of the privilege was doubtless to secure the safe arrival and regular attendance of members on the scene of their Parliamentary duties : the privilege itself may perhaps relate back to the Saxon rule that such persons as were on their way to the gemot were in the King's peace. It never was held to protect members from the consequences of treason, felony, or breach of the peace. In 1763 both Houses resolved, in the case of Mr. Wilkes, that it did not extend to the writing and publishing of seditious libels and since that time the rule has been considered settled that '*Privilege is not claimable for any indictable offence*'. Nor does privilege protect a member from being committed to prison for contempt of Court. A committee of privileges was appointed to deal with the case of Mr. Long Wellesley in 1831 : he had taken a ward in chancery, his own daughter, out of jurisdiction and had been committed for contempt by the Lord Chancellor, Lord Brougham. The committee reported that his claim of privilege ought not to be admitted. A series of cases since that day has confirmed the opinion expressed by the Committee of 1831.

"But within the limit of civil cases the privilege was made a cause of hardship to suitors, for not only was the member's person protected from arrest and his property from legal process but right of action were held in abeyance, since proceedings could not even be commenced against a member or his servant."

The passage above quoted shows that immunity extends certainly to freedom from arrest for civil process or for a debt due, for forty days prior to the commencement and for the same time after the session. It is also clear that this immunity does not extend to indictable offences at all. The present extent of this immunity is discussed by the learned author at page 165 and he quotes the authority which we have already adverted to, namely, *Goudy* v. *Duncombe*[1].

In the well-known book, Sir T. Erskine May's Parliamentary practice has been devoted some space for discussion of this question. In the 14th edition of that book edited by that great authority on Parliamentary Procedure, Sir Gilbert Campion, at page 68, it is observed as follows :—

"It will be convenient to begin with the sphere in which enjoyment of freedom from arrest is unquestioned, namely, in civil suits, setting out the extent to which this privilege has been limited or defined by statutes and resolutions of either House ; then similarly to define the sphere in which freedom from arrest does not exist, namely, in criminal process ; and to conclude with an account of the extent to which the privilege has been extended by analogy from Members to other persons, such as witnesses, in virtue of their relations to Parliament."

At page 70 the case regarding the release of members from custody has been discussed and at page 71 the present mode of releasing arrested members as well as transition to modern practice are discussed. At page 72 in discussing the effect of the privilege on admissibility of members on bail the learned author says that as a consequence of the immunity of a member of Parliament, it has been held that he cannot be admitted as bail ; for not being liable to attachment, by reason of his privilege, he cannot be effectually proceeded against, in the event of the recognizances being forfeited. Then, at page 73, the question regarding the duration of privilege is discussed and the learned author observes that :

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1. (1847) 1 Exch. 430 : 154 E. R. 183.

"With regard to members of a House of Commons 'the time of privilege' has been repeatedly mentioned in the statutes, but never explained. It is stated by Blackstone and others, and has been the general opinion (founded, probably, upon the ancient law and custom, by which writs of summons for a Parliament were always issued at least forty days before its appointed meeting), that the privilege of freedom from arrest remains with a member of the House of Commons for forty days after every prorogation, and forty days before the next appointed meeting;"

and this extent of privilege has been allowed by the Court of Law, on the ground of usage and universal opinion.

"Thus in the case of a Member who had been, by a Judge's order, allowed his privilege, extending to forty days, the chief baron, on a motion for rescinding the order, maintained the privilege, and stated as the Judgment of the court that 'the period of forty days before and after the meeting of parliament has, for about two centuries at least been considered either a convenient time or the actual time to be allowed. Such has been the usage, the universally prevailing opinion on the subject'; and such, we think, is the law".

From these precedents and authorities we have to take it that there is immunity extending for a period of forty days prior to the meeting and forty days subsequent to the conclusion of the meeting for a Member of Parliament from being arrested for a civil debt; that is, if there is a decree against him, or, if he is sought to be arrested before judgment, he can certainly claim the immunity and freedom from arrest. It is also clear that such immunity cannot extend or be contended to operate, where the Member of Parliament is charged with an indictable offence, but these alone would not help us in solving the problem now before us. It is difficult to say that the arrest of the petitioner was for any indictable offence, for, the Madras Maintenance of Public Order Act is a preventive measure and not a punitive one. There is no allegation suggesting thereby that the petitioner has committed any crime; but his detention has been necessitated by the fact that in the opinion of the Provincial Government of the State, as it now is, his being at large is dangerous to the public safety or the maintenance of public order in this State. We need hardly add that his arrest is not for a civil debt or a civil process.

Therefore we have to find out whether there is any precedent like this or whether any Member of the House of Commons, who had been subject to preventive detention had the privilege extended to him in such a case.

A case apposite in point was that of Captain Ramsay who was a Member of Parliament in 1940. We have been able to secure a copy of the report submitted by the Committee of Privileges of the House of Commons to Mr. Speaker in October 1940 and very useful guidance can be got from the report of that Committee. What happened there was that Captain Ramsay was detained in pursuance of an order issued by Sir John Anderson, Secretary of State for the Home Department, purporting to act under Regulation 18-B of the Defence (General) Regulations, 1939. Thereafter, Captain Ramsay approached the Speaker of the House of Commons alleging that by his detention his immunity from arrest as Member of the House of Commons had been infringed. On this, the Speaker referred the matter to the Committee of Privileges who, after hearing Sir John Anderson as well as Sir Gilbert Campion, came to the following conclusion:

"The precedents lend no support to the view that Members of Parliament are exempted by privilege of Parliament from detention under Regulation 18-B of the Defence (General) Regulations, 1939. Preventive arrest under statutory authority by executive order is not within the principle of the cases to which the privilege from arrest has been decided to extend. To claim that the privilege extends to such cases would be either the assertion of a new Parliamentary privilege or an unjustified extension of an existing one. No question of any infringement of the privilege of freedom of speech arises."

The committee considered the entire history of the privileges of Members of Parliament, discussed in great detail the scope of the enquiry, and then found that freedom had been claimed from all arrest except for indictable offences on the one hand, and on the other hand, as being limited to arrest in civil proceedings. Until then, the procedure was on the assumption that arrest in civil proceedings and arrest on a criminal charge for an indictable offence exhaust the possible grounds of arrest. Apart from the possibility of arrest or imprisonment for a non-indictable offence, preventive detention under Regulation 18-B and under analogous powers

onferred on the Executive fell into neither category. Therefore, the Committee opined that,

"it is plain that arrest in civil proceedings is a breach of privilege and that arrest on a criminal charge for an indictable offence is not."

But they further observed that these statements did not cover preventive detention by order of the executive authority which was the matter involved in the case of Captain Ramsay. The Committee further discussed the principle laid down by the House of Commons as early as 1641 and found that

"Privilege of Parliament is granted in regard to the service of the Commonwealth and is not to be used to the danger of the Commonwealth".

It is unnecessary for us to elaborate in great detail the exhaustive discussion of this topic by that committee. We cannot resist the temptation to quote Sir Gilbert Campion's words to the following effect:

"It is certain that during this period, (the last two hundred years) privilege from arrest has not been successfully claimed except in civil cases."

Therefore applying the principle set out above the Committee came to the conclusion that the arrest of Captain Ramsay was not a breach of privilege. The Committee further considered the question of the absence of precedents in matters like this. They also adverted to a Statute passed by the British Parliament in 1881, namely, the Protection of Person and Property (Ireland) Act, 1881, which gave the Irish Executive power to arrest and detain persons suspected of high treason, felony, etc., or of *acts tending to interfere with or disturb the maintenance of law and order in Ireland.* Section 3, sub-section (3) of the Act provided that

"if any member of either House of Parliament be arrested under this Act the fact shall be immediately communicated to the House of which he is a Member, if Parliament is sitting at the time, or if Parliament be not sitting, then immediately after Parliament reassembles in like manner as if he had been arrested on a criminal charge."

The Committee was of opinion that the arrest of a Member of Parliament in order to effect preventive detention would be lawful and not a breach of privilege. We do not think it necessary to elaborate this aspect of the case in detail because the conclusions of the Committee based upon Regulation 18-B are apposite to the facts of the present case.

But Mr. Ramachandran for the petitioner contends that the conditions that were obtaining in England in 1940 cannot be said to be analogous to the state of our country at the present juncture and that the decision under Regulation 18-B or the circumstances under which that Regulation was in force in England cannot be used as analogy in our country now. We are unable to accept this contention because this Court has held in *Narayanaswami* v. *Inspector of Police, Mayavaram*[1], that considerable light on matters like this can be obtained from the decision of the House of Lords in *Liversidge* v. *Sir John Anderson*[2], where the Law Lords discussed the applicability of Regulation 18-B regarding the detention of Liversidge. The basis of the judgment of the Full Bench in *Narayanaswami* v. *Inspector of Police, Mayavaram*[1], is founded upon the observations of the House of Lords in *Liversidge's case* and this Court was of opinion that the words of Regulation 18-B and the interpretation thereon can be applied to the interpretation of section 2 (1) (*a*) of the Madras Maintenance of Public Order Act under which the petitioner is detained. We, therefore, do not think that the arguments of the learned counsel that the situation created under Regulation 18-B in England cannot be applied here should be acceded to. Therefore it seems to us that, if on 26th January, 1950, a member of the House of Commons of the United Kingdom at Westminster has no immunity as a result of Parliamentary privilege from being arrested and detained under a preventive detention regulation (rule 18-B) the provisions of which are somewhat analogous to the provisions of the Madras Maintenance of Public Order Act it follows that under Article 194, clause 3, a Member of a State Legislature cannot have that

1. (1949) 1 M.L.J. 1 : I.L.R. 1949 Mad. 377 (F.B.).
2. (1942) A. C. 206.

privilege. So long as the Legislature of the State has not provided by law and declared the rights, immunities and privileges of its members, we have to take it that the English system prevails here and if under the English system there is no immunity from arrest in the case of a preventive detention order, a member of the Legislature here too cannot have it. It seems to us, therefore, that the petitioner cannot claim any immunity from arrest; and that on this ground we cannot issue a writ of *habeas corpus* directing the Superintendent of the Central Jail, Cuddalore, to produce the petitioner or to direct his release.

Mr. Ramachandran, however, contends that the general question as to how far the Madras Maintenance of Public Order Act has become void on 26th January, 1950, by reason of Part III of the Constitution of India will have to be decided. That matter is the subject of our consideration, and as the judgment has been reserved in a similar case, it is conceded that our decision in that will govern this also. We, therefore, decide to adjourn this petition until the disposal of that application.

In our judgment in *M. R. Venkataraman*, In re[1], we have held that sections 2, 3, 4, 4 (*a*) and 15 of Madras Act XXIII of 1949 are repugnant to and inconsistent with the Fundamental Rights provision in Part III of the Constitution and on that ground we decided that the petitioner there was entitled to be released. The same order would apply to this case. As in that case, our attention has been drawn to G.O. Ms. No. 1314, Public (General, R.) Department of the Government of Madras dated 27th February, 1950, by which the Government of Madras has detained the petitioner under sub-section (1) of section 3 of the Preventive Detention Act, 1950 (Central Act No. IV of 1950) and therefore he is no longer being detained under the Madras Maintenance of Public Order Act. As in the other case, we express no opinion regarding the validity or otherwise of this detention. Our order will not affect the detention under G.O. Ms. No. 1314, dated 27th February, 1950.

K. S. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL, MR. JUSTICE VISWANATHA SASTRI, AND MR. JUSTICE BALAKRISHNA AYYAR.

The Joint Secretary, Board of Revenue, Madras .. *Applicant**

v.

K. R. Venkatarama Ayyar .. *Respondent.*

Stamp Act (II of 1899), Section 27 and Schedule I, Article 58—Settlement deed—Statement in it that "value for purposes of Stamp and Registration Rs. 3,000" while property was worth over a lakh of rupees—Powers of Registrar—If can embark on inquiry as to value—Principles underlying the provisions of Stamp Act—Requirements of Section 27.

The principle underlying the provisions of the Stamp Act with regard to valuation and estimation of the duty payable is that the value of the property should be taken from the face of the document, and that the revenue of the Government is protected by requiring the parties to make a true and full disclosure of all facts and circumstances having any bearing on the duty payable, failing which they must suffer the consequences of their false or defective statements. If it be found that the omission to state the value of the property, or the undervaluation was intentional to defraud the Government, then a prosecution would protect the Government against the attempted fraud.

Although the Registrar cannot embark on an independent inquiry regarding the value of the property, yet he has power under Section 35, of the Stamp Act to refuse registration if the document is not duly stamped, from which it would seem to follow that he can require the person seeking registration to furnish the particulars required for the calculation of the duty payable. Where the settlor states in the settlement deed "value for purposes of Stamp and Registration Rs. 3,000" while the property settled is worth at least a lakh of rupees, the Registrar could have refused to accept that evasive statement and insist upon a valuation being given which purported to be the market value.

In order properly to calculate the amount of duty payable on a settlement, the value of the property settled must be known, as Article 58 of the Stamp Act itself makes clear. Since the Registrar is not empowered to conduct an enquiry himself as to the market value, the value must be set out in the document itself; and Section 27 of the Stamp Act requires that that fact (the value) should be

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1. (1950) 2 M.L.J. 186.

*Case referred No. 16 of 1949. 20th March, 1950.

truly set forth. The relevant value must be the value at the time the document is executed and not the value of the property at the time when the executant acquired it.

The settlor is bound to give the true value of the property. So whether his statement "for purposes of Stamp and Registration the value is Rs. 3,000" be regarded as a valuation of the property or a failure to value the property he equally contravened the provisions of Section 27 of the Stamp Act.

Case referred to the High Court by the Joint Secretary to the Board of Revenue, Madras, under section 57 of the Indian Stamp Act II of 1899.

The Government Pleader (*K. Kuttikrishna Menon*) for applicant.

R. Ganapathi Aiyar for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—We are here concerned with a reference made by the Board of Revenue under section 57 of the Indian Stamp Act II of 1899 on a question of the stamp duty payable on a settlement deed.

It is conceded that the document contains terms which make it a settlement deed and that for purposes of stamp duty it should be treated as such. Under Article 58 of the Stamp Act (Schedule I) the duty is to be the same as for a bond for a sum equal to the amount or "value of the property settled as set forth in such settlement." The real value of the property is admitted by the settlor to be Rs. 2 lakhs; and since it is subject to a mortgage of one lakh of rupees, the value of the equity of redemption would be at least one lakh of rupees. The revenue authorities value it at Rs. 1,59,300. The settlor did not in so many terms purport to give the real value of the property; because if he gave a false value, he would be liable to prosecution. So he tried to guard himself by saying, "Value for purposes of stamp and registration, Rs. 3,000". He argued before the Revenue authorities, as he did here, that he was entitled to put any notional value on the property. Since however it was clear from the document itself that the property was worth a great deal more than Rs. 3,000, the matter was referred by the Registrar to the Collector and by the Collector to the Board of Revenue, which body, we are told, directed that the instrument should be registered and that proceedings should be taken against the settlor. The Board of Revenue thereupon referred to this Court the question as to,

> "the effect of section 27 on the words 'value of the property as set forth in the settlement occurring in Article 58, Schedule I, of the Stamp Act, as the term 'value' may be interpreted in different ways, namely, (1) the market value at the time of execution, (2) the value to the executant when he acquired it, *i.e.*, purchase price, and (3) a nominal or fictitious value."

Value, unless the term in any enactment suggests the contrary, must of course mean the real value, the real value of property of the nature of land and houses being ordinarily and most suitably estimated by determining what that property would fetch if sold in the open market. In other words, "value" ordinarily means "market value". There are certain provisions in the Court-fees Act and elsewhere which provide some special methods for calculating the value in certain cases, and so by way of contrast, the expression 'market value' is used where the value is not to be calculated in a special way; but the expression "market value" is not found anywhere in the Stamp Act. We find only the expression "value", and so we must take it that the term "value" means market value. Nominal value means value only in name and not in fact. The expression "fictitious value" shows that the value given is not the value. If, as here contended, persons who convey property could value it as they pleased; the Act would be purposeless; for little or no revenue would ever be collected. The value of the property when an executant acquired it cannot be the relevant value which must mean the value at the time when the document is executed.

No machinery is set up in the Stamp Act for ascertaining the true value of the property or consideration, as the case may be, in every case that comes before the Registrar; and it would clearly be impracticable to cast the burden on the Registrar in each case to ascertain what the true market value is. If the stamp

duty were payable only on a market value to be ascertained, then it would have to be definitely stated in the Act who was to ascertain the market value and what rights, if any, an aggrieved party had by way of appeal, revision, or the like.

Even if the matter were *res integra*, we should have no hesitation in holding from an examination of the wording used in the various Articles of the Indian Stamp Act that the Stamp fee had to be collected on the value shown in the document itself. The matter is however very fully covered by authority. In this Court it was held in *Reference under Stamp Act, Section* 46[1] that the value was the value indicated in the sale deed or in the settlement deed respectively, and *Reference under Stamp Act, Section* 46[1], has been followed in *Reference under Stamp Act, Section* 46[2], by this Court; and by other High Courts also. It is sufficient to refer to the *Financial Commissioner, Burma* v. *C. R. M. M. L. A. Chettiar firm*[3], In the matter of *Muhammad Muzuffar Ali*[4], in which reference was expressly made to *Reference under Stamp Act, Section* 46[1] and to *Khetramoni Debya*, In re[5]. In the last case, it was held that the valuation should be the valuation at the time of execution. In the *Financial Commissioner, Burma* v. *C. R. M. M. L. A. Chettiar Firm*[3], it was laid down that although the court could not take evidence *de hors* the document itself to ascertain what the real consideration was, it was not bound to take the consideration stated by the party, if the document itself showed that the consideration was incorrect and was, in fact, from the terms of the document itself, something different. Although the Registrar cannot embark on an independent enquiry regarding the value of the property; yet he has power under section 35 of the Stamp Act to refuse registration if the document is not duly stamped; from which it would seem to follow that he can require the person seeking registration to furnish the particulars required for the calculation of the duty payable. He could in this case, for example, have refused to accept the settlor's evasive statement and insisted upon a valuation being given which purported to be the market value.

The more important question is as to the effect of section 27 of the Stamp Act on this matter. That section runs,

> The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein."

In order to properly calculate the amount of duty payable on a settlement, the value of the property settled must be known, as Article 58 itself makes clear. Since the Registrar is not empowered to conduct an enquiry himself as to the market value, the value must be set out in the document itself; and section 27 requires that that fact (the value) should be *truly* set forth. It seems to us that the principle underlying the provisions of the Stamp Act with regard to valuation and estimation of the duty payable is that the value of the property should be taken from the face of the document, and that the revenue of the Government is protected by requiring the parties to make a true and full disclosure of all facts and circumstances having any bearing on the duty payable, failing which they must suffer the consequences of their false or defective statements. In many of the cases cited above the learned Judges have had to consider what protection the revenue authorities have against false recitals in documents. The judgment in *Reference under Stamp Act, Section* 46[1], for example, concludes by saying;

> "There are provisions which appear sufficiently to protect the revenue, if we adopt this construction that the stamp duty should be collected on the valuation given in the document itself."

In In the matter of *Muhammad Muzufar Ali*[4], no value was given at all; but nevertheless the Registrar registered the document. The learned Judges held that the words "as set forth in such instrument" refer back to the word "value" and not to the word "property". Then they went on to say:

> "In the present instance there is no 'value' set forth in the said instrument. No doubt this is a contravention of section 27 of the Indian Stamp Act, and, if it be found that the omission to state

1. (1885) I.L.R. 8 Mad. 453.
2. (1896) I.L.R. 20 Mad. 27.
3. (1935) I.L.R. 13 Rang. 613.
4. (1922) I.L.R. 44 All. 339.
5. (1937) I.L.R. 17 Pat. 95 (F.B.).

the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument under section 64 of the Indian Stamp Act."

With regard to undervaluation they later on added,

"If there was an intentional undervaluation, then a prosecution would protect the Government against the attempted fraud."

From these authorities and from the wording of section 27, it seems clear to us that the Settlor was bound to give the true value of the property. So whether his statement "for purposes of stamp duty and registration the value is Rs. 3,000" be regarded as a valuation of the property or a failure to value the property, he equally contravened the provisions of section 27 of the Act.

There will be no order as to costs.

K. S. ——— *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE BALAKRISHNA AYYAR.

Sahayanidhi (Virudhunagar), Limited, through its Managing Director, A. Saminatha Mudaliar .. *Plaintiff**

v.

A. S. R. Subrahmanya Nadar and others .. *Defendants.*

Companies Act (VII of 1913), *Section* 153-*A—Scheme and order of Court approving it directing transfer of assets and liabilities of a company in liquidation to another company—Documents transferring such assets and liabilities—If liable to stamp duty under the Stamp Act (II of* 1899), *Schedule I, Article* 23 *and Section* 2 (10).

A scheme of arrangement under Section 153-A of the Companies Act was approved by the Court and the order of Court provided that for the purposes of carrying out the scheme the official liquidators of the company in liquidation should transfer its assets and liabilities to another limited company which was to float a number of joint stock companies for taking over the assets and liabilities of each branch or group of branches of the company in liquidation and to carry on the business as before of such branch or group of branches. The official liquidators transferred the assets and liabilities of the company in liquidation to the transferee Company under a deed of indenture and the transferee company transferred to newly floated companies taking over the assets and liabilities of the branches by deeds of indenture. The deeds contained further covenants by the transferee as to payment of consideration in the matter. A newly floated company which had taken over the assets and liabilities of a branch filed suits in the District Munsif's Court on promissory notes executed in favour of the branch. On a question whether the deeds of transfer of the assets and liabilities were liable to stamp duty,

Held:—The title of the transferee company to the property and assets transferred as the result of the order of Court under section 153-A of the Companies Act is derived from and by the force of the order of the Court itself. Where however documents which are in form transfers of assets and liabilities by act of parties though carried out pursuant to the order of Court, are executed they cannot be regarded as vouchers passed by the parties in token of their having carried out the terms of the court's order. Such a document is a conveyance as defined by section 2, clause (10) and Article 23 of the Stamp Act and is to be stamped as such. The transfers cannot be treated as deeds of composition within the meaning of Article 22.

The plaintiff suing on the promissory note can establish its title to recover the book debts of the branch taken over by it on the basis of the order of the Court approving the scheme of arrangement. Under Section 38 (2) of the Stamp Act the documents have to be sent by the Munsif to the Collector who has to levy the proper duty and the penalty in respect of those documents.

Case referred to the High Court by the District Munsif, Sattur, under section 60, Indian Stamp Act, Act II of 1899, in O.S. No. 59 of 1949, on the file of his Court for decision.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the State.

K. S. Champakesa Aiyangar for Plaintiff.

Defendant not represented.

*Case Referred No. 19 of 1949. 21st March, 1950.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—This is a reference under section 60 of the Indian Stamp Act by the learned District Munsif of Sattur raising two questions with reference to the stamp duty chargeable on two documents filed in his Court. These documents have been marked for purposes of identification as A-2 and A-3. The facts that have led up to this reference are these. The Pudukottah Benefit Fund, Limited, a company carrying on chit fund business in as many as 114 branches scattered throughout the southern districts of this Province, got into financial difficulties and was ordered to be wound up by an order of this Court dated 12th January, 1948, in O.P. No. 190 of 1947, a petition filed by the creditors of the company. By its order, dated 16th November, 1948, in O.P. No. 301 of 1948, this court sanctioned a scheme of arrangement under section 153-A of the Companies Act. The order of this court provided that for the purpose of carrying out the said scheme the Official Liquidators of the Pudukottah Benefit Fund, Limited, should transfer its assets and liabilities to another limited company the Central Finance Syndicate Limited, Erode, styled in the order as the transferee company. Clauses 1 to 4 of the scheme approved by this Court in its order in O.P. No. 301 of 1948 were in these terms :

(1) The Central Finance Syndicate, Limited, Erode, the proposed transferee company shall take over by transfer the whole of the undertaking and the property of the Pudukottah Benefit Fund, Limited and be liable for all the liabilities of the said Pudukottah Benefit Fund, Limited.

(2) The said Syndicate will conduct and run not only the chits discontinued prior to liquidation but will continue the business in the same manner as the Pudukottah Benefit Fund, Limited, would have done but for the intervention of the liquidation proceedings.

(3) The said Syndicate will float a number of joint stock companies for taking over the assets and liabilities of each branch or group of branches of the Pudukottah Benefit Fund, Limited, and to carry on the business as before of each such branch or group of branches.

(4) The said Syndicate shall and hereby undertakes to pay the creditors from time to time within two years at least a minimum of eight annas in the rupees in full satisfaction of the debts due to them from the assets received from the newly formed companies and also by sale or transfer of the assets.

Pursuant to the scheme and the order of this Court approving of it, the Official Liquidators transferred the assets and liabilities of the Pudukottah Benefit Fund, Limited, to the Central Finance Syndicate Limited, Erode, under a deed of indenture, dated 10th January, 1949, referred to as A-2 in the order of reference. The Central Finance Syndicate, Limited, Erode, floated joint stock companies in some of the places where the branches of the Pudukottah Benefit Fund, Limited, had been functioning, for the purpose of taking over the assets and liabilities of those branches. The Sahayanidhi (Virudhunagar). Limited, was one such company and the assets and liabilities of the Virudhunagar branch of the Pudukottah Benefit Fund, Limited, were transferred to it by the Central Finance Syndicate Limited under a deed of indenture, dated 4th February, 1929, referred to as A-3 in the order of reference. The assets so transferred consisted mostly of book debts and promissory notes of persons who had bid at the auctions and taken the chit money with a liability to pay future instalments of subscriptions. The Sahayanidhi (Virudhunagar), Limited, instituted suits for the recovery of money due on promissory notes executed by the subscribers and O.S. No. 59 of 1949 out of which this reference arises was one of such suits. In the course of this suit, the question of the proper stamp duty payable on the documents referred as A-2 and A-3, the deeds of transfer of assets and liabilities effected by the Official Liquidators in favour of the Central Finance Syndicate Limited and by the Central Finance Syndicate Limited in favour of the Sahayanidhi (Virudhunagar), Limited arose for consideration. The two documents have each of them been stamped with a stamp of Rs. 15 as composition-deeds under Article 22 of the Stamp Act. The questions that have been referred to us by the learned District Munsif are—

(1) Whether the transfer by the Official Liquidators in favour of the Central Finance Syndicate Limited, Erode, dated 10th January, 1949, requires to be stamped under the Stamp Act and if so under what article of the Stamp Act.

(2) Whether the transfer deed executed on the 4th February, 1949, by the Central Finance Syndicate, Limited, Erode, in favour of the Sahayanidhi (Virudhunagar), Limited, is properly stamped and if not what is the proper duty leviable on this document?

The learned District Munsif expressed the opinion that the deed of indenture A-2, dated 10th January, 1949, by which the Official Liquidators transferred the assets and liabilities of the Pudukottah Benefit Fund, Limited, to the Central Finance Syndicate, in consideration of the latter agreeing to pay eight annas in the rupee to the creditors of the Pudukottah Benefit Fund, Limited, in pursuance of the order of this court sanctioning the scheme, was a composition deed liable to stamp duty under Article 22 of the Stamp Act (Schedule I-A, Article 18 of the Act as amended in Madras). With regard to the transfer A-3, dated 4th February, 1949, by which the assets and liabilities of the Virudhunagar branch of the Pudukottah Benefit Fund were transferred by the Central Finance Syndicate to the Sahayanidhi (Virudhunagar), Limited, the learned District Munsif was of the opinion that it was a conveyance chargeable to stamp duty under Article 23 of Schedule I of the Stamp Act. At the same time he wanted the opinion of this court on the said two matters.

Before considerihg the terms and stipulations in the two deeds of transfer referred to as A-2 and A-3, we would like to refer to section 153-A of the Companies Act which has been enacted with a view to facilitate arrangements and compromises between a company and its creditors or shareholders which involve a transfer of its assets and liabilities to other companies as part of such arrangement. If any such scheme or arrangement is sanctioned by Court, the court is empowered by the section to make provision by its order sanctioning the arrangement or any subsequent order, for the transfer of the assets and liabilities of a company in liquidation to another company, styled in the section as the transferee company. Where an order of court made under the section provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are, by virtue of that order, without more, transferred to and vest in the transferee company and the liabilities of the former company are also cast upon the transferee company. Under the ordinary law of contracts, while assets are assignable, liabilities under contracts or duties arising thereunder are not assignable but the effect of section 153-A is to some extent to override the ordinary law. There is not only a vesting of assets and property but also the imposition of a liability to discharge the debts of the transferor company as a result of the order of court passed under section 153-A. The physical handing over of the property and assets transferred would in many cases have to be effected by the Official Liquidators who are in possession of the assets and properties of the company under liquidation and section 153-A (1), clause (*a*) of the Companies Act empowers the court to pass an order directing such transfer or delivery of assets to the transferee company. The title of the transferee company to the property and assets transferred as the result of the order of court under section 153-A is derived from and by the force of the order of the court itself. The transfer of assets and liabilities sanctioned by the court under section 153-A might be in favour of another company in existence or under formation and awaiting incorporation as a company. Clause 3 of the scheme approved by this court provides that the Central Finance Syndicate Limited, the transferee company, might float other joint stock companies for taking up the assets and liabilities of the several branches of the Pudukottah Benefit Fund, Limited. The transfer of the assets and liabilities of the Virudhunagar branch of the Pudukottah Benefit Fund, Limited, to the Sahayanidhi (Virudhunagar), Limited, under the transfer deed referred to as A-3 is a transfer authorised and provided for by the order of this court approving clause 3 of the scheme. It therefore follows that by reason of the order of this court in O.P. No. 301 of 1948 the Central Finance Syndicate, Limited and the Sahayanidhi (Virudhunagar) Limited would be entitled to the assets and be subject to the liabilities of the Pudukottah Benefit Fund, Limited and the Virudhunagar branch of the Pudukottah Benefit Fund, Limited.

We have, however, to deal not with the effect of the order of this Court sanctioning the arrangement, but with the liability to stamp duty of the documents referred

to as A-2 and A-3 which are in form transfers of assets and liabilities by act of parties though carried out pursuant to the order of court. These two documents cannot be regarded as vouchers passed by the parties in token of their having carried out the terms of the court's order. The Stamp Act subjects to duty instruments falling within the description of documents specified in Schedule I and for fixing the duty payable, the substance of the documents should be looked into. It is not possible therefore to accept the contention of the plaintiff that these documents merely incorporated the terms and conditions of the order passed by this court and therefore they do not require to be stamped as independent transfer of property. The document referred to as A-2 purports not only to carry out the terms of this court's order but goes much further. There is an undertaking on the part of the transferee company to pay a sum of Rs. 24,750 to the Official Liquidators on a charge of the assets transferred. There are also covenants entered into by the transferee company to pay arrears of salary due to the staff and arrears of rent. These obligations are part of the consideration for the transfer under A-2 according to the terms of the document. The question is not whether these arrangements could not be effected otherwise than by the execution of a document like Exhibit A-2, but is, whether, when a document like A-2 has been duly executed, it is a conveyance as defined by section 2, clause (10) and Article 23 of the Stamp Act. The position is the same with reference to the document referred to as A-3 which admittedly goes further than the court's order and embodies as part of the bargain between the parties terms and conditions which are not found in the court's order. The transferee agrees to pay as part of the consideration and as a first charge on the assets a sum of Rs. 1,000 towards the liquidation expenses and another sum of Rs. 500 for the goodwill, such as it was, and all arrears of rents and salaries payable by the defunct branch of the Pudukottah Benefit Fund, Limited. The definition of the expression " conveyance " in section 2, clause (10) of the Stamp Act is in these terms :

" Conveyance includes a conveyance on sale and every instrument, by which property, whether moveable or immoveable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I ".

The documents referred to as A-2 and A-3 *ex facie* purport to transfer moveable property in the shape of book debts and promissory notes and the consideration for such transfer is partly in the shape of a cash payment and partly in the shape of covenants entered into by the transferee. We are therefore of the opinion that these two documents fall within Article 23 of the Schedule I and are to be stamped as such.

It is suggested on behalf of the plaintiff that these documents could be viewed as deeds of compositions within the meaning of Article 22 of Schedule I of the Act. Composition is an arrangement to which a debtor and his creditors are parties whereby the creditors agree to accept in full satisfaction of their debts something less than or something different from that which may be claimed by them as of right. In the present case, it is difficult to apply the language of Article 22 of Schedule I of the Stamp Act to the deeds of transfer referred to as A-2 and A-3. For one thing, the debtors are not parties and secondly the transfer is made pursuant to an order of court sanctioning a scheme of arrangement entered into between the creditors and the company. The deeds of transfer themselves purported to be mere transfers of property by the Official Liquidators in the one case and by the Central Finance Syndicate in the other case in favour of other companies. We do not consider, therefore, that it is possible to treat these transfers as deeds of composition within the meaning of Article 22.

The plaintiff, however, does not require these documents to be admitted in evidence in the court of the District Munsif. In the view we have taken of the effect of section 153-A of the Companies Act, the plaintiff can establish its title to recover the book debts of the Virudhunagar branch of the Pudukottah Benefit Fund on the basis of the order of this court approving the scheme of arrangement. Therefore, the learned District Munsif is not called upon to decide the question of the proper stamp duty payable upon these documents and also the penalty

leviable on them. Under section 38 (2) of the Stamp Act, he has to send the documents to the Collector who has to levy the proper duty and the penalty in respect of these documents. It is therefore unnecessary for us to indicate the amount of the stamp duty leviable on the two documents. That will be a matter to be dealt with by the Collector when the documents are sent to him.

We answer the reference in the manner above indicated.

K. S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

G. F. F. Foulkes and others .. *Appellants**

v.

A. S. Suppan Chettiar and another .. *Respondents.*

Indian Succession Act (XXXIX of 1925), Sections 307, 323 and 360. proviso—Scope and effect—Administrator of the estate of deceased—Powers of disposition—Right to dispose of property and pay creditors—Assets insufficient to fully satisfy all creditors—Payments or sales to creditors who had knowledge of existence of other creditors—Rights of dissatisfied or unsatisfied creditors as against administrator and the other creditors and alienees.

Decree—Preliminary decree against administrator for accounts—Proper form—Hypothetical in form—Not proper.

Civil Procedure Code (V of 1908), Order 1, Rule 8—Representative suit—Leave—Effect of grant of—Death of one plaintiff—Right if survives to his legal representatives—Right of remaining plaintiffs to prosecute or defend suit or appeal—Proper procedure.

Where the plaintiffs (the creditors of the estate of a deceased) did apply under Order 1, rule 8 of the Code of Civil Procedure and did obtain an order permitting them to proceed with their suit for administration challenging the alienations made by the administrator, it is impossible thereafter for the defendants to contend that the suit was not brought by them in a representative capacity on the ground that there were no other creditors whom the plaintiffs could be said to represent, *Jaina Muhammad Sheriff Maracair* v. *Official Assignee, Madras*, (1945) 2 M.L.J. 318, distinguished.

When a suit is brought by several persons in a representative capacity, and if one of them dies, the suit does not abate, because, the right to represent others of a class is not a right which *ipso facto* survives to the legal representative of the deceased party. The source of that right is the order of the court permitting the party to represent others. In such a contingency, namely, the death of one of the parties to whom originally permission was granted to institute a suit in a representative capacity, it is for the court to decide whether the suit can be allowed to be continued by the surviving person or persons or whether other person or persons should be joined. The proper procedure is for the remaining person or persons to apply to the Court for directions and it is for the court to decide whether the person or persons to whom the original sanction was given to continue to prosecute or defend the suit or appeal or it will give directions to bring on record additional person or persons *Venkatakrishna Reddi* v. *Srinivasachariar*, (1930) 61 M.L.J. 135; I.L.R. 54 Mad. 527 and *Jagadam Ram* v. *Asarfi Ram*, A.I.R. 1937 Pat. 149, relied on.

Under section 307 (1) of the Indian Succession Act, an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit. It is a general rule of law and equity in England—and that rule is followed in India—that an executor may dispose of the testator's assets over which he has an absolute power and they cannot be followed either by the creditors or by the legatees into the hands of the alienee. But neither jurisdiction will permit the rule to be observed so as to protect a disposition founded on fraud or a transaction amounting to a breach of trust, concerted between the executor or administrator and the purchaser. There is no duty cast on the purchaser to see to the application of the purchase money. He is not obliged to ascertain whether the executor is discreetly exercising his power; but the purchaser will not be protected if he is a privy to a breach of trust and if the transaction of sale is in its nature incompatible with the legitimate administration of the testator's estate. If the nature of the transaction imports notice to the purchaser that the executor is dealing with the assets otherwise than in due course of administration, then he would have participated with the administrator in an improper conversion and application of the estate of the deceased and the sale in his favour would be invalid.

Where the assets of the deceased are not sufficient to fully satisfy all his creditors, the following principles apply.

* Appeals Nos. 256 and 546 of 1945. 22nd July, 1949.

(i) Section 323 of the Succession Act does confer a right on the creditors to an equal and rateable payment of all the debts.

(ii) Such a right can be enforced against the executor or administrator unless he is protected by following the procedure in section 360, in which case a creditor of whose debt the executor or administrator had no notice cannot proceed against the executor or administrator. The creditor can also file an administration suit making the other creditors parties to the suit and can in that suit enforce the right. Order 22, rule 13 (2) of the Code of Civil Procedure also comes to his aid. Ordinarily he cannot have a right of action against the other creditors.

(iii) Generally speaking an unsatisfied or dissatisfied creditor who has not been paid or has been paid less than what would be due to him rateably has no right enforceable against the creditors who have been paid in full or in excess of their rateable share, *i.e.*, he cannot compel those who have received the payment to refund the excess.

But the person (like an executor or administrator) who is under an obligation to hold the property for the benefit of persons having interests or claims against the property are subject to the same liabilities and disabilities, as if he were a trustee of the property for the persons for whose benefit he holds it. If the executor or administrator is guilty of *devastavit* he is guilty of a breach of trust. A person, who joins a trustee in the commission of a breach of trust and earns a benefit by that wrongful act of the trustee shall hold the advantage so obtained for the benefit of the beneficiaries.

[Case law discussed.]

The creditors who were parties to a scheme of disposal of the available assets of the deceased and thereby gained an undue advantage over a creditor of whose claim they had knowledge cannot be allowed to retain any advantage gained by them by reason of the sale to them. They should refund the excess amounts which they (creditors to whom properties were sold) must be deemed to have received.

A preliminary decree against the administrator making him personally liable " for maladministration and neglect, if any, in the management of that estate as administrator " is vague and cannot be allowed to stand in that hypothetical form. It must be first decided on allegations specifically and properly made of maladministration whether any of the charges has been made out. It is only thereafter that the court can direct an account on that basis.

O. T. G. Nambiar instructed by Messrs. King and Patridge, Solicitors for appellant.

Alladi Krishnaswami Ayyar, A V. Narayanaswami Ayyar, Alladi Kuppuswami and *E. A. Viswanatham* for first respondent.

The Judgment of the Court was delivered by

Rajamannar, C. J.—These two appeals arise out of a suit, Original Suit No. 67 of 1943, instituted in the Court of the Subordinate Judge of Madura by two plaintiffs on behalf of themselves and on behalf of the other creditors of the estate of one Robert Foulkes, deceased, for an administration of his estate and *inter alia* to declare certain alienations effected by the first defendant as the administrator of the said estate in favour of defendants 3 to 7 invalid and not binding upon the plaintiffs and the other creditors of the estate, and for directions for the proper disposal of the properties comprised in the said estate, and, alternatively, to direct the first defendant, in any event, to make good to the plaintiffs the loss of Rs. 1,32,268-9-8 with subsequent interest thereon, occasioned by reason of his acts of *devastavit*. The learned Subordinate Judge granted a decree personally against the first defendant for rendition of accounts of the assets and income of the estate of Robert Foulkes (deceased) from 14th December, 1938 and directing the amount due on taking accounts to be paid by the first defendant in satisfaction of the debts due to the plaintiffs and the other creditors of the estate, if any, in rateable distribution. The suit was dismissed against all the other defendants. Appeal Suit No. 256 of 1945 is by the first defendant and Appeal Suit No. 546 of 1945 is by the plaintiffs.

The main facts leading up to the suit are not in dispute and may be briefly stated. One Robert Fischer died on 29th November, 1908, leaving behind him his last will and testament, dated 10th March, 1908, and considerable properties which he disposed of by the said will. Letters of administration with the will annexed were granted to four persons, among whom the first defendant was one, as executors named in the said will. Under the said will, Fischer bequeathed a life interest in certain properties to his wife Sybil Fischer and the remainder over to Robert Foulkes, one of the executors under the will. By an indenture, dated 24th April, 1913, Robert Foulkes took on lease the said properties for a period

of ten years and on the same day executed in favour of the trustees under the will, a mortgage whereby he assigned to the other trustees the reversionary right to which he was entitled under the will to secure payment of the rent and other moneys due and payable under the indenture of lease up to a maximum limit of one lakh of rupees. In pursuance of a covenant for renewal contained in the indenture of 1913, another lease was granted to him on 12th September, 1923, for a further period of ten years commencing from 1st September, 1922 and it was agreed that the mortgage of 1913 would cover also payment of rent reserved under the renewed lease. On 26th June, 1926, Robert Foulkes executed in favour of one Rao Sahib Alagannan Chettiar a deed of mortgage for Rs. 1,25,000 in respect of properties covered by the mortgage to the trustees of Robert Fischer's estate. On 21st September, 1932, he executed a promissory note in favour of the same Chettiar for Rs. 20,000. He died on 24th September, 1935 leaving a will, dated 30th May, 1917, in and by which he bequeathed all the properties to his wife Isabel Foulkes. The will could not take effect as the wife had predeceased the testator. The first defendant who was a brother of the deceased Robert Foulkes applied to the District Court of Madura in Original Petition, No. 53 of 1935, for grant of letters of administration to the estate of the deceased. His petition was allowed on 31st March, 1936 and, on the 7th April, 1936, letters of administration were duly issued to him. On 21st January, 1936, he, *i.e.*, the first defendant in the present suit, brought a suit, Original Suit No. 10 of 1936, in the Court of the Subordinate Judge of Sivaganga, later on transferred to the Court of the Subordinate Judge of Ramnad, at Madura and numbered there as Original Suit No. 35 of 1937, against himself as the administrator of the estate of Robert Foulkes (deceased) to recover a sum of Rs. 34,485-2-8 and to enforce the mortgage executed by Robert Foulkes on 24th April, 1913, in respect of Rs. 20,323-2-8 out of the said sum. To this suit, Alagannan Chettiar was made the second defendant, because he was entitled to the rights under the mortgage of 26th June, 1926, executed by Robert Foulkes which, however, would rank only after the mortgage of 1913. On 20th December, 1937, a preliminary decree was passed directing the first defendant therein to pay to the plaintiff therein out of the estate of the deceased Robert Foulkes, a sum of Rs. 33,854-1-7, and costs, out of which sum it was declared that the amount due to the plaintiff therein on the mortgage of 1913 up to 20th June, 1938, was Rs. 16,335-13-7. The decree further declared that the amount due to the second defendant Alagannan Chettiar on his mortgage calculated up to the same date was Rs. 2,74,065-13-3 and further interest and that the plaintiff was entitled to the payment of the amount due to him in priority to the second defendant. The decree was in Form No. 9 and the date fixed for payment was 20th June, 1938. The decree contained the usual clauses for sale of the hypotheca on failure to deposit the amount. In that suit a charge was claimed only on one of the three items of properties comprised in the mortgage deed in favour of Alagannan Chettiar and the decree consequently was confined to that item. As Alagannan Chettiar felt that he might not obtain satisfaction of his claim from a sale of the item in that suit, he brought another suit (Original Suit No. 35 of 1938) on the file of the Sub-Court, Madura, praying for a mortgage decree in respect of all the three items of the hypotheca and for a personal decree against the other properties belonging to the estate of Robert Foulkes, in the event of the mortgaged properties proving insufficient. On 26th December, 1939, a preliminary decree for sale was passed for a sum of Rs. 2,65,445-0-7 and the date of payment was fixed as 30th April, 1940. It was of course provided in this decree that any amount which the plaintiff decree-holder may realize in Original Suit No. 35 of 1937 should be given credit towards the amount due under it. On 5th August, 1940, Alagannan Chettiar died and the plaintiffs in the present suit were brought therein on record as his legal representatives, and a final decree was passed on 7th December, 1940. In the other suit, namely, Original Suit No. 35 of 1937 also, a final decree was passed at the instance of the plaintiffs on 1st August, 1941. There were sales of the mortgaged items in execution of the decrees in both the suits. On 18th June, 1942, the item covered by the decree in Original Suit No. 35 of 1937 was sold in court auction and purchased by the plaintiffs for Rs. 2,01,700

out of which they deposited into Court the amount payable to the plaintiff-decree-holder in that suit in respect of the mortgage of 1913. On 29th December, 1942, the sale was duly confirmed. In execution of the decree in the second suit, the plaintiffs purchased the other two items and their sale was confirmed on 23rd March, 1942.

In the preliminary decree in Original Suit No. 35 of 1937, it was provided that if the money realized by the sale directed by it was not sufficient for payment in full of the amount due in respect of the mortgage in favour of Alagannan Chettiar, he shall be at liberty to apply for a personal decree against the first defendant therein for the amount of the balance, provided of course, such remedy was open to him and was not barred in law. In the later suit, *i.e.*, Original Suit No. 35 of 1938, a specific issue was raised whether the personal remedy was in time, and it was found by the Court that the personal remedy was not barred and the plaintiff would be entitled to apply for a personal decree under Order XXXIV, rule 6, of the Code of Civil Procedure, if the amount realized by the sale of the mortgaged properties was not sufficient for the payment of the amount declared to be due to him. As the amount actually realized by the sale of the mortgaged items in execution in the two suits was not sufficient to satisfy the decree in their favour, the plaintiffs applied on 15th February, 1943, for a personal decree for Rs. 1,28,285-10-4. This application they made in Original Suit No. 35 of 1937 (Interlocutory Application No. 67 of 1943), and it was granted by an order, dated 30th July, 1943 [Exhibit P-10 (*d*)].

It was during the pendency of the application for personal decree and during the summer recess, that the first defendant executed the sales in favour of defendants 3 to 7, which are being impeached in this suit by the plaintiffs. On 5th June, 1943, the first defendant executed five sale-deeds in favour of defendants 3 to 7, respectively, and it is common ground that these sales practically covered the entire properties then remaining out of the estate of the deceased Robert Foulkes. We say " practically " because it was represented to us that there was one item of property which the plaintiffs succeeded in proceeding against and having it sold in part satisfaction of the personal decree. But it is apparent that this item was not considered at the time of these sales as a saleable asset. By these sales, it may be now taken as not disputed, all the debts payable out of the estate of Robert Foulkes except the personal decree in favour of the plaintiffs were fully discharged, and among such debts was a debt due to Alagannan Chettiar himself under a decree obtained by him on 21st December, 1936, in Original Suit No. 29 of 1936 on the file of the Sub-Court, Madura, for the amount payable on the promissory note executed in his favour by Robert Foulkes on 21st September, 1932. On 27th July, 1943, the decree in respect of the promissory note was fully satisfied with the proceeds of one of the above sales. On 20th August, 1943, the plaintiffs instituted the present suit. There were originally nine defendants of whom the first defendant represented the estate of Robert Foulkes as well as the estate of Robert Fischer, and the second defendant was an additional trustee to Robert Fischer's estate. Defendants 3 to 7 are the alienees under the sales of 5th June, 1943. Defendants 8 and 9 were impleaded because provision was made in one of the sale deeds for the satisfaction of the debt in their favour. The ninth defendant died pending the suit and defendants 10 to 13 were added as his legal representatives. Later on, the eleventh defendant also died and defendants 15 to 18 were added as his legal representatives. The fourteenth defendant was added to represent the estate of Mrs. Fischer who died in December, 1938.

The allegations in the plaint on which the plaintiffs sought the several reliefs in this suit were as follows :—

No notice was given to the plaintiffs of any intention on the part of the first defendant to effect any alienation of the remaining properties of the estate of the deceased Robert Foulkes ; but the plaintiffs, coming to know of the secret arrangement for such alienations, sent registered notices on 3rd and 4th June, 1943 to the first defendant and his agent, respectively, protesting against any such alienation. The plaintiffs also published in the local newspaper " Thanthi " on 3rd June,

1943, a warning to prospective purchasers that any alienation by the first defendant would not be binding on them. Similar notices were also published subsequently in "Dinamani" and "Hindu," The alienations of the entire properties then remaining were made without making any provision for the large claim of the plaintiffs to the extent of Rs. 1,30,000. Defendants 3 to 7 were parties and privies to the *devastavit* by the first defendant in the matter of these alienations and had all acted in collusion and conspiracy to defeat the plaintiff's claims. The first defendant was in a fiduciary position to all the creditors of the estate and was bound to make provision for the payment of all the debts by a rateable distribution of the assets, as they were insufficient for the payment of the debts in full, and as these alienations were made with the deliberate object of defeating the claim of these plaintiffs and defendants 3 to 7 had full knowledge of the plaintiffs' claim, the alienations were invalid and inoperative and not binding on the plaintiffs. The consideration recited in the sale deeds was grossly inadequate. Certain allegations were made specially against the first defendant that he has been appropriating the entire profits and income accruing from the estate to the extent of Rs. 30,000 every year. These allegations were substantially denied by the concerned defendants.

The learned Subordinate Judge found that at the time the first defendant executed the impugned sales, he was fully aware of the plaintiffs' claim, made in his application for a personal decree, and he must have had the intention to defeat the plaintiffs' claim and though there was no positive evidence that defendants 3 to 7 had knowledge of the plaintiff's claim and that there was a conspiracy amongst them to defraud the plaintiffs, there were circumstances from which it could be inferred, that defendants 3 to 6 who were creditors of the estate had knowledge of the plaintiffs' claim and that it was being left out of the settlement with the creditors. The sales were made for proper and adequate consideration. The sixth defendant was a creditor only in respect of a small sum, *i.e.*, about Rs. 1,600 and the seventh defendant was no creditor at all and should be held to be a *bona fide* purchaser. The alienations therefore could not be held to be fraudulent. The learned Judge also rejected the legal contention raised on behalf of the plaintiffs that, under the provisions of the Indian Succession Act, the creditors who had directly been paid the full amount of their claims, leaving nothing towards the plaintiffs' claim, should disgorge what they had taken and return the properties purchased by them to the estate, so that there might be an equal and rateable distribution of the assets among all the creditors, including the plaintiffs. He therefore dismissed the suit against the alienees and the creditors who were not alienees. The learned judge, however, held that the first defendant was liable not only to render accounts for the rents and profits of the estate during the period of his administration, but also would be liable for the loss caused to the plaintiffs and other creditors, if any, by his disposal of the remaining assets of the estate without providing for the plaintiffs' claim.

Before dealing with the several questions of fact and law, which were canvassed before us by Counsel on both sides, it will be convenient to dispose of a preliminary objection raised by the respondent in Appeal Suit No. 256 of 1945, which is the appeal preferred by the first defendant. This objection is based on the fact that the second respondent (second plaintiff) died pending the appeal, but his legal representatives were not brought on record in time. There were applications made seeking to excuse the delay and to set aside the abatement (Civil Miscellaneous Petitions Nos. 3276 to 3278 of 1948), but they were dismissed. On behalf of the first respondent, it is contended that the appeal has consequently abated in its entirety. The two plaintiffs, it may be recalled, are the legal representatives of Alagannan Chettiar, who was the original creditor and the decree-holder in Original Suit No. 35 of 1937 and Original Suit No. 35 of 1938. According to the respondent, they are in the position of joint decree-holders and the abatement of the appeal as against one of them results in the abatement of the appeal *in toto*.

The appellant met this objection by relying upon the representative capacity in which the two plaintiffs instituted the suit. In paragraph thirty of the plaint,

the plaintiffs stated that they had applied for permission to file the suit both on their behalf and on behalf of the other creditors, if any, of the estate of the late Mr. Robert Foulkes. They did apply for an order under Order, 1 rule 8, of the Code of Civil Procedure. In his written statement, the first defendant denied that the plaintiffs were entitled to file the suit for and on behalf of themselves and on behalf of the other creditors, if any. He stated that there were no other creditors except the legal representatives of Mrs. Fischer and one Mrs. Zara Berry to whom an annuity of Rs. 6,000 was payable and this annuity was made a charge on all the properties. This written statement was filed on 18th December, 1943. Nevertheless, the plaintiffs pressed their application under Order 1, rule 8, and obtained an order on 21st December, 1943, permitting them to proceed with the suit in a representative capacity. The counsel for the first respondent (first plaintiff) wanted to rely on the fact that there were no other creditors whom the plaintiffs could be said to represent and therefore the suit must be treated as a suit by the two plaintiffs in their individual capacity as joint decree-holders. He relied upon the decision of a Division Bench in *Jaina Muhammad Sheriff Maracair* v. *Official Assignee, Madras*[1]. In that case, there was no order of Court under Order 1, rule 8, of the Code of Civil Procedure and objection was taken that the suit was not maintainable because of the absence of such an order. The learned Judges held that Order 1, rule 8, applied only when some persons out of a large body of persons entitled to file a suit desired to conduct proceedings on behalf of themselves and on behalf of the absentee parties; but when all the persons jointly interested were made parties, Order 1, rule 8, did not apply and there was no need to apply for leave of the Court. This decision can have no application to the facts of the present case. Here, the plaintiffs did apply for an order under Order 1, rule 8 and did obtain such an order. It is impossible thereafter for them to contend that the suit was not brought by them in a representative capacity.

There is authority for the position that when a suit is brought by several persons in a representative capacity, and if one of them dies, the suit does not abate, because, the right to represent others of a class is not a right which *ipso facto* survives to the legal representatives of the deceased party. The source of that right is the order of the Court permitting the party to represent others. In such a contingency, namely, the death of one of the parties to whom originally permission was granted to institute a suit in a representative capacity, it is for the Court to decide whether the suit can be allowed to be continued by the surviving person or persons or whether other person or persons should be joined. In *Venkatakrishna Reddi* v. *Srinivasachariar*[2], Ramesam, J., has discussed this question and with great respect to that learned Judge, we are in entire agreement with his conclusion. He points out that the proper procedure, in a case like this, is for the remaining person or persons to apply to the Court for directions and it is for the Court to decide whether it will permit the remaining person or persons to whom the original sanction was given to continue to prosecute or defend the suit or appeal or it will give directions to bring on record additional person or persons [*vide* also *Jagdam Ram* v. *Asarfi Ram*[3]]. The appellant has made such an application to us and we direct that the appeal be proceeded with as against the surviving respondent. The preliminary objection is therefore overruled.

As the main targets of the attack by the plaintiffs were the alienations in favour of defendants 3 to 7 and the scheme of the distribution of the proceeds to certain of the creditors, which was a part of the transactions of sale, it is necessary to ascertain further details relating to them. All the sale deeds contain more or less the same recitals. They bear the same date and each of the sale deeds provides for execution by both the vendor and the purchaser. In the preamble to each of the sale deeds, there is a list of the debts payable by the estate of Robert Foulkes as follows:—

1. (1945) 2 M.L.J. 318: I.L.R. 1946 Mad. 486.
2. (1930) 61 M.L.J. 135: I.L.R. 54 Mad. 527.
3. A.I.R. 1937 Pat. 149.

(i) Rs. 33,151-6-8 to the third defendant under a decree obtained by him in Original Suit No. 18 of 1942 on the file of the Court of the Subordinate Judge of Madura on 7th April, 1942,

(ii) Rs. 26,966-6-8 to the family of M. Ganapathi Chettiar represented by the fourth defendant due under a decree obtained by the father of the fourth defendant against the estate of Robert Foulkes in Original Suit No. 7 of 1936 on the file of the Court of the Subordinate Judge of Madura on 11th January, 1937, in which an execution petition had been filed by the fourth defendant as the legal representative of his father,

(iii) Rs. 1,600 due to the sixth defendant under a decree obtained by him against the estate in Original Suit No. 178 of 1938 on the file of the Court of the District Munsif of Madura on 27th April, 1939,

(iv) Rs. 18,400 due to Mrs. Fischer under the decree in Original Suit No. 35 of 1937 on the file of the Court of the Subordinate Judge of Ramnad at Madura, already referred to,

(v) Rs. 1,120 due to the eighth defendant being the balance due to him under a decree obtained by him against the estate in Original Suit No. 163 of 1936 on the file of the District Munsif's Court of Madura Town,

(vi) Rs. 700, a book debt, due to the ninth defendant,

(vii) a sum of about Rs. 21,000 to Rao Sahib A. S. Alagannan Chettiar, that is to say, the plaintiffs, after his death, due under the decree obtained by Alagannan Chettiar in Original Suit No. 29 of 1936 on the file of the Court of the Subordinate Judge of Madura on foot of the promissory note already referred to and in respect of which the plaintiffs had filed an execution petition and secured an attachment of the properties which were the subject-matter of the sales,

(viii) Rs. 5,691-9-6 due to the fifth defendant under two decrees in Original Suit No. 359 of 1946 and Original Suit No. 221 of 1941 respectively on the file of the District Munsif's Court, Madura, in respect of which he had filed execution petitions in the District Munsif's Court, Melur, and had attached one of the villages belonging to the estate.

The preamble to the sale-deeds contained the following further recitals :—

"Whereas by these agreements the entirety of the debts of the estate of Robert Foulkes subsisting to-day is fully discharged ; whereas there is no other means of satisfying them in respect of their dues otherwise than by a disposal of the properties of the said Robert Foulkes."

The sale deeds in favour of the third defendant, fourth defendant and the fifth defendant contained rather an unusual covenant which runs thus :

"The purchaser undertakes to indemnify the vendor from all claims and litigations that might arise hereafter in respect of the undermentioned property."

All the sale-deeds contain a clause relieving the vendor from all responsibility and liability for any inaccuracy, or misstatement or deficiency or defect of title. Of the five alienees, the seventh defendant was not a creditor of the estate, and the sixth defendant was a creditor only to an extent of Rs. 1,600. The sale in favour of the third defendant (Exhibit D-1) was for a consideration of Rs. 34,971-6-8 made up of Rs. 33,151-6-8 due to the purchaser himself, Rs. 1,120 to be paid to the eighth defendant and Rs. 700 to be paid to the ninth defendant. The sale to the fourth defendant (Exhibit D-4) was for a consideration of Rs. 26,966-6-8 being the amount due to the purchaser himself under the decree obtained by him. The sale to the fifth defendant (Exhibit D-7) was likewise in discharge of the decrees obtained by him under which a sum of Rs. 5,691-9-6 was due as aforesaid. The sale in favour of the sixth defendant (Exhibit D-9) was in consideration of a sum of Rs. 20,000 of which Rs. 18,400 went to discharge the decree debt due to Mrs. Fischer under the decree in Original Suit No. 35 of 1937 and the balance of Rs. 1,600 was taken in discharge of the decree debt owing to the purchaser himself. The sale to the seventh defendant (Exhibit D-11), a stranger, was for a sum of Rs. 25,000 out of which Rs. 4,000 was paid to the vendor by cheque and Rs. 21,000 were reserved

with the purchaser to be deposited into the Court of the Subordinate Judge of Dindigul to the credit of the decree obtained by Alagannan Chettiar in Original Suit No. 29 of 1936.

In their plaint, the plaintiffs charged that defendants 3 to 7 acted in collusion and conspiracy with the first defendant to defeat the claim of the plaintiffs under the personal decree in Original Suit No. 35 of 1937 and had acted *mala fide* in taking such sales. The plaintiffs also charged that the sale transactions were only nominal and not intended to be given effect to. They alleged that the consideration recited in the sale deeds was grossly inadequate. They therefore prayed for a declaration that the alienations were invalid and not binding on the plaintiffs and other creditors, if any, of the estate and that the properties continued to be liable for the plaintiffs' claim and the claims of the other creditors of the estate. Alternatively, the plaintiffs claimed, as part of the administration of the estate, an equitable enforcement of rateable distribution by calling upon defendants 3 to 6 and 8 and 9 to disgorge the benefit or the consideration received by them in excess of what they would be legitimately entitled to take on a rateable distribution (*vide* paragraph 28).

The learned Subordinate Judge held that the alienees (defendants 3 to 7) had paid proper and adequate consideration for their purchases and that the underlying purpose of these transactions was not to defraud the plaintiffs. Mr. Alladi Krishnaswami Ayyar, the learned counsel for the plaintiffs, did not challenge these findings of the trial Judge. Nor did he press the plea that the sales were nominal and not intended to be acted upon. He did not suggest that the sales were vitiated by fraud and that they should be set aside on that account. His entire argument was based on (i) the right of the creditors to obtain an equal and rateable distribution of the assets of the estate, with the correlative duty of the administrator to make an equal and rateable payment of the debts and (ii) the knowledge of the alienees of the plaintiffs' claim which had been left unsatisfied in the scheme of distribution evidenced by the sale deeds in question, which amounted to participation by the alienees in the *devastavit* committed by the first defendant.

In our opinion, on the findings of the learned trial Judge that the sales were for adequate consideration, that the sales were not nominal transactions and that they were not vitiated by fraud or other similar defect, it must be held that the sales, as such, in favour of the several alienees must stand, unless the purchasers were privy to a breach of trust committed by the administrator. Under section 307 (1) of the Indian Succession Act, an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit. The restrictions and the conditions to which this general power is subject under sub-section (2) do not apply to the present case as the deceased did not belong to the class of persons enumerated in that sub-section. It is a general rule of law and equity in England—and that rule is followed in India—that an executor may dispose of the testator's assets over which he has an absolute power and they cannot be followed either by the creditors or by the legatees into the hands of the alienee. But neither jurisdiction will permit the rule to be observed so as to protect a disposition founded on fraud or a transaction amounting to a breach of trust, concerted between the executor or administrator and the purchaser. There is no duty cast on the purchaser to see to the application of the purchase money. He is not obliged to ascertain whether the executor is discreetly exercising his power, but the purchaser will not be protected if he is privy to a breach of trust and if the transaction of sale is in its nature incompatible with the legitimate administration of the testator's estate. A purchaser would not have the benefit of the general rule protecting a purchaser from an executor, if the purchaser concurs in any act which manifests from the transaction itself that it is not the legitimate mode of administering the estate. If the nature of the transactions imports notice to him that the executor is dealing with the assets otherwise than in due course of administration, then, he would have participated with the administrator in an improper conversion and application of the estate of the deceased and the sale in his favour would be invalid.

Mr. Krishnaswami Ayyar relied upon two provisions of the Indian Succession Act as the foundation of the plaintiffs' case as against the alienees and the creditors who had received payments in satisfaction of their debts as a result of the sales. They are section 323 and the proviso to section 360 of the Indian Succession Act. Section 323 is as follows :—

"Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend."

Though only the proviso to section 360 was relied upon, it will be useful to set out the main section as well :

"Section 360 : Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe or, if no such rule has been made, as the High Court would give in an administration suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution :

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively."

Having regard to the peculiar and complicated facts of this case, in discussing the various problems which emerge for our solution, it is useful and necessary to adhere to a logical division. Among such major problems are these; *ex hypothesi*, they arise only when the assets of the deceased are not sufficient to fully satisfy all his creditors :

(*i*) Does section 323 of the Indian Succession Act confer any right on the creditors ?

(*ii*) If it does, against whom can such a right be enforced ?

(*iii*) If some of the creditors have received payment of their debts in full or in excess of what would be due to them rateably, has an unsatisfied or dissatisfied creditor, who has not been paid at all or has been paid less than what would be due to him rateably, any rights enforceable against the creditors who have been paid in full or in excess ?

Section 323 of the Indian Succession Act of 1925 replaced section 282 of the Succession Act of 1865 and section 104 of the Probate and Administration Act of 1881. Section 282 of the Succession Act of 1865 ran as follows :—

"Save as aforesaid, no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal or on any other account. But the executor or administrator shall pay all such debts as, he knows of including his own, equally and rateably, as far as the assets of the deceased will extend."

Section 104 of the Probate and Administration Act was in these terms :—

"Save as aforesaid, no creditor is to have a right of priority over another. Bur the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend."

It will be seen that the present section 323 is a reproduction of section 104 of the Probate and Administration Act which did not contain the words

"by reason that his debt is secured by an instrument under seal or on any other account."

These words were omitted because they were merely explanatory. But their presence in the Act of 1865 was necessary and not accidental. This was because the Act of 1865 followed the English law with only slight variations and, according to the English Law of that time, precedence in order of payment was given to debts by special contract. The executor or administrator was bound to give preference to bonds, covenants and other instruments under seal of the party over debts by simple contract. The framers of the Indian Act deliberately abolished this preference. It may be mentioned that even in England such distinction was abolished by 32 and 33, Victoria, Chapter 46. Apart from this abolition of the distinction between speciality debts and simple debts, section 282 of the Succession Act of 1865 also departed from

the English law in another respect. According to the English law of the time, an executor had the right to pay any creditor, whether himself or another person, in preference to another creditor of equal degree. The framers of the Indian Act deliberately departed from this rule and made it incumbent on the executor or administrator to pay all debts (saving exceptions), as he knows of, including his own, equally and rateably. While the distinction between different classes of debts has been abolished in England, the old English rule which confers a right on the executor or administrator to prefer any debt is still retained and is now to be found in section 34 (2) of the Administration of Estates Act of 1925, which runs thus :

"The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased * * * * "

There is no doubt then that section 323 does restrict the powers of an executor or administrator as regards payment of debts. He must pay all debts as he knows of, including his own, equally and rateably. There can be no doubt that a creditor can insist upon such an equal and rateable payment among creditors by filing an administration action. The same principle substantially underlies the provisions of Order 20, rule 13 (2) of the Civil Procedure Code, which lays down that in the administration of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules as those applicable in bankruptcy shall be observed. But if an administration action had not been filed in due time, and the executor or administrator had paid some of the creditors in excess of the rateable amount due to them, what are the rights of the other creditors who had not been paid? One right they certainly have and that is against the executor or administrator who has committed a breach of his duty. It was held as early as 1871 in *Asiatic Banking Corporation* v. *Amador Viegas*[1] that an administrator who pays such debts as he knows of otherwise than equally and rateably as far as the assets of the deceased will extend was personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets; *vide* also *Kissondas* v. *Jivatlal Pratapshi & Co.*[2]

But have the unsatisfied and unpaid creditors any further right? Have they the right to call upon the creditors who have received in excess of their rateable proportion to refund the excess? Is this right an absolute right, that is to say, can it be enforced against any creditor who has received an excess payment irrespective of the fact that he had or had no notice of the fact that the assets of the deceased were not sufficient to fully satisfy all the debts?

There is very little of authority bearing on this question in any of the reported cases in this country and this question cannot arise in England in the absence of a rule corresponding to that contained in section 323 of the Indian Succession Act. The only decision on which Mr. Alladi Krishnaswami Aiyar relied in support of his contention that irrespective of any notice of the insufficiency of the assets to discharge all the debts in full, creditors who have received payment in excess of their rateable proportion should refund the excess for the benefit of unpaid and unsatisfied creditors, is that of Tyabji, J., in *Mathuradas* v. *Raimal*[3]. Even this decision is not on all fours, but there are observations which *prima facie* appear to support this contention of his. The material facts in that case were as follows :— One *K* died leaving a will appointing his widow as executrix. She obtained probate of the will. The first defendant, one *H*, was one of the creditors of the estate, and he demanded payment of his debt. The executor thereupon created in favour of the first defendant an equitable mortgage of some of the immoveable properties belonging to the estate to secure his claim. The first defendant brought a suit on his mortgage and obtained a preliminary and then a final decree. At this stage, the other creditors of the estate brought the suit to prevent that decree from being executed so as to infringe the rights of the other creditors of the deceased. They prayed for a declaration that the mortgage in favour of the first defendant was unauthorized and

1. (1871) 8 B.H.C.R. 20.
2. A.I.R. 1936 Bom. 423, 436, 438.
3. A.I.R. 1935 Bom. 385.

not binding upon the other creditors of the estate, and that the properties purported to be mortgaged should be followed in the hands of the first defendant for the purpose of having the debts of all the creditors liquidated therefrom, without priority and equally and rateably as far as the assets of the deceased extended. It was admitted that the executrix committed a breach of her duty to pay the debts equally and rateably and the personal liability of the executrix to make good the loss to the other creditors under section 368 of the Indian Succession Act was also admitted. The only question which had to be decided was whether creditors who suffered by this breach of duty had a right to prevent the decree being executed for enforcement of the mortgage created in disregard of their rights. The learned Judge substantially granted a decree as prayed for. He granted an injunction restraining the first defendant from executing the decree so as to affect other creditors' rights to have the property equally and rateably applied towards the payment of their debts and declare that he was entitled to satisfaction of the decree according to law in due course of administration.

As Mr. Alladi Krishnaswami Ayyar adopted the reasoning and observations of the learned Judge in this case as part of his argument, we shall analyse the judgment. We wish, however, to preface the discussion by stating that we are in entire agreement with the decision of the learned Judge in that case in so far as he granted an injunction restraining one of the creditors from recovering more than his rateable share from the assets of the deceased. The steps in the reasoning of the learned Judge are as follows :—Section 323, which is an innovation in the Indian law, provides for an equal and rateable payment of the creditors (with a few exceptions). Therefore, the rights of all the creditors become inter-dependent and the rights of each creditor are brought into relation with the rights of all others. This is not the case in England. The section no doubt lays down the duty of the executor to pay equally and rateably, but this duty comes only as a sequel to the declaration that no creditor shall have a right of priority over another. The intention of the Legislature appears to be to cut down each creditor's claim ; he is not entitled to his full debt, but merely to an equal and rateable payment out of the assets. It would be the duty of the Court to protect the rights of the creditors under that section to receive equal rateable payment. How the rights of the creditors, declared by this section, are to be worked out is not specifically provided in the Act. The proviso to section 360, though it does not create by itself a new right, assumes the existence of the creditor's right to follow the assets. The Court ought to intervene so long as the situation is not beyond its control or irremediably altered and so long as no injustice is done to any innocent party. The assets coming to the hands of the first defendant in excess of what he was entitled to receive may be followed in his hands. As the creditors had intervened before the injustice to them had been effectuated and before any steps were taken as would create new equities, they were entitled to an injunction restraining the first defendant from executing the decree in his favour so as to affect the other creditors' rights to have the property equally and rateably applied towards the payment of their debts. This, in short, is the gist of the judgment of Tyabji, J.

It may be conceded that section 323 not only enjoins on the executor or administrator the duty of equal and rateable payment of debts ; it also declares that no creditor is entitled to priority over another. It may also be conceded that it is the duty of the Court to assist the creditors to protect their rights. We are in entire agreement with the learned Judge in his observation that

> "it would be the duty of the Court to assist the creditors to resist the attempts of other parties to secure for themselves more than what has been laid down as their due."

In our opinion, the creditors would certainly be entitled to seek intervention by the Court to prevent a breach of the duties of the executor or administrator being consummated. If any of the creditors apprehend that the executor or administrator intends to commit a breach of the duty laid on him by section 323, they can forthwith file a suit for administration and obtain an order restraining the executor

or administrator from effectuating his intention. The case of *Soobul Chunder Law* v. *Russick Lall Mitter*[1], which was decided by a Bench of three Judges (Petheram, C.J., Wilson and Tottenham JJ.) is an instance in point. In that case, one of the creditors of the deceased who had obtained a money decree secured an attachment of certain properties belonging to the estate. Before further proceedings in execution could take place, another creditor filed a suit for administration of the estate and applied for an order staying all proceedings taken by the attaching decree-holder against the estate and directing him to come in, should he think fit so to do and prove his claim in the administration suit, *i.e.*, share rateably along with other creditors. The application was granted and the attaching decree-holder was restrained from further execution of the decree. The case before Tyabji, J., himself was another example. It appears from the judgment that though the first defendant had obtained a final mortgage decree, the decree had not been executed. So, it cannot be said that the imperative terms of section 323 would be reduced to a mere recommendation, unless the creditors are given a right to proceed against such of the creditors who had been paid in excess of their rateable share and rights of refund similar to those expressly conferred on them against legatees (section 361).

The learned Judge admits, what is quite apparent, that while the Act makes specific provision empowering the unsatisfied creditor in certain circumstances to call upon a legatee who has received payment of his legacy to refund, the Act is silent in respect of such questions as to whether or not a creditor who had not received equal and rateable payment had any rights against another creditor who had received more than his due on an equal and rateable basis. But the learned Judge assumes that the omission by the Legislature to work out its intention expressed in section 323 in and by appropriate provisions was a mere oversight and that omission can be supplied by taking guidance from the analogy of provisions relating to legatees. With great respect to the learned Judge, we think this is a dangerous principle to assume that there was an inadvertent oversight on the part of the Legislature in such an important matter. As Earl Loreburn observed in *Bristol Guardians* v. *Bristol Waterworks Company*[2] :

> "Now it is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended . . . . To insert such a provision would be simply making, not interpreting, the law. After all, it is not our function to repair the blunders that are to be found in legislation. They must be corrected by the Legislature."

[*Vide* also Halsbury's Laws of England, Second Edition, Volume XXXI, paragraph 635.]

We must now refer to a line of cases which starts from the decision in *Nilkomul Shaw* v. *Reed*[3], in 1872. It has been uniformly held in these cases that when a creditor has obtained a decree against the estate of a deceased person, and applies to execute the decree in the hands of the legal representative of the deceased, such as an executor or administrator, he is entitled to have the amount of his decree paid out of the assets of the deceased in the hands of such legal representative. In such a case, the executor or administrator is bound to pay to the decree-holder the full amount of the decree, though there may be other creditors of the deceased and the assets may not be sufficient to pay them all in full. Tyabji, J., no doubt refers to the decision in *Nilkomul Shaw* v. *Reed*[3], but distinguished it on the ground that there, the other creditors were not before the Court and the question whether they could object to the assets being applied in disregard of their rights under section 323 was not under consideration. We do not think that this distinction helps the learned Judge to escape from the principle of the decision, namely, that

1. (1888) I.L.R. 15 Cal. 202.
2. (1914) A.C. 379, 388.
3. (1872) 12 B.L.R. 287.

in certain cases a creditor may receive more than what is rateably due to him. And it has never been held, nor did Mr. Alladi Krishnaswami Ayyar contend, that when a creditor has received his debt in full in execution of a decree obtained by him, he can be asked subsequently to refund for the benefit of other unsatisfied creditors the amount received by him in excess of what would have been payable to him rateably. In other words, the unsatisfied creditors have never been held to be entitled to follow up the moneys which so came into the hands of the decree-holder-creditor.

In *Nilkomul Shaw* v. *Reed*[1], Couch, C.J., expressly held that section 282 of the Indian Succession Act (corresponding to section 323 of the present Act) did not interfere with the right of a decree-holder to have his decree satisfied out of the property of the deceased or out of the property of the executor, if it should appear that he has not duly applied the property of the deceased. The principle of this decision was followed by Pigot, J., in *Remfry* v. *De Penning*[2], in which it appeared that the assets were not sufficient to pay in full all the claims made against the estate. The case of *Venkatarangayan Chetti* v. *Krishnaswami Ayyangar*[3] was one to which the Probate and Administration Act of 1881 applied, in which the provision corresponding to the present section 323 was section 104. It was held by Shephard, O.C.J., and Benson, J., that the right of a decree-holder to have his decree executed against the legal representative of a deceased judgment-debtor was not affected by section 104 of the Probate and Administration Act. The following observation in the judgment is significant :

> " Although there are certainly difficulties in construing section 104 of the Probate and Administration Act, we think that the language of the section is so far similar to that of the corresponding section in the Indian Succession Act that we must follow the ruling in *Nilkomul Shaw* v. *Reed*[1]."

In *Bai Meherbai* v. *Maganchand*[4], a creditor of an estate represented by the administrator obtained a decree on an award against the administrator and in execution of that decree, certain property forming part of the estate was purchased by the decree-holder. Afterwards a suit was brought to set aside the said decree and the sale in execution on the ground that under section 282 of the Indian Succession Act, the decree-holder was entitled only to a rateable distribution among the creditors of the estate. It was held that, in the absence of fraud or collusion, the decree and the subsequent sale in execution could not be set aside. It was contended therein that having obtained the decree, the creditor was bound by section 282 of the Indian Succession Act to ask for a rateable distribution in due course of administration in satisfaction of his decree and that was his only right. The answer given by the learned Judges was : whatever might have been the proper way of executing such a decree, as a matter of fact it had been executed rightly or wrongly and the sale could not be set aside. Chandavarkar, J., threw out a suggestion that a creditor's action against a deceased person's estate must be always treated as an administration suit and the decree should merely give a declaration of the debt due and that the decree-holder is entitled to satisfaction of the decree according to law in due course of administration and not otherwise. The learned Judge said :

> "It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of those creditors."

Whatever force there may be in these observations, they proceed on the basis that once a creditor realises in full his debt from the assets of the estate in execution of a decree obtained by him, the other unsatisfied creditors cannot compel such a creditor to refund the excess which he had received over his rateable share.

In our opinion, there is nothing in the proviso to section 360 which necessarily leads to the conclusion that creditors who have received a payment from the

1. (1872) 12 B.L.R. 287.
2. (1884) I.L.R. 10 Cal. 929.
3. (1898) I.L.R. 22 Mad. 194.
4. (1904) I.L.R. 29 Bom. 96.

executor or administrator of their debts in full or in excess of their legitimate proportion should refund the excess received by them for the benefit of unpaid and unsatisfied creditors. The main section, it may be noticed, deals both with creditors and other claimants and, provided certain conditions are fulfilled, it absolves the executor or administrator from all liability for the assets distributed by him to any person or of whose claim he shall not have had notice at the time of the distribution. The proviso is really in the nature of a saving clause which declares that the fact that the executor or administrator is discharged from liability does not destroy such rights which a creditor or a claimant may have to follow the assets in the hands of the persons receiving the payments from an executor. Tyabji, J., himself was of the same view that the proviso itself did not confer any new right, if the creditor or claimant had no right apart from it. It is legitimate to presume that the proviso contemplates the rights of creditors and claimants embodied in the other sections in the chapter. We may also concede that if there are, under the general law, any rights to which the creditors or claimants may be entitled to, such rights also would not be prejudiced, having regard to the proviso. It is not as if the proviso would be devoid of content unless we hold that the unpaid or unsatisfied creditors have a right to follow the assets in the hands of the creditors who have received payment. The proviso can well apply to the right of a creditor under section 361 to call upon a legatee to refund. It is unnecessary to devote any time to a discussion of the question in the abstract whether a proviso as such can or cannot create a substantive right. There may be provisos and provisos and there is nothing inherently impossible in even a proviso conferring a substantive right.

The learned Advocate-General cited to us a number of decisions of the English Courts, namely, *Gillespie* v. *Alexander*[1], *March* v. *Russell*[2] *Jervis* v. *Wolferstan*[3] and *Harrison* v. *Kirk*[4] to show that the rights of the unpaid and dissatisfied creditor is only against the legatee. In *Hedges* v. *Waddington*[5] there is the following observation, the full significance of which it is difficult to gather from the very meagre report:

"But if an executor pays a debt upon a simple contract, there shall be no refunding to a creditor of a higher nature."

These decisions have little bearing on the present question.

It is not entirely without significance that this proviso which was a proviso to section 320 of the Succession Act of 1865 is in terms identical with the proviso to section 29 of 22 and 23 Victoria, Chapter 35 (Lord St. Leonard's Act). Surely, the proviso in the English statute could not have regard to the right of a creditor to claim a refund from another creditor and there can be no doubt whatever that the proviso had reference mainly to the refunding by legatees and others in certain special circumstances.

On this point we agree with the view of Rangnekar, J., in *Kissondas* v. *Jivatlal Pratapshi & Co.*[6], and his construction of section 323 and the proviso to section 360; and in particular, with the following remarks:

"The scheme under the Indian Succession Act seems to me to be this, namely, that when the executor finds that the assets of a deceased person are insufficient for the payment of his debts in full, he has to pay reteably, and section 323 casts the duty on the executor. If the executor is about to act in contravention of that duty, there is a perfectly simple remedy open to the creditor, and that is to file an administration action. If, on the other hand, payment has already been made and the executor cannot be protected because he has not acted in accordance with section 360, then there is a remedy open to the creditor to proceed against the executor, who, in turn, has a right to proceed against the legatees. Section 360, which was enacted to protect the executors making *bona fide* payments to creditors and in order that the administration of estates should not be unduly and indefinitely hampered, saves a right which the legislature gives to the creditor when he finds that the estate has been distributed by the executor properly and enables the creditor to proceed against the legatees."

Our answers to the three questions formulated at the outset of this discussion are as follows :—

1. (1827) 3 Russ. 130 : 38 E.R. 525.
2. (1837) 3 My. and Cr. 32 : 40 E.R. 836.
3. (1874) L.R. 18 Eq. 18.
4. (1904) A.C. 1.
5. 2 Vent. 360 : 86 E.R. 485.
6. A.I.R. 1936 Bom. 423, 438.

(i) Section 323 of the Indian Succession Act does confer a right on the creditors to an equal and rateable payment of all the debts.

(ii) Such a right can be enforced against the executor or administrator unless he is protected by following the procedure in section 360, in which case, a creditor of whose debt the executor or administrator had no notice cannot proceed against the executor. The creditor can also file an administration suit making the other creditors parties to the suit and can in that suit enforce the right. Order 20, rule 13 (2) of the Code of Civil Procedure also comes to his aid. Ordinarily he cannot have a right of action against the other creditors.

(iii) Generally speaking, an unsatisfied or dissatisfied creditor who has not been paid or has been paid less than what would be due to him rateably has no rights enforceable against the creditors who have been paid in full or in excess of their rateable share, *i.e.*, he cannot compel those who have received the payment to refund the excess.

Having stated the general rule, the next question which falls for consideration is whether there is an exception to it. As this question is also mixed up in this case with the alienations which are being impeached by the plaintiffs, it is convenient to deal with this question bearing in mind the alienations.

It was not disputed before us that an administrator who pays certain creditors out of the available assets of the estate, deliberately leaving other creditors who have equal claims against the estate, will be guilty of a breach of duty. Such a misapplication of the assets goes by the technical name of *devastavit* in English law. We have already expressed the view that payments made in contravention of the provisions of section 323 make an executor or administrator liable for *devastavit*; See *Asiatic Banking Corporation* v. *Amador Viegas*[1]. As the executor or administrator occupies a fiduciary position towards the creditors of the estate and the beneficiaries, including the legatees, if he is guilty of *devastavit*, he is guilty of breach of trust. Now it is a cardinal principle of English law—and that principle is applicable to India also—that a person, who joins a trustee in the commission of a breach of trust and earns a benefit by that wrongful act of the trustee, shall hold the advantage so obtained for the benefit of all the beneficiaries : *vide* section 68 of the Trusts Act.

This doctrine has been applied over and over again in England as a recognised exception to the general rule that a purchaser of the assets of a deceased from his legal representative like an executor or administrator obtains a free, complete and valid title and the subject-matter of the sale cannot be followed by creditors or legatees into the hands of the alienee. In India, the general rule is embodied in section 307 (1) of the Indian Succession Act. The exception is stated thus in the early case of *Scott* v. *Tyler*[2] :

> "If one concerts with an executor or legatee by obtaining the testator's effects at a nominal price or at a fraudulent under-value or by applying the real value to the purchase of other subjects for his own behoof or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser or his pawnee and make him liable for the full value."

In *Hill* v. *Simpson*[3], a transfer by an executor which was a clear misapplication of assets, because, it was made to secure a debt of the executor and future advances under circumstances of gross negligence, though not direct fraud, was set aside at the instance of legatees. Williams, in his book on Executors, Volume I (1930 Edition) states the law in the following manner at page 576 :—

> "Thus, where the person to whom an executor collusively conveys the property knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is ineffectual and void. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage; it must further appear that the purchaser or mortgagee participated in the *devastavit*, or breach of duty in the executor. Where there exists such collusion as to render a dealing

1. (1871) 8 B.H.C.R. 20.
2. (1788) Dicknes 725 : 21 E.R. 448.
3. (1802) 7 Ves. 153 : 32 E.R. 63.

by a personal representative invalid, not only a creditor, but a legatee, whether general or specific is entitled to follow the assets. But they must enforce their right within a reasonable time, or it may be barred by their acquiescence."

The case of *Crane* v. *Drake*[1], is an apposite instance. *A* purchased a leasehold estate from an executor, having notice that a debt of the testator was unpaid and out of the purchase money set off a sum of two hundred £ due to him from the testator and a debt of five hundred and fifty due to him from the executor and the remainder one hundred and fifty was paid in money. An unsatisfied creditor filed an action to have satisfaction of his debt out of the leasehold purchased by *A* as part of the testator's assets. The sale was held to be not good, because the defendant was a party consenting to and contriving a *devastavit*. Actually in this case there does not appear to have been a charge of fraud or collusion between the purchaser and the executor. But it was admitted that the defendant had notice of the plaintiff's debt which remained unsatisfied. In *Andrew* v. *Wrigley*[2], there is a reference to a note in Gilbert's Equity Reports that

"Where the party knew of other debts, he could not take the testator's property in satisfaction of his own debt."

Sir John Leach in *Watkins* v. *Cheek*[3], stated the general rule and the exception as follows :—

"So a mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there, such mortgagee or purchaser being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor."

These principles we find embodied in the Trusts Act in India. Section 93 of the Act enacts :

"Where creditors compound the debts due to them, and, one of such creditors, by a secret arrangement with the debtor gains an undue advantage over his co-creditors he must hold for the benefit of such creditors the advantage so gained."

Section 94 is a residuary section in Chapter IX dealing with constructive trusts and runs thus :

"In any case not coming within the scope of any of the preceding sections, where there is no trust but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

Illustration (*a*) to this section is material. It says :

"*A*, an executor, distributes the assets of his testator *B* to the legatees without having paid the whole of *B's* debts. The legatees hold for the benefit of *B's* creditors, to the extent necessary to satisfy their just demands, the assets so distributed."

The person who is thus under an obligation to hold the property for the benefit of persons having interests or claims against the property are subject to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it.

For an application of this doctrine, it is clear that three conditions should be satisfied :

(i) there should be an act of a person occupying a fiduciary position like an executor or administrator,

(ii) such person must be under a duty, statutory or otherwise, and have committed a breach of such duty. In the case of an executor or administrator, he must be guilty of *devastavit*, and

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1. (1708) 2 Vern. 616 : 23 E.R. 1004.
2. (1792) 4 Bro.C.C. 125 : 29 E.R. 812.
3. (1825) 2 Sim. & St. 199 : 57 E.R. 321.

(iii) the person deriving an advantage from such wrongful act of the trustee (or executor or administrator) must have participated in it; participation necessarily implying notice of the wrongful nature of the act.

It now remains to be considered whether these conditions are fulfilled in this case. Admittedly, the first two conditions are satisfied. Then is the third condition satisfied and in respect of which of the defendants? The alienees are defendants 3 to 7. While defendants 3 to 6 are creditors, the seventh defendant is not a creditor. He is a stranger who had nothing to do with any of the transactions of the estate except the purchase under Exhibit D-11. In spite of the argument of Mr. Narayanaswami Aiyar, we are not convinced that it has been proved satisfactorily that the seventh defendant was a party to the scheme of the alienations and the distribution of the assets. We accept the finding of the learned judge that he is a *bona fide* purchaser for value and that he was not aware of either the plaintiff's claim or the intentions of the first defendant. The sixth defendant is a creditor only for a small sum of Rs. 1,600. As already mentioned it is only this sum he was allowed to set off against the consideration for the sale in his favour and he had to pay the balance of consideration Rs. 18,400 towards the amount due to the decree-holder in Original Suit No. 35 of 1937.

The learned Judge found that all the creditors, namely, defendants 3 to 6 and 8 and 9 had notice of the plaintiff's claim and of the available assets of the estate and that the assets were not sufficient to pay all the debts including the debt of the plaintiffs under their claim for a personal decree against the estate. None of the defendants 3 to 6 was examined to deny knowledge of the plaintiff's claim or the other facts relating to the scheme of alienations. It is enough to refer to Exhibit P-6 series, the proceedings before the Debt Conciliation Board, Madura Taluk, to impute to the several creditors a knowledge of the total claim of the plaintiffs in respect of their mortgage. Exhibit P-14 series which relate to an application filed by one of the plaintiffs herein to be added as a party to the suit filed by the third defendant (Original Suit No. 18 of 1942) clearly fix the third defendant with notice of the plaintiff's claim [*vide* paragraph 3 of Exhibit P-14 (*a*)]. The fourth defendant, in the written statement filed by him in this case, admits that he was aware of the decrees obtained by the plaintiffs and the sales in execution of them and that he made investigation thereafter. The decree obtained by the fifth defendant expressly limited his right to the satisfaction of the amount decreed according to law in due course of administration and not otherwise [Exhibit D-8 (*a*)]. A few days before the date of the sale-deeds, the plaintiffs published notices in "*Thanthi*," a local Tamil, newspaper and in "*Dinamani*" and in the "*Hindu*", newspapers published in Madras, notifying that a large sum of about Rs. 1,50,000 was due to them from the estate of Robert Foulkes and warning intending purchasers from the first defendant [Exhibits P-12 (*a*) and P-12 (*b*) respectively]. The plaintiffs also sent a registered letter to the first defendant himself and to his agent prohibiting him from entering into any kind of negotiations for alienation of the assets of the estate of Robert Foulkes [Exhibits P-11 (*a*) and P-11 (*b*)].

There can be no doubt that all the sales virtually formed one transaction and were executed by the first defendant in pursuance of a general agreement with all the creditors other than the plaintiffs. Each sale deed, as already mentioned, recites the subsisting debts and the fact that there is no other means of satisfying them than by disposal of the remaining properties of the deceased Robert Foulkes. Mention has already been made of the unusual covenant in the sale-deeds in favour of defendants 3 to 5 and the clause relieving the vendor of his responsibility and liability for any deficiency or defect of title. The third defendant obtained full satisfaction of the debt due to him (Rs. 33,151-6-8) by the sale in his favour. He had to pay Rs. 1,120 to the eighth defendant and Rs. 700 to the ninth defendant. Likewise, the sales to the fourth and fifth defendants were in consideration of the amounts due to them respectively.

An application of the legal principles set out above to the facts in respect of the several defendants leads to the following conclusions. The sale in favour of

the seventh defendant is valid and proper because he had no notice of the plaintiffs' claim and he obtained no advantage by reason of the sale as he was not a creditor. Though the sixth defendant was a creditor, the advantage which he obtained from the sale was only to the extent of his debt of Rs. 1,600, the balance of the consideration he paid in cash. The third, fourth and the fifth defendants secured the advantage of having their debts satisfied in full by the respective sales to them. The eighth and ninth defendants were also paid in full by the third defendant. As the learned trial Judge found that the consideration for the several sales was not low and inadequate, the sales will stand. But the creditors who were a party to this scheme of disposal of the available assets of the deceased and thereby gained an undue advantage over the plaintiffs cannot be allowed to retain such advantage. The measure of this advantage is the amount which they must be deemed to have received in excess of what they would have got if there had been an equal and rateable distribution, taking into account the plaintiffs' claim also. It is this excess amount that must be held by them for the benefit of the plaintiffs. There will be a declaration accordingly.

Appeal No. 546 of 1945 is allowed to this extent except as against the seventh defendant against whom it shall stand dismissed with costs.

In Appeal No. 256 of 1945, the first defendant was the appellant. He died pending the appeal and his legal representative has been brought on record. So far as the first defendant is concerned, as an administrator who clearly committed a breach of the duty imposed on him by section 323 of the Indian Succession Act, he would be liable under section 368 of the Act for *devastavit*. The very decision relied upon by Mr. O. T. G. Nambiar in *Kissondas* v. *Jivatlal Pratapshi & Co.*[1] contains observations which go directly against his client. At page 436, the learned Judge said :

> "If an executor follows it (section 323) and further follows the provisions of section 360, he is protected. If he does not, he is liable * * * * * If the executor pays out of Court, the unpaid creditor has a remedy against him." See also *Asiatic Banking Corporation* v. *Amador Viegas*[2].

Mr. Nambiar attempted to found an argument on the series of decisions beginning with *Nilkomul Shaw* v. *Reed*[3], to which reference has been made above, based on the fact that most of the creditors who had been satisfied by the sales had obtained decrees. All these cases, however, will have no application, because the payment was made by the administrator out of Court and in pursuance of a scheme of distribution of the available assets among all the creditors except the plaintiffs.

Mr. Nambiar's next contention was that it is not open to the plaintiffs to file an administration suit when they could get the relief they now claim against the first defendant in execution of their decrees. For this contention, he sought support in the judgment of Somayya, J., in *Venugopala Naidu* v. *Valambal Ammal*[4]. The answer to this contention is twofold. There is nothing in the circumstances of this case to preclude the plaintiffs from filing an administration suit simply because they could have obtained a personal decree against the administrator under section 52 (2) of the Code of Civil Procedure. Moreover, the suit was not only against the administrator but also against alienees and creditors and these latter could not have been made parties to the proceedings in execution of the plaintiffs' decrees. Another answer is that the suit must be deemed to have been filed not only on behalf of the plaintiffs in their individual right but also in a representative capacity on behalf of all the creditors. Surely, it cannot be maintained that the right of the creditors as a body could be agitated in the execution proceedings. Mr. Nambiar cannot be heard to say this is not a suit in a representative capacity, because it was on that ground that we have held that the appeal did not abate though the legal representatives of the second respondent were not brought on record in time.

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1. A.I.R. 1936 Bom. 423.
2. (1871) 8 B.H.C.R. 20.
3. (1872) 12 B.L.R. 287.
4. (1942) 1 M.L.J. 580.

Clauses 1 (*a*) and (*b*) of the decree must stand. Apart from the *devastavit* which consisted of the alienations in favour of defendants 3 to 7, the plaintiffs also alleged that the first defendant has been appropriating the entire profits and income from the estate to the extent of nearly Rs. 30,000 every year without making any payment either towards the principal or the interest on the debts of the estae. The first defendant, therefore, must account for the income of the estate. Of course, when such an account is rendered it would be open to the plaintiffs to surcharge and falsify. Clause 1 (*c*) of the decree, however, appears to be in the highest degree vague and indefinite. It seeks to make the first defendant personally liable "for maladministration and neglect, if any, in the management of that estate as administrator." Now, a preliminary decree cannot be in that hypothetical form. It must be first decided on allegations specifically and properly made of maladministration whether any of the charges has been made out. It is only thereafter that the Court can direct an account on that basis. Mr. Alladi Krishnaswami Ayyar very properly conceded that such a vague decree should not have been passed. This clause will therefore be deleted but otherwise the appeal will be dismissed with costs.

[These appeals having been posted for being mentioned, the Court made the following ORDER :—]

These appeals have been posted to-day for mentioning certain matters. So far as costs of the suit and the appeal are concerned, we have heard counsel again, and we think that the best order to be made in the circumstances of this case is as follows :—

The first defendant will be liable to pay to the plaintiffs the costs of the suit and the appeal calculated on the amount in which he may be found ultimately liable at the stage of the final decree.

So far as the seventh defendant is concerned, our order will stand, namely, that Appeal No. 546 of 1945 will stand dismissed as against him with costs. The order of costs in the lower Court will also stand.

As regards the defendants other than 1 and 7, the order will be that the costs of all of them shall come out of the estate. The costs of the plaintiffs, after giving credit to the costs they may be entitled to against the first defendant personally, shall come out of the estate, both in the suit and in the appeal.

As the first defendant is dead, the costs will be recoverable against his legal representatives to the extent of the assets in their hands.

On behalf of the first defendant's legal representatives, it was represented that as this Court has set right, as it were, the *devastavit* committed by the first defendant, *viz.*, distributing the sale-proceeds of the several alienations between the creditors to the exclusion of the plaintiffs, clause 1 (*b*) of the decree of the lower Court should be deleted. That clause dealt with the loss caused by the first defendant's act of *devastavit*, namely, the distribution of the assets of the estate among the other creditors leaving out the plaintiffs. No other act of *devastavit* was specifically made out against the first defendant except, of course, the charge as to the appropriation of the income of the estate. The lower Court obviously included that clause in the decree because it found that the plaintiffs were not entitled to any relief whatever against defendants other than the first defendant. Now that we have found that the creditors who have received payments in excess of their rateable share should bring into Court for the benefit of the plaintiffs such excess, the plaintiffs cannot be said to have again a claim against the first defendant in respect of the alienations and the distribution of the proceeds of the alienations. Mr. Narayanaswami Aiyar contended that though the sales might be good as against the alienees as not being for a grossly inadequate consideration, it is open to the plaintiffs to establish that the sales were at under-value and that the first defendant would be liable for the loss sustained by the creditors on account of such under-value. In the lower court, there was no finding that the sales were actually made at an under-valuation, nor was it sought to be established before us. On the other hand,

the finding of the learned Judge was that the alienees paid proper and adequate consideration for their purchases. We think that, having regard to our judgment and decree in Appeal No. 546 of 1945, the proper order would be, rather than to completely delete clause 1 (b) of the decree of the lower Court, to declare that clause 1 (b) will be confined to cases in which the plaintiffs are unable to recover the excess payments made to any of the creditors from such creditors themselves. The first defendant will be liable for such amounts. Otherwise, clause (b) will have no operation.

Finally, we think, in the interests of clarity, it is better to indicate that if any amounts are recovered from the first defendant or from properties belonging to the estate of Robert Foulkes, other than the subject-matter of the alienations in favour of defendants 3 to 7, all the creditors including the plaintiffs will be entitled to rateable distribution of such moneys. Of course, the payments which the creditors may have to refund in accordance with our judgment will enure only to the benefit of the plaintiffs.

These appeals having been set down to be mentioned, the Court made the following ORDER :—

In our judgment we held that the creditors, who had received excess payments in the distribution consequent on the several alienations in favour of defendants 3 to 6, should refund the excess amounts which they must be deemed to have received. The creditors who were mentioned specifically were defendants 3 to 6, 8 and 9. Actually, however, there was admittedly another creditor, namely, the first defendant himself as representing the estate of Mrs. Fischer. This dual capacity which cannot be denied was not specifically adverted to in this portion of the judgment. The decree as drafted, which follows the judgment, naturally did not mention the first defendant in his capacity as representative of Mrs. Fischer as creditor along with defendants 3 to 6, 8 and 9. To bring the decree in accordance with the finding in the judgment, it is necessary that the following words should be added in clause 1, sub-clause 1 (a) of the decree after the word "defendants", "No. 1 as representative of the estate of Mrs. Fischer."

In sub-clause 1 (b) of clause 1, the words from "and do personally render accounts" to "in favour of defendants 3 to 6 as aforesaid" shall be deleted, because the effect of this direction is contained in the clause left after deleting these words.

We dismissed Appeal No. 546 of 1945 with the costs of the seventh defendant. The seventh defendant is interested only in one item of property covered by the sale in its favour which was for a sum of Rs. 25,000. It would be entitled to Advocate's fee calculated on this amount only.

The decree will be drafted in accordance with these directions.

K.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE BASHEER AHMED SAYEED.

Rekapalli Radhakrishnayya *alias* Frank R. Anderson and another. . *Appellants**

v.

Bhamidipati Sakuntala and others .. *Respondents.*

Hindu Law—Settlement giving properties to daughters in equal shares to pass on hereditarily from sons to grandsons unlike stridhanam *and if there is no male issue to their daughters—Nature of estate bestowed on daughters.*

The relevant clauses of a settlement deed by a Hindu governed by the Mitakshara law were as follows :—

"4. It is settled that you, three individuals (daughters) shall take the property, subject to the terms mentioned below, with equal rights in three shares and shall pass on hereditarily from your

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*Appeal No. 273 of 1946. 12th September, 1949.

sons to grandsons and so on *i.e.*, unlike Stridhanam (property), if you should each separately have male issue, and female issue, the share of each of you shall pass to her sons or if there should be no male children to her daughters.

* * * * * * *

7. It is settled that in case any one of the said three daughters should not have *aurasa-santhana* (children born in her) or should unfortunately die issueless, her share of property should only pass to the daughters and their *aurasa-santhans* then living ; and the husband of the deceased or his heirs shall have no right thereto.

8. The said property has been subject to the said conditions, delivered possession of to you. Hence, you shall enjoy the same happily and hereditarily from your sons to grandsons and so forth with powers of gift, sale, etc., subject to the said conditions. . . . . "

On a construction of the deed, *Held* :—The intention of the settlor was only to bestow a limited estate in favour of his daughters and that the absolute estate should vest in his male grandchildren in preference to his grand-daughters.

The true meaning and import of a deed of settlement or will should be gathered from the language and the surrounding circumstances of each case and it is difficult and dangerous to construe the real tenor and import of one document by the construction placed upon other documents however similar the terms employed may be.

Appeal against the decree of the Court of the Subordinate Judge of Kakinada dated 28th January, 1946 in O. S. No. 86 of 1945.

C. Rama Rao for Appellants.

P. Somasundaram and *K. Bheemasankaram* for Respondents.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—This appeal arises out of the judgment and decree of the learned Subordinate Judge of Kakinada decreeing the suit in favour of the plaintiff, declaring that the plaintiff is entitled to recover a one-third share of the plaint B and C schedule properties with mesne profits and costs of the suit and passing a preliminary decree to that effect.

The plaintiff filed the suit for partition by metes and bounds for recovery of her one-third share of the properties set out in B and C schedules appended to the plaint, and, for separate possession of such share. The plaintiff also prayed for mesne profits, past and future, in respect of the schedule mentioned properties. The plaintiff's case was that her maternal grandfather one Paddibhotla Venkatakrishnia executed a deed of settlement dated 5th May, 1903, marked Ex. P-2 in the case, creating an absolute estate in favour of the plaintiff's mother and also two of her maternal aunts to the extent of one-third share each in the properties mentioned in the schedules B and C to the plaint, the settlor reserving to himself certain interests for his lifetime without any rights of alienation and that her mother died in 1917, even during the lifetime of the maternal grandfather, leaving the plaintiff and her brother. The senior maternal aunt of the plaintiff is said to have died in or about 1905, while the junior maternal aunt died in 1943. The settlor himself died on 30th August, 1933. She further contended that though this deed of settlement contained certain conditions in respect of the devolution of the property after the death of her mother, those conditions were void and inoperative, and, that she being the daughter of her mother who got an absolute estate under the settlement deed, Ex. P-2, she was entitled exclusively to a one-third share of the properties described in the schedule to the plaint according to the law of succession in respect of Stridhanam property ; while the one-third share belonging to the senior maternal aunt was inherited by the second defendant being the only daughter of her mother. The share of the junior maternal aunt had already been settled in equal moieties on the father of the third defendant and the husband of the fourth defendant. The third and the fourth defendants therefore took a one-sixth share each. The fifth defendant is an alienee from the first defendant who is the brother of the plaintiff.

The contesting defendants have been the first and the fourth defendants. While the fourth defendant contended that she was not a necessary or proper party to the suit, and that she was not liable to pay anything towards past or

future mesne profits, she also denied that the daughters were given any absolute estate in the properties of the late Venkatakrishnia, and, generally supported the case of the first defendant. The first defendant who is the main contestant in the suit claimed that the settlement created only life estates in favour of the three daughters of Venkatakrishnayya, the settlor, that the remainder after the life estate in favour of the three daughters, vested in the male heirs of the daughters as per the terms of the settlement, that the plaintiff being a daughter was not entitled to any share in the suit properties, that the deed of settlement did not contain any void or inoperative terms, that the gift in favour of the three daughters was only of a limited extent, that the gift-over in favour of the male children of the daughters was effective, that by reason of his junior maternal aunt having died issueless, her property also vested in the surviving son of Venkayamma that is the 1st defendant and the daughter of Sarva Lakshmamma, *i.e.*, the 2nd defendant, that he was therefore entitled to a moiety of the suit properties to the exclusion of the plaintiff, that the fourth defendant had no right to the suit properties, and, that the fifth defendant was only an alienee from the first defendant to the extent of his (1st defendant's) half share in the suit properties. The first defendant also denied his liability to pay any mesne profits. The fifth defendant being the alienee from the first defendant naturally sailed with the first defendant.

After framing as many as six issues and after considering numerous authorities cited by both the parties, the learned Subordinate Judge came to the conclusion that the contention of the plaintiff was right, that only an absolute estate was created in favour of the daughters by the deed of settlement, that the further words used in the deed had the effect of altering the legal course of succession to an absolute estate and that therefore they were void and inoperative. Against this finding the 1st and 4th defendants have preferred this appeal.

The main question in this appeal is therefore one of construction of the deed of settlement, Ex. P.-2. The learned counsel for the appellants contends that the deed of settlement, construed as a whole, creates only a life estate in favour of each of the daughters, to the extent of 1/3 and that the ultimate devise is in favour of the male issues in preference to the female issues born to the said daughters and that there is nothing in the terms of the settlement deed that militates against this interpretation of the true intention and meaning of the settlor. As against this, the learned counsel for the respondents would argue that when clauses 4 and 8 of the deed of settlement are read together, what is given to the daughters is only an absolute estate, and an absolute estate having been created the further terms and conditions of the deed restraining devolution in the usual legal manner applicable to absolute estates are repugnant to the creation of the absolute estate and are therefore void and inoperative. As between these two contentions, we have to find out from a reading of the various clauses of the settlement as a whole as to what exactly was the real intention and meaning of the settlor in making the settlement.

Before we proceed further, it is necessary that the relevant clauses of the settlement deed which are clauses 4, 7 and 8 should be set out. The fourth clause reads as follows :

4. "It is settled that you, three individuals (daughters), shall take the said property, subject to the terms mentioned below, with equal rights in three shares and shall pass on hereditarily from your sons to grandsons and so on *i.e.*, unlike Stridhanam (property), if you should each separately have male issue and female issue, the share of each of you shall pass to her sons or if there should be no male children, to her daughters."

The seventh clause reads as follows :

7. "It is settled that in case any one of the said three daughters should not have aurasa-santhana (children born in her) or should unfortunately die issueless, her share of property should only pass to the daughters and their aurasa-santhans then living ; and the husband of the deceased or his heirs shall have no right thereto."

And the eighth clause reads as follows :

8. "The said property has been subject to the said conditions, delivered possession of to you. Hence, you shall enjoy the same happily and hereditarily from your sons to grandsons and so forth with powers of gift, sale, etc. subject to the said conditions. . . . . . "

The seventh clause really applies to the case of the third daughter Bapanamma, who died issueless and whose share, according to the said clause, enures to the benefit of the other surviving daughters and their aurasa-santhans and the husband of the deceased daughter or his heirs shall have no right. This clause is not very material in this case except to the extent that under this clause the interest of the third daughter has ceased on her death and has devolved upon the aurasa-santhans of her sisters, she having died issueless.

In construing a deed of this kind, it will be relevant to take into consideration certain facts which have a bearing on the question at issue. The settlor in the present case is a Hindu governed by the Mitakshara law, and while providing for the devolution of joint family property, members of the Hindu joint family entertain certain notions and wishes which cannot ordinarily be ignored. It can be fairly assumed that generally it is the desire of a Hindu testator or settlor that an estate, particularly an ancestral estate, should be retained in the family as far as possible and ordinarily it is the case that in the Hindu Society women do not take absolute estates by inheritance which they are enabled to alienate in the exercise of their rights of ownership. Further in this present case, the settlor had only daughters and his anxiety would naturally be to keep the property in his family and that it should go to his heirs as far as possible, though he intended to benefit his daughters at the same time. The settlor seems to be also conscious that if the property were given absolutely to the daughters, it will go not to the male children by them, but only to the daughters. If these things are kept in view, there should be no difficulty in arriving at the real intention of the testator in the present case and the nature of the estate he was creating while devising the property in favour of his daughters.

An examination of the language of clause 4 of the deed of settlement, Exhibit P-2 in this light reveals that while the testator bestows on the three daughters a benefit, he makes clear, at the same time, by unambiguous terms as to what exactly is the character of the estate that he seeks to bestow upon the daughters for their enljoyment. He states in clause 4 of the said deed that the three daughters shall take the said property, subject to the terms mentioned, below, with equal rights in three shares, and, he completes the dispositive words by further stating that the estate so vested shall be passed on hereditarily from son to grandson and so forth. Not being satisfied with this, he seems to make it further clear as to what he means by the estate being passed from son to grandson. He therefore adds the words that "unlike streedhanam property" the property bestowed upon the daughters should devolve upon male issues in preference to female issues, and so forth. This clause, taken as a whole, therefore constitutes the actual creation of the estate in favour of the daughters and in the very act of creating the said estate, the settlor makes his meaning quite clear by the language which he has adopted. Thus while creating the estate in favour of the daughters, the language of this clause as a whole makes it obvious that the testator intends that the property should be first enjoyed by the three daughters for their lifetime and that after such enjoyment it should devolve upon his heirs through the daughters but not in the manner that streedhanam property would devolve, but on the other hand in the ordinary manner, known to Hindu Law of devolution of separate property, *viz*., that the daughters' sons should get in preference to the daughters' daughters, if there are aurasa sons. The introduction of the words 'unlike streedhanam property' when an estate is created in favour of the daughters, cannot point to any other conclusion except that it was the deliberate intention of the settlor to give only a limited estate to the daughters and not confer an absolute estate, which would be the case but for the insertion of the words "unlike streedhanam property". It therefore seems to be clear to us that while the settlor intends to benefit the daughters for their lifetime, his paramount intention remains that the property should be ultimately enjoyed by his grandsons by the daughters as a gift over and and not that it should be passed on to the daughters' daughters. Even so, the terms of clause 8, which are confirmatory and explanatory of what is stated in clause 4 of the deed, indicate that the intention of the settlor was only that the

property shall be enjoyed by the daughters in such a manner as to pass it on to the sons and grandsons to be inherited by them after the lifetime of the daughters. From a reading of these two clauses, leaving out the other terms which are descriptive of the interests and rights reserved for himself by settlor for his life-time, the conclusion to our mind is irresistible that the settlor had no other intention than that the daughters should be benefited by a life-estate and that the grand-daughters should get only in case there are no grandsons.

The learned counsel for the appellant has however invited our attenton to various decisions relied upon by him for the purpose of showing that what was intended by the settlor was only a limited estate in favour of the daughters and not an absolute estate. In particular the decisions in *Radha Prasad Mullick* v. *Rani Mani Dasee*[1], *Venkata Chandikamba* v. *Venkata Rao*[2], *Manumallaswami* v. *Chinna Narayanaswami*[3], *Govindaraja Pillai* v. *Mangalam Pillai*[4], *Thayalai Achi* v. *Kannammal*[5], *Pavani Subbamma* v. *Anumala Rama Naidu*[6], *Narayanaswami* v. *Gopalaswami*[7], *Khajeh Habibulla* v. *Anga Mohan Roy Chudhuri*[8] and *Nisar Ali Khan* v. *Muhammad Ali Khan*[9], cited by him seem to be relevant to the present case. These decisions lay down the general rules and broad principles for the construction of wills and deeds similar to the one under consideration in this appeal and in particular, they lay down the rule that the entire terms of the will should be taken as a whole and the intention of the testator or settlor, should be gathered from the language used in the particular will or deed involved. In the view we have taken of the terms of the deed under consideration in the present appeal, we do not think it necessary to discuss each one of these cases in detail. Suffice it to say that each case has been decided upon the construction of the particular terms and language of the will or deed involved in that case and it is difficult and dangerous, as has been laid down in those very authorities to construe the real tenor and import of one document by the construction placed upon other documents however similar the terms employed may be. No two wills or deeds are couched in exactly the same language so as to warrant the application or interpretation of one document to the intepretation of another document. There is always a good deal of difference in the context and the surrounding circumstances of each case and the language of each will or deed has to be construed in its particular context and the real intention has to be collected from the general tenor of the terms of the will or deed taken as a whole ; and, if there are inconsistencies or irreconcilabilities, these may have to be reconciled so as to make the will or deed as a whole intelligible and consistent. However, we feel that applying the principles of interpretation as deducible from the many important decisions quoted above, it will be safe and correct to say that the intention of the settlor in the deed under consideration in this appeal, was only to bestow a limited estate in favour of his daughters and that the absolute estate should vest in his male grand-children in preference to his grand-daughters.

Mr. P. Somasundaram the learned counsel for the respondents, however, invites our attention to the following authorities, *viz.*, *Ramlal Mookerjee* v. *Secretary of State*[10] *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*[11], *Raghunath Prasad Singh* v. *Deputy Commissioner Pratap Garh*[12], *Sarajubala Debi* v. *Jyotiramaye Debi*[13], *Rameshwar Baksh* v. *Balraj Kuar*[14], *Govindabhai* v. *Dhayabhai*[15], *Hardone* v. *Dasarathy*[16], *Ananthasayana Naidu* v. *Kondappayya*[17], *Krishnaswami* v. *Srinivasan*[18], *Bishun Singh* v. *Thakurji Mangala Nain*[19], *Lalla Baksh Singh* v. *Phoolchand*[20] and to a passage in Mayne's Hindu Law

1. (1908) 18 M.L.J. 287 : L.R. 35 I.A. 118 : I.L.R. 35 Cal. 896.
2. (1928) 53 M.L.J. 557.
3. (1932) 63 M.L.J. 107.
4. (1932) 63 M.L.J. 911.
5. (1934) 68 M.L.J. 707.
6. (1937) 1 M.L.J. 268.
7. 46 L.W. 258.
8. I.L.R. (1942) 2 Cal. 363.
9. (1932) 63 M.L.J. 336 : I.L.R. 7 Luck. 324 : L.R. 59 I.A. 268 (P.C.).
10. (1881) L.R. 8 I.A. 46 : I.L.R. 7 Cal. 304 (P.C.).
11. (1897) L.R. 24 I.A. 76 : I.L.R. 24 Cal. 834 (P.C.).
12. (1929) I.L.R. 4 Luck. 483.
13. (1931) 61 M.L.J. 501 : L.R. 58 I.A. 270 : I.L.R. 59 Cal. 142 (P.C.)
14. A.I.R. 1935 P.C. 187.
15. A.I.R. 1936 Bom. 201.
16. A.I.R. 1939 Cal. 38.
17. (1940) 1 M.L.J. 212.
18. (1945) 1 M.L.J. 220.
19. (1945) 1 M.L.J. 91 : L.R. 72 I.A. 27 : I.L.R. (1945) All. 231 (P.C.)
20. (1945) 2 M.L.J. 393 (P.C.)

at page 760 and section 139 of the Succession Act, and, contends that the terms contained in clauses 4 and 8 of the deed, Exhibit P-2 in the present case, read together, have the effect of giving an absolute estate in favour of the daughters and that the words contained therein such as

> ". . . unlike Stridhanam property, if you should each separately have male issue and female issue, the share of each of you shall pass to her sons or if there should be no male children, to her daughters".

have the effect of curtailing the absolute estate already bestowed in the earlier part of the clause 4 of the deed and that therefore it should be considered to be repugnant and consequently inoperative and void. But we feel it difficult to agree with his contention. A reading of the decisions quoted by the learned counsel for the respondents makes it clear that in almost every one of those cases, the terms creating the estate have been clear and unambiguous and have left no room for any doubt as to what exactly was the intention of the testator or settlor concerned in each one of them. The dispositive words used in each of those cases have had the effect of creating an absolute estate and so they have been decided accordingly. We have already stated that it is not safe, nor always permissible to import into the consideration of one will or deed, the interpretation of the terms of another will or deed however similar the langugage and words may appear to be. We do not think it therefore necessary to examine the authorities cited in detail for we have to deal with the terms and circumstances of each deed or will as it emerges to arrive at the true meaning and intention of the settlor or testator. As we have already observed, in the present case, the language used by the settlor for the creation of the estate in favour of the daughters, in our opinion, leaves no room for doubt, that what he intends to create was only a life estate and not an absolute estate. The entire clause forms one whole by itself as expressing the intention of the settlor and does not lend itself to being split up into parts. We consider, even otherwise, that neither the latter words in clause 4 of the deed, nor for the matter of that, the terms in clause 8 of the deed, have the effect of cutting down any absolute estate created in favour of the daughters. On the other hand, those words by themselves constitute the creation of only a life estate in favour of the daughters. Much emphasis however has been laid upon the words 'Putra Powtra Parampara' occurring in both clauses 4 and 8 of the deed, not only by the lower Court but also by the learned counsel for the respondents, but, in the view we have taken of the construction of those two clauses, we cannot agree with the contention that these words by themselves create an absolute estate in the daughters and that the later words seek to alter the legal course of succession to an absolute estate so created. We think that the language of clause 4 taken as a whole is consistent with the view that what is created in favour of the daughters is not a "stridhanam estate" but an estate well known to law, *viz.*, a life estate with a gift-over in favour of the male grand-children of the settlor in preference to the female grandchildren.

We do not agree also with the opinion of the learned Subordinate Judge that the terms used by the settlor in the latter part of clause 4 have the effect of altering the course of legal succession for the simple reason, that what the settlor is creating by the terms of the said clause is not any estate unknown to the Hindu Law. There seems to be no warrant for such a conclusion when we keep in view the anxiety of the settlor that the property should be made available to his male grandchildren by the daughter after the life-time of the daughters who are sought to be benefited in the first instance.

When we see that in one of the decisions relied upon by the learned counsel for the respondent, viz., *Bishun Singh* v. *Thakurji Mangala Nain*[1], it has been held that a widow on whom no absolute estate is conferred could still have full powers of transfer in excess of the ordinary power of transfer for legal necessity possessed by her as a Hindu widow, it is difficult for us to accept that the mere use of the words "Putra Powtra Parampara" bereft of the context and what follows thereafter,

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1. (1945) 1 M.L.J. 91 : L.R. 72 I.A. 27 : I.L.R. (1945) All. 231 (P.C.).

would constitute an absolute estate in favour of the donees as is sought to be made out in the present case by the learned counsel for respondents. In the view we have taken of the construction of the deed, *viz.*, that it is not the intention of the donor to create an absolute streedhanam estate and then seek to alter the legal course of succession to such an estate, and, for the reason that the true meaning and import of this deed of settlement or will should be gathered from the language and the surrounding circumstances of each case, we feel that a detailed discussion of the scope of each one of the authorities cited by the learned counsel for the respondents is not called for and is not likely to serve much purpose. It is also not our desire to make this judgment more voluminous.

For the reasons stated above, we hold that the deed Exhibit P-2 does not give any absolute estate to the daughters and that it was the intention of the settlor as gathered from the terms of the deed Exhibit P-2 that the male grandchildren should have a preferential right to succeed to the estate after the lifetime of the daughters of the settlor and it follows that the decree of the learned Subordinate Judge is not correct and will have to be reversed. We accordingly set aside the decree of the learned Subordinate Judge and declare that the first defendant will be entitled to a half share of the suit properties as per our construction of the deed, Exhibit P-2 in the appeal, and the suit of the plaintiff will stand dismissed.

The appeal is therefore allowed with costs throughout payable by the plaintiff.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Sakthi Velu .. *Petitioner.**

Constitution of India (1950), Article 134 (1) (c)—Question whether appellate Court hearing an appeal under section 411-A of the Code of Criminal Procedure (V of 1898) is entitled to go into the validity or otherwise of the order of the trial Judge granting leave to appeal—Question is one of importance regarding procedure and fit for appeal to Supreme Court.

The question as to whether an appellate Court, at the time of hearing an appeal under section 411-A of the Code of Criminal Procedure is entitled to go into the validity or otherwise of the order granting leave to appeal by the trial Judge, is a question of importance regarding procedure on which there is no direct authority. Accordingly it is a fit case for appeal to the Supreme Court.

Petition under Article 134, clause (1) (*c*) of the Constitution of India, praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioner to appeal to the Supreme Court against the judgment of the High Court in C. A. No. 623 of 1949, setting aside the order of acquittal in Case No. 10 of the III Criminal Sessions of 1949 of the High Court in the exercise of its Ordinary Criminal Jurisdiction and convicting the petitioner under section 302, Indian Penal Code and sentencing him to transportation for life.

F. S. Vaz and *P. M. V. Srinivasan* for Petitioner.

The Government Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

The Order of the Court was made by

Govinda Menon, J.—This is an application for leave to appeal to the Supreme Court in a case in which the petitioner, who had been acquitted at the trial held at the third Criminal Sessions of 1949 of this Court, was found guilty, on appeal, by the State under section 411-A of the Criminal Procedure Code, and sentenced to transportation for life. Article 134, clause (1) of the Constitution of India provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India, if the High Court has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death. On the face of it this provision cannot apply because the petitioner has not been sentenced to death on appeal by the State. But the

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* Crl. M. P. No. 773 of 1950. 20th April, 1950.

learned counsel for the petitioner places reliance on sub-clause (*c*) which says that if the High Court certifies that the case is a fit one for appeal to the Supreme Court, an appeal shall lie. Our attention has not been drawn to any provision made under clause (1) of Article 145 as stated in the proviso ; nor are there any conditions established by the High Court. In such circumstances, we have to decide whether the case is a fit one for appeal to the Supreme Court.

Mr. Vaz appearing for the petitioner contends that the learned Judge who granted leave to appeal did not place before himself in the forefront the conditions laid down by their Lordships of the Judicial Committee at pages 81 and 82 of the report in *Thiagaraja Bhagavathar* v. *King-Emperor*[1]. There, their Lordships observed as follows :

> " Whether the fear expressed by the learned Judge that the right of appeal given by section 411-A will reduce trial by jury in the High Courts to a mockery must depend on the manner in which the judges of the High Courts exercise the powers conferred upon them by the section. If judges make a practice of giving leave to appeal on facts from the verdict of a jury which is not perverse or unreasonable on the ground that the Judge himself does not agree with the verdict, or that he thinks that the Court of Appeal might take a different view of the evidence from that which appealed to the jury . . . . . . the result, no doubt, will be to deprive people tried in the High Court of the effective enjoyment of their right, to trial by jury ; but the remedy lies in the hands of the Judges."

In granting leave to appeal on a question of fact, the learned Judge has given expression to the following view :

> " I give no opinion as to whether the verdict in this case is perverse, but I have no doubt whatever that there was sufficient evidence let in by the prosecution in this case on which the jury might well have returned a unanimous or majority verdict of ' guilty.' In that view, I certify that this is a fit case for appeal (even though it is a case of acquittal) on a question of fact. More than this it will not be proper for me to say at this stage. The application is granted."

In our judgment we have expressed the opinion that it would have been better if the learned Judge had expressed an opinion as to whether the verdict was perverse or not, instead of stating that the evidence was such that it was open to the jury to have come to a different conclusion. We were bound by the Privy Council decision cited above and therefore it was not open to us, leave once having been granted, to go behind it and say that it is invalid. On the merits of the case, we came to the conclusion that the verdict of the jury was wrong and having considered the evidence let in, in the light of the observations made by Lord Russell of Killowen in *Sheo Swarup* v. *King-Emperor*[2], we held that the petitioner was guilty of the offence. It seems to us that the question as to whether an appellate Court, at the time of hearing an appeal under section 411-A, is entitled to go into the validity or otherwise of the order granting leave to appeal by the trial Judge, is a question of importance regarding procedure on which there is no direct authority.

Mr. Vaz invited our attention to the observations of Lord Denman in *O'Connell* v. *Reg*[3], but we are of opinion that in considering the question before us those observations are not of any help. The learned counsel further contended that the decision in *Thiagaraja Bhagavathar* v. *King-Emperor*[1], being one in a case of an appeal against conviction, should not be applied when the Court has to decide an appeal against an acquittal by the State under section 411-A, Criminal Procedure Code. It seems to us that there is not much point in that objection because their Lordships of the Judicial Committee at the time of considering the appeal against the conviction have followed previous observations of theirs in *Sheo Swarup* v. *King-Emperor*[2], which itself arose out of the reversal by the Allahabad High Court of an order of acquittal by the Sessions Judge. We therefore certify under sub-clause (*c*) of clause (1) of Article 134 of the Constitution of India that this is a fit case for appeal to the Supreme Court against our judgment.

K.S. *Certified as fit case for appeal to Supreme Court.*

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1. (1947) 1 M.L.J. 404 : L.R. 74 I.A. 132 : I.L.R. 1948 Mad. 70 (P.C.).
2. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).
3. (1844) 8 E.R. 1061 at 1149.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Yalavarthi Gopalakrishna Chowdhury .. *Appellant**

v.

Raja Kamineni Bangaru Krishnamanayanim Varu being minor by guardian the Manager of the Chundi Estate, appointed by the Court of Wards, Madras .. *Respondent.*

Madras Impartible Estates Act (II of 1904), sections 4 and 6—Scope—Debts incurred by holder of the estate—Decree for—If enforceable against estate in the hands of succeeding holder—Necessity for obtaining declaration that it is binding by a separate suit—Borrowing for payment of peshkush—Absence of Collector's sanction—Effect.

Section 4 of the Madras Impartible Estates Act clothes the holder of an impartible estate with all the powers of the manager of a joint Hindu family not being the father or grandfather to mulct the family property by making alienations binding on the estate or incurring a debt binding on the estate just as if he is a manager of a joint Hindu family. The only difference which section 4 postulates is that when a suit is brought on a debt incurred by an impartible estate holder, unlike the manager of a joint Hindu family, he cannot represent his successors-in-interest in that suit. If the lender has to realise the money from the estate subsequent to the death of that impartible estate holder, he has to take separate proceedings and show that the borrowing was for a necessary purpose. This cannot be decided in proceedings in execution of the decree against the deceased holder but only by a fresh declaratory suit.

Immudipattam Bommayya Naicken Ayyan v. *Subramania Ayyar*, (1923) 46 M.L.J. 374, applied.

To decide whether the decree debt is binding on the estate in the hands of the succeeding holder what is to be seen is whether the monies were borrowed for a necessary purpose of the estate or whether the estate had benefit of it.

Where there is a compromise decree for payment of maintenance to an illegitimate son of the holder in execution of which a village is sold, a borrowing for making a deposit in Court for setting aside the sale would be a justifiable necessity the liability for which can be fastened on the estate. The lender need not have gone further and seen whether the liability in its inception was one which would be binding on the estate.

Section 6 of the Impartible Estates Act prohibits the incurring of any debt by making the estate liable for paying of land revenue due to the government unless the zamindar had first obtained the consent in writing of the Collector of the District in which the estate is situated. A debt borrowed for paying off peshkush due from the estate without obtaining the consent of the Collector, cannot be made binding on the estate.

Appeal against the decree of the Court of Subordinate Judge of Nellore, dated 27th October, 1945, and passed in O. S. No. 62 of 1944.

V. K. Thiruvenkatachari, N. V. B. Sankara Rao and *K. Rayanna* for Appellant.

K. Umamaheswaram for Respondent.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal against the dismissal of O. S. No. 62 of 1944 in the Court of the Subordinate Judge of Nellore on the ground that the suit was barred under Order 2, rule 2, Civil Procedure Code, as well as by limitation and further that even if there was no bar, the plaintiff cannot maintain the suit against the present zamindar of Chundi in respect of the estate in his possession and that the debts contracted by the previous zamindar were not for purposes binding on the estate.

In O. S. No. 106 of 1936 on the file of the Subordinate Judge's Court, Nellore, the appellant claimed to recover a sum of Rs. 8,031-4-9 under six headings of liability incurred by the defendant in that suit and which were payable to the appellant. They consisted of a sum of Rs. 2,000 claimed as damages for wrongful dismissal of the appellant from his position as Dewan of the Chundi estate in accordance with a contract, dated 31st December, 1935. The second item was a sum of Rs. 1,566-9-4 due to the appellant under two promissory notes which had been got endorsed in his favour by him for collection, the promissory notes being one for

* Appeal No. 220 of 1946. 10th August, 1949.

Rs. 1,250, dated 27th December, 1935 and another for Rs. 250, dated 30th December, 1935, executed by the then zamindar to one Seshamma. The third item of the claim was a sum of Rs. 2,627-6-3 due under two promissory notes dated 31st December, 1935, executed by the zamindar in favour of one Sambayya for Rs. 1,670 and one Sambrajyamma for Rs. 800. These promissory notes were also endorsed over for collection in favour of the appellant. The fourth item was a sum of Rs. 1,155-4-5 due on a promissory note, dated 7th January, 1936, by the same zamindar in favour of one Y. Purushotham for Rs. 1,100. The fifth item was a sum of R. 207-0-9 due on a promissory note for Rs. 200 executed by the zamindar in favour of the appellant himself. The sixth and the last item was a sum of Rs. 475, being the arrears of salary due to him. Despite the suit being contested by the zamindar, the Subordinate Judge on the 19th August, 1937, passed a decree for the amount claimed in the plaint after deducting Rs. 850 out of the damages claimed. It may be mentioned that the plaintiff claimed recovery of the amount not only from the then zamindar personally but also from the Chundi estate which is an impartible estate included in the schedule to the Madras Impartible Estates Act, 1904. Exhibit D-3 (*a*), the decree, directs the payment by the defendant to the plaintiff of the sum of Rs. 7,181-4-9 with interest and costs. There was no decree against the estate. The zamindar died on 4th September, 1938, and as the present respondent, his son, was a minor, the Court of Wards took charge of the estate under section 10 of the Madras Court of Wards Act. The appellant claimed the recovery of this amount from the estate in the hands of the Court of Wards and the Collector passed orders Exhibits P-3 and P-3 (*a*) by which portions of the amount decreed by the Civil Court were disallowed. The claim for damages to the extent of Rs. 1,150 allowed by the Civil Court was approved of by the Collector. So also was the sum of Rs. 475 being the arrears of salary. He disallowed the amounts due under the promissory note executed in favour of Seshamma as well as the promissory notes executed in favour of Sambayya and Sambrajyamma. With regard to the promissory note executed by the zamindar in favour of Y. Purushotham for a sum of Rs. 1,100, it was held that it cannot bind the impartible estate beyond the lifetime of the zamindar. The claim as regards the sum of Rs. 207 based on a promissory note for Rs. 200 being the money lent by the plaintiff for raising the attachment on the zamindar's car was also disallowed. The appellant thereupon filed the present suit praying for the following relief :—

"Declaring that the decree debt in O S. No. 106 of 1936 on the file of the Sub-Court of Nellore less the sum of Rs. 2,235-1-10 being the amount calculated as due on the promissory note executed in favour of Seshamma, is binding and enforceable against the defendant therein and the Chundi estate in the hands of the Court of Wards."

The answer, to the claim given by the defendant was that these debts were not binding on the estate beyond the lifetime of the executant of the promissory notes and therefore the suit was not maintainable. Various other pleas were taken in the written statement, which formed the subject-matter of as many as seven issues in the suit. As stated already, the learned Judge held that the suit was not maintainable under issues 1, 4, 5 and 6. On the question whether the suit was barred by *res judicata*, the learned Subordinate Judge was of opinion that since the appellant had already filed a suit against the previous zamindar as well as the estate in his hands and since the decree passed in O. S. No. 106 of 1937 was only a personal decree against the zamindar, the present suit was not maintainable. The question is whether that view of the learned Judge is correct or not.

The decision in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1] is relied upon by the learned counsel for the appellant as an authority which is against the view taken by the lower Court. What happened there was this : A decree had been obtained against the holder of an impartible estate for a sum of money due to the plaintiff in O.S. No. 714 of 1911 on the file of the District Munsif's Court, Dindigul. The zamindar died in 1917 and the decree was thereafter sought to be executed against the succeeding zamindar as the legal representative of the

1. (1923) 46 M.L.J. 374.

late zamindar and against the estate in his hands. The succeeding zamindar contended that the estate in his hands would not be liable for the payment of that debt and also that the matter could not be proceeded against in execution. The District Munsif agreed with the contention of the succeeding zamindar and referred the plaintiff therein to a fresh suit. But the learned Subordinate Judge in appeal held that the matter could be decided in execution. On a further appeal to this Court, Krishnan and Waller, JJ., were of the view that the decision of the Subordinate Judge was incorrect. The learned Judges say that the question could not be decided in execution because it is one of enforcing a new liability against the estate by proof that the debt was borrowed for the benefit of the estate. In such circumstances, the plaintiff's remedy is to bring a new suit and after obtaining a declaration that the debt incurred by the previous zamindar for which a personal decree had been obtained against him, was binding on the impartible estate and the income that had accrued due from the impartible estate in the hands of the succeeding zamindar, to apply in execution of his decree and have the same executed against the property. The reasoning of the learned Judges comes to this; that in view of section 4 of the Madras Impartible Estates Act, it cannot be said that a zamindar can represent the estate and make it liable for debts incurred by him so as to enure beyond his lifetime. This decision was passed in December, 1923 and a quarter of a century has elapsed since then. Counsel on either side have not been able to show any authority which either accepted the principle decided by the learned Judges or dissented from their decision. Such being the case, on the accepted notions of *stare decisis* we are bound to follow the Bench decision which has stood the test of time. Learned counsel for the respondent contends that the observations which have been considered by us in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1], are unnecessary and *obiter* for the decision of that particular case and cannot be followed as a binding authority. He further contends that in the present case, it would have been possible for the decree-holder to have got a decree against the estate itself by making the previous zamindar alone a party, if he were able to show that the money was utilised for the necessities or the benefit of the estate. The argument is that if the present plaintiff could have got a valid decree under section 4 and got it executed against the estate during the lifetime of the zamindar, it necessarily follows that he having put in issue the question of the liability of the estate and the Court not having specifically declared that it was binding on the estate, it should be deemed that the claim had been rejected by the Court on a previous occasion, and, as such the estate now cannot be mulcted with this liability. The learned Judges in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1] have in some way answered this contention. They have said that if the judgment-creditor plaintiff is able to show that the debt was for a sum of money borrowed for the benefit of the estate under section 4 of the Impartible Estates Act, the debt would be one binding on the impartible estate and the creditor would be entitled to enforce his debt as against the estate in the hands of the succeeding zamindar. They further observed that by proving that the debt was borrowed for the benefit of the zamindari, the zamindari does not become the assets of the late zamindar in the hands of the succeeding zamindar; but the only thing that results is *whether* the plaintiff judgment-creditor will be able to enforce his debt against the impartible estate in the hands of the succeeding zamindar. We are of opinion that the principle enunciated in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1] has to be applied to the facts of the present case. The judgment-debtor zamindar could not have represented the estate so as to make it liable beyond his lifetime. The analogy of the manager of a joint Hindu family being sued for a debt due by him, and the family properties being made liable for that amount cannot apply to the present case in view of section 4 of the Impartible Estates Act. In the case of a joint Hindu family, if a decree is obtained against the manager personally, the judgment-creditor is entitled to recover the same from the share of the manager by an attachment of the share and getting

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1. (1923) 46 M.L.J. 374.

it sold. But in the case of an impartible estate, the holder, for the time being cannot have any share as such. All that the creditor can do is to realise the money by appointment of a receiver for the estate or by other means known to law during the lifetime of the judgment-debtor zamindar. If he is not able to realise the money during that period and wants to enforce the liability against the estate in the hands of the succeeding holder, in our opinion, he will have to get a declaration that the debt incurred by the previous zamindar was for and on behalf of the estate and therefore the estate is liable. This, as held in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1], cannot be decided in execution, but only by a fresh declaratory suit. We should not be understood as stating that in all respects an impartible estate holder cannot represent the estate in litigation. It is only where his own acts are in question and when his borrowings are sought to be charged on the impartible property that he cannot represent the estate, so that the debt may bind the estate beyond his lifetime. Suppose, for example, there was a dispute as regards portions of the zamindari with a rival landholder and the zamindar for the time being contests the suit and a decision either way is passed, such a conclusion should be binding on the succeeding zamindar on the principle of *res judicata* ; or in other words, in all cases where the action of the zamindar is one that could be impugned by the succeeding zamindar, it seems to us that the decree obtained against a zamindar who has himself created the debt, cannot be enforced in execution against the estate after his death. The Subordinate Judge seems to think that where an impartible estate holder incurs a debt, it is inconceivable that one suit could be filed against him based on a certain borrowing and another suit subsequently for a declaration that the same debt is binding on the impartible property. This is exactly what has been repelled in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1]. The distinction between the representative capacity of an impartible estate holder for transactions entered into by him for binding the estate beyond his lifetime and that where he represents the estate in other proceedings in which he has no personal estoppel against third parties is a real one ; and we are of opinion that section 4 of the Impartible Estates Act clearly enunciates this view. For purposes of our present case it has to be said that an impartible estate holder stands on an equal footing with the manager of a joint Hindu family even though in the case of a manager of a joint Hindu family, he has a share in the properties which can be proceeded in execution and in the case of an impartible estate holder such a thing cannot be resorted to. Following the principles laid down in *Immudipattam Bommayya Naicken Ayyan* v. *Subramania Ayyar*[1], we are of opinion that the suit as framed is maintainable.

It is difficult to see how Order 2, rule 2, Civil Procedure Code, has any application. It is not as if there are different reliefs arising out of the same cause of action and therefore the plaintiff in the previous suit having abandoned one relief or not having obtained a decree regarding that relief, in a subsequent suit the same relief is prayed for. We feel that the cause of action against the previous holder for the recovery of money borrowed by him personally is different from the cause of action regarding the right to recover the amount from the estate, because the monies were borrowed for the necessities of the estate. As there are two causes of action and one of such causes of action has been put in issue in the previous suit, Order 2, rule 2, Civil Procedure Code, cannot be said to be a bar for a subsequent suit on different cause of action.

If the plaintiff's cause of action to recover the money from the estate in the hands of the succeeding zamindar arises only after the death of the previous zamindar, his suit is said to be in time under Article 120 of the Indian Limitation Act and there is no question of bar at all.

On the finding that the suit is maintainable, the question as to how far each of the debts is binding on the estate has to be considered. Since the Collector himself in Exhibits P-3 and P-3 (*a*) has admitted the liability regarding damages

1. (1923) 46 M.L.J. 374.

for wrongful dismissal to the extent of Rs. 1,150 and since the sum of Rs. 475 being the arrears of salary also has been admitted, we need not go into that question now. With regard to the promissory notes executed in favour of Seshamma and endorsed in favour of the plaintiff, Exhibits D-5 and D-5 (*a*), and which had been disallowed as not binding on the estate by the Collector, though that was one of the items for decision by the lower Court, here in appeal, the learned counsel for the appellant has not chosen to argue its binding nature and has given up that part of his case. We are therefore concerned with only three items, *viz*., the amounts due under the promissory note Exhibits P-2 and P-2 (*a*) in favour of Sambayya and Sambrajyamma as well as the amount due on a promissory note, dated 7th January, 1936, in favour of Y. Purushotham together with the amount on a promissory note for Rs. 200 lent by the plaintiff to the zamindar for raising the attachment on his car. The plaintiff as P.W. 1 deposes that the previous zamindar came to his native place Kuchipudi and wanted him to arrange for a loan for depositing in Court for setting aside a sale of a village by name Vuppalappadu which had been sold under a decree of Court for a sum of money due as maintenance to an illegitimate son of the zaminlar. This was on 31st December, 1935. Accordingly the plaintiff arranged for the loans from Sambayya and Sambrajyamma by executing the two promissory notes, Exhibits P-2 (*a*) and P-2 on 31st December, 1935, for Rs. 1,670 and Rs. 800 respectively. It is seen from Exhibits D-1 (*a*) and D-1 (*b*) the credit and debit chitta of the Chundi estate for the year 1936, that both these amounts were credited in the estate accounts as being borrowed for being remitted, to the Sub-Court in connection with the auction sale of Vuppalappadu village on 1st January, 1936. We find that on 3rd January, 1936, a sum of Rs. 2,437-8-0 was paid over through one T. Lakshmayya, Pleader's clerk, for remitting in the Imperial Bank in connection with the auction sale of Vuppalappadu in O.S. No. 9 of 1928 on the file of the Sub-Court. Thus, it is clear, that the moneys borrowed from Sambayya and Sambrajyamma were utilised for a necessary purpose of the estate. It is not seriously disputed that these monies were actually used for averting the loss of Vuppalappadu from the estate. But it is contended by the learned counsel for the respondent that the debt for which Vuppalappadu village was sold was one not binding on the estate and therefore the money borrowed for setting aside the sale cannot be held to be binding on the estate. Exhibit D-6 (*b*), dated 11th September, 1929, is a compromise decree between the previous zamindar and a minor by name Radhakrishnamurthi by his mother and next friend Lakshmamma, whereby it was decreed in terms of a razinama that the minor plaintiff should be paid a sum of Rs. 4,500 by the zamindar. The suit arose out of a claim made by the minor on the ground that he is an illegitimate son of the zamindar for maintenance. See plaint Exhibit D-6. The zamindar's written statement was Exhibit D-6 (*a*). He contended that the minor's mother was not a permanently kept concubine and that the minor was not his illegitimate son. This suit was settled and a compromise decree passed in accordance with the terms of the razinama filed in Court. The copy of the razinama has not been made available to the Court but from the recitals contained in Exhibit D-6 (*b*) it is clear that there was a decree against the then zamindar for a sum of Rs. 4,500 though there are statements in the decree that the minor's mother was not the permanently kept concubine of the zamindar and that the minor plaintiff was not the illegitimate son or dasiputhra of the then zamindar. Despite these statements in the razinama, there was a decree on foot of a compromise for a sum of Rs. 4,500. It is admitted that in execution of this decree, this Vuppalappadu village was attached and sold in Court auction and the amount deposited on 3rd January, 1936, was to set aside the sale under Order 21, rule 89, Civil Procedure Code. The argument of the learned counsel for the respondent is that the decree Exhibit D-6 (*b*) does not amount to a *bona fide* compromise of a disputed claim, for in view of the Privy Council decision in *Kumara Krishna Yachendra* v. *Rajeswara Rao*[1], *viz*., the Venkatagiri case, an illegitimate son of an impartible estate holder cannot claim maintenance out of the estate

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1. (1942) 1 M.L.J. 132 : L.R. 68 I.A. 181 : I.L.R. (1942) Mad. 419 (P.C.).

at all. Their Lordships held in the above case, following an earlier decision of the Judicial Committee in *Commissioner of Income-tax, Punjab, etc.* v. *Dewan Bahadur Dewan Krishna Kishore*[1], that an illegitimate son of an impartible estate holder is not a member of the joint family; nor is he entitled by custom to any allowance or maintenance under the Hindu Law. This being the law, Mr. Umamaheswaram contends that the compromise decree directing the payment of Rs. 4,500 to the minor Radhakrishnamurthi, even if he happened to be an illegitimate son of the zamindar, is not a legitimate claim binding upon the estate. It is further contended that since Exhibits P-2 and P-2 (*a*) do not make any mention of the fact that the monies borrowed thereunder were utilized for being deposited in Court, it cannot be safely inferred that they were so utilised. According to the learned counsel, in the promissory note Exhibit D-5 regarding which there is no claim now in appeal, the zamindar makes specific mention that the money was borrowed for being deposited in Court. But in view of Exhibits D-1 (*a*), D-1 (*b*) and D-1 (*c*) which are to the effect that these two amounts of Rs. 1,670 and Rs. 800 were credited in the zamindar's account and practically contemporaneously an equivalent amount was given to a pleader's clerk for depositing in Court to avert the sale, we are of opinion that the non-mention of the purpose in the promissory notes is a matter of no consequence at all. What is to be seen is whether these monies were borrowed for a necessary purpose of the estate or whether the estate had benefit of it.

Though according to the *Venkatagiri case*[2] and the decision which it followed, viz., *Commissioner of Income-tax, Punjab, etc.* v. *Dewan Bahadur Dewan Krishna Kishore*[1], an illegitimate son of an impartible estate holder is not entitled to maintenance out of the estate, still, the prevailing view prior to these decisions in the case of an ordinary partible joint family governed by the Mitakshara was that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and though he is not entitled to a partition, he is entitled as member of the family, to maintenance out of the joint family property in the hands of the collaterals with whom the father was joint. It was therefore a matter of belief in legal circles that the proposition laid down in *Vellaiyappa Chetty* v. *Natarajan*[3], was applicable to an impartible estate as well at the time O.S. No. 9 of 1928 was filed by the minor against the previous holder of the estate. We have therefore to see whether under section 4 of the Impartible Estates Act tne borrowing by the zamindar was for paying off the compromise decree debt due to the so-called illegitimate son was a justifiable necessity, the liability for which can be fastened on the estate. If according to the view which prevailed before the decision in the *Venkatagiri case*[2], rightly or wrongly an impartible estate holder is bound to mintain his illegitimate sons out of the estate, then there can be no doubt that the borrowing from Sambayya and Sambrajyamma could be justified. There has been a good deal of discussion about the interpretation to be put upon section 4 of the Impartible Estates Act. Mr. V. K. T. Chari contends that with regard to the binding nature of a debt borrowed by an impartible estate holder, section 4 does not make any difference between such a holder and the manager of a Hindu family not being the father or grandfather. Section 4 of the Impartible Estates Act runs as follows :—

> "The proprietor of an impartible estate shall be incapable of alienating or binding by his debts such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other coparceners independently of their consent."

If the debt in the present case had been incurred by the zamindar as the manager of a joint Hindu family not being the father or grandfather, would it be binding on the estate? According to the learned advocate for the appellant the case has to be viewed in this aspect. There was a danger to be averted to the estate because Vuppulapadu village was sold. Whether the debt for which that estate was sold

1. (1941) 2 M.L.J. 972 : I.L.R. 1942 Lah. 1 (P.C.).
2. (1942) 1 M.L.J. 132 : L.R. 68 I.A. 181 : I.L.R. (1942) Mad. 419 (P.C.).
3. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.).

was properly incurred or not is not a matter which a lender need enquire into at all. He relied for this proposition on the decision in *Niladri Sahu* v. *Mahant Chaturbhuj Das*[1] and also on the definition of what is meant by "benefit" and "necessity" in *Sellappa Chettiar* v. *Subban Chettiar*[2]. In the case of an ordinary manager of a joint Hindu family, if a creditor is told that properties belonging to the family have been sold in Court auction and the creditor is *bona fide* satisfied that such was the case, a lending by him to get the sale set aside would be binding on the estate. But it is contended on the other side that unless there is compelling necessity or apparent benefit to the estate, the borrowing would not be binding on the property because of the principle enunciated in *Hunumanprasad Pandey* v. *Mussammat Babooee Munraj Koonwaree*[3], that only a lender who *bona fide* makes enquiries and satisfies himself of the necessities of the loan is protected even if the manager does not apply the money borrowed for purposes of the estate. Mr. Umamaheswaram contends that the words in section 4, *viz.*, "would entitle the managing member of a joint Hindu family" to incur a debt, do not include the category of cases where a lender who makes *bona fide* enquiries and lends the money is protected. It is a case of a protection to the lender by making the estate liable and not one where the managing member is given a right of incurring a debt. For this purpose he relies upon a recent decision of our learned brother Raghava Rao, J., in *Narra Rama Naidu* v. *K. K. B. Krishnappa Naick*[4]. The learned Judge says that what the section requires according to its plain language is the existence of circumstances entitling the manager of a joint Hindu family to incur the debt in question. It takes no notice of circumstances entitling the lender to relief notwithstanding the absence of circumstances entitling the manager to incur the debt. We are not inclined to agree with this distinction. If the lender makes *bona fide* enquiries and satisfies himself of the necessities of the loan, the alienation made by the manager or the debt incurred by him could be binding on the estate. That would be a case where the manager is entitled to make an alienation. The distinction is not whether the necessity or benefit does exist, but the relief given to the lender arises from the fact that having satisfied himself of the existence of necessity or benefit, he lends the money but the borrower does not utilise it for that purpose. It is only the failure of the manager to utilise the money borrowed towards the necessity that is condoned in order to give relief to the lender. We are therefore of opinion that a reading of section 4 of the Impartible Estates Act clothes the holder of an impartible estate with all the powers of the manager of a joint Hindu family not being the father or the grandfather to mulct the family property by making alienations binding on the estate or incurring a debt binding on the estate just as he is a manager of a joint Hindu family. The only difference which section 4 postulates is that when a suit is brought on a debt incurred by an impartible estate holder, unlike the manager of a joint Hindu family, he cannot represent his successors-in-interest in that suit. If the lender has to realise the money from the estate subsequent to the death of that impartible estate holder, he has to take separate proceedings and show that the borrowing was for a necessary purpose.

It is further contended by Mr. V. K. T. Chari that the question of *bona fide* enquiry does not arise in this case because there was an application of the money to a necessary purpose. He relied upon the well-known cases such as *Shibaprasad Singh* v. *Prayagkumari Debi*[5], regarding the character of an impartible estate in comparison with that of a joint Hindu family. He also relied upon *Sellappa Chettiar* v. *Suppan Chettiar*[2]. In the latter case Venkatasubba Rao, J., was of opinion that the rule of benefit to the estate should not be confined only to cases where both need and benefit co-exist and the transaction need not be of a defensive nature and therefore a narrow interpretation should not be put upon the expression "for the benefit of the estate". It is unnecessary for us in this case to discuss this matter at length because we are of opinion that the payment of the amount due under

1. (1926) 51 M.L.J. 822 : L.R. 53 I.A. 253 : I.L.R. 6 Pat. 139 (P.C.).
2. (1937) 1 M.L.J. 422 : I.L.R. 1937 Mad. 906.
3. (1856) 6 M.I.A. 393.
4. S. A. No 1002 of 1946.
5. (1932) 63 M.L.J. 196 : L.R. 59 I.A. 331 : I.L.R. 59 Cal. 1399 (P.C.).

the compromise decree for the maintenance due to the minor was a debt then binding on the estate and the lender need not have gone further and seen whether the liability in its inception was one which would be binding on the estate. The decision in *Raja Ramachandra Suru Harischandra Deo Garu* v. *Akella Venkatalakshminarayana*[1] on which Mr. Umamaheswaram laid great stress and where the policy of the Impartible Estates Act is considered in great detail, cannot be said to be strictly applicable to the present case. On the other hand, Mr. Thiruvenkatachari argues that what was public policy when the Impartible Estates Act was enacted would not be public policy to-day and he relies upon *Bourne* v. *Keane*[2] and *Ponder* v. *St. John Mildmay*[3]. We do not intend to go into the matter in view of our finding that there was a debt which was ostensibly binding on the estate and about which the creditors' agent, the present appellant, was *bona fide* satisfied that the same was binding on the estate. In this connection we may also refer to a decision of the Lahore High Court reported in *Chala Ram* v. *Kishen Chand*[4], where it is held that where the money is actually utilized for a necessary purpose, the question of further enquiry was unnecessary. It seems to us therefore that the amounts due under the promissory notes to Sambayya and Sambrajyamma are binding on the estate and the appellant is entitled to recover them.

The next amount claimed by the appellant and which is made the subject of appeal is the sum of Rs. 1,155 due on a promissory note, dated 7th January, 1936, by the zamindar for a principal sum of Rs. 1,100 in favour of one Purushotham. The object with which this money was borrowed was for paying of the peishkush due from the estate. Section 6 of the Impartible Estates Act prohibits the incurring of any debt by making the estate liable for paying of land revenue due to the Government, unless the zamindar had first obtained the consent in writing of the Collector of the District in which the estate is situated, though the clause further says that such consent shall not be refused unless, in the opinion of the Collector, the case is one in which the land revenue due to the Government may be realised by management of the estate under the provisions of the Madras Revenue Recovery Act, 1864. It cannot be said that in this case such consent was either asked for or refused. Relying upon the decision in *Venkatalingama* v. *Rao Muni Venkatadri Rao*[5] and a recent judgment of Leach, C.J. and Lakshmana Rao, J. in *Raja Kaminení Bangaru Kumara Krishnappa Nayanim Varu* v. *Boyidi Ramanadandu and another*[6], it is contended for the respondent that this debt is opposed to public policy and cannot be made a charge on the estate. In *Venkatalingama* v. *Rao Muni Venkatadri Rao*[5], the question whether the sale was opposed to section 6 of the Madras Impartible Estates Act was allowed to be raised even in appeal and the learned Judges held that in the interests of public policy, the sale should be set aside. As the previous zamindar in this case did not even take the permission of the Collector to borrow for paying off the peshkush and as Purushotham, the lender, knew fully well that the money was to be utilised for a purpose for which the estate could not be alienated without the permission of the Collector, we are of opinion that the learned Subordinate Judge was right in holding that this sum cannot be made binding on the estate. We therefore disallow the appellant's claim regarding the amount of Rs. 1,155 claimed in the plaint.

The next item is the sum of Rs. 207-0-9 on a promissory note for Rs. 200 advanced by the appellant to the zamindar for raising the attachment on his car. In view of the evidence in this case, that, at the time the money was advanced, the car belonging to the zamindar had been attached and this amount was utilised for raising the attachment, we are of opinion that this debt comes within the ambit of section 4 of the Impartible Estates Act.

Our conclusion, therefore, is that out of the amounts claimed by the plaintiff in this suit, the amounts due under the promissory notes to Sambayya and Sambrajyamma as well as the amount due to the plaintiff under the promissory note, dated

1. (1918) 37 M.L.J. 65.
2. (1919) A.C. 815.
3. (1938) A.C. 1.
4. A.I.R. 1923 Lah. 462 (2).
5. (1927) 53 M.L.J. 533 : I.L.R. 50 Mad. 897.
6. A.S. No. 439 of 1943.

9th March, 1936 are alone liable to be paid by the present zamindar and that the rest of the claims are not binding on the estate.

In the result, the decree of the lower Court dismissing the suit is set aside and the plaintiff is given a decree against the estate in the hands of the present zamindar represented by the Court of Wards to the extent of the amounts due under the promissory notes executed to Sambayya and Samrajyamma as well as the promissory note in favour of the plaintiff dated 9th March, 1936. These documents are decreed in addition to what has been allowed by the Collector. The decree of the lower Court will be modified accordingly. Each party will bear his own costs throughout.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kistappa Naicker .. *Appellant* *

v.

Parvati Ammal and others .. *Respondents.*

Presidency Small Cause Courts Act (*XV of* 1882), *Sections* 18 *and* 19, *Clause* (*s*)—*Suit for declaration of maintenance right—Cognizability by City Civil Court—Hindu Married Women's Right to Separate Residence and Maintenance Act* (*XIX of* 1946)—*Fact of taking a second wife—Ground for awarding maintenance to first wife without proof of unchastity or improper conduct.*

Where a suit is for declaration of maintenance right it would come within the saving of clause (*s*) of section 19 of the Presidency Small Cause Courts Act and can be filed in the City Civil Court.

The fact that a man has taken a second wife is sufficient ground for award of separate maintenance to the first wife under Act XIX of 1946 (Central) in the absence of any unchaste or improper conduct.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 283 of 1947.

T. V. Ramanathan for Appellant.

B. C. Seshachala Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This City Civil Court Appeal arises out of a suit for maintenance by the respondent before me against her husband, the appellant before me. The Judge below has decreed the suit for Rs. 30 per mensem as for the future and for Rs. 240 for arrears of maintenance.

Mr. Ramanathan, for the appellant, urges that the plaintiff is not entitled to separate maintenance because she chose to keep herself away from the husband's roof; but any how there is the fact that the appellant is a man who has taken a second wife. That fact by itself is sufficient ground for award of separate maintenance to the wife under Act XIX of 1946 (Central) in the absence of any unchaste or improper conduct on her part. So much has been held in recent decisions of this Court of which I need only refer to my judgment delivered just today in S.A. No. 556 of 1947. This point of the learned Counsel, therefore, fails.

Then says Mr. Ramanathan this suit ought not to have been entertained by the City Civil Court because it is a suit cognizable by the Presidency Small Cause Court under section 18 of the Presidency Small Cause Courts Act (XV of 1882). As the learned Judge below has pointed out, the suit is for a declaration of maintenance right and consequently comes within the saving of section 19, clause (*s*) of the Act. For the appellant it is urged that there is a ruling of this court in *Pokala* v. *Murugappa*[1], which forbids the entertainment of a suit of the present kind by the City Civil Court and compels its cognizance by the Presidency Small Cause Court. When that ruling is looked into, it is found that all that it has decided is that a suit for maintenance based on contract or on a declaratory decree can be, and must be, filed in the Small Cause Court. The present suit is

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* C.C.C. Appeal No. 63 of 1948. 15th March, 1950.

1. (1886) I.L.R. 10 Mad. 114 (F.B.).

not of the kind referred to in that ruling and cannot be treated as governed by it. The present suit is not one based on a declaratory decree, but one filed for a declaratory decree.

Lastly, it is said for the appellant that the award of Rs. 30 per mensem is unfair because, as the learned Judge below himself observes, the defendant is a man earning only Rs. 36 per month. It is true that the Judge further observes that whenever the defendant did more work he would earn about Rs. 90 to Rs. 100 per mensem. The Court can, after all, go by the permanent earnings which the husband normally makes and not by any exceptional earnings which occasionally he may make if he chooses to do more work, than ordinarily he does. I am not satisfied that the award of Rs. 30 per mensem to the respondent is at all proper or fair in the circumstances of this case. The appellant has, besides the second wife, two children already. It is true that the award of Rs. 30 covers the needs of maintenance not only of the plaintiff but of her two children as well. Even so, I am inclined to think that an award of Rs. 15 per mensem is all that the plaintiff ought to get. The parties will be at liberty to apply for enhancement or reduction according to the circumstances in future. I accordingly vary the decree of the Court below by substituting Rs. 15 per mensem for Rs. 30 per mensem in the decree of the court below and by substituting Rs. 100 for Rs. 240 for arrears of maintenance. As regards the arrears, I award Rs. 100 a round figure not seriously objected to by either side in place of the Rs. 240 awarded by the court below. Each party will bear his own costs in this appeal.

V. S. *Appeal dismissed. Maintenance reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Machireddi Narappa .. *Appellant* *

v.

Proddatur Subbarayudu and others .. *Respondents.*

Execution petition—Presentation without vakalat—Subsequent filing of vakalat after period of limitation—If a valid presentation—Civil Procedure Code (*V of* 1908), *Order* 3, *Rule* 1.

The provisions of Order 3, rule 1, have been introduced in the interests of a plaintiff or petitioner to avoid practising of any fraud by the parties by seeking to represent persons though not authorised to do so. Once it is shown that an advocate was authorised to represent the parties, though such authority was not reduced to writing in the shape of vakalat at the time of filing the petition, the filing of vakalat by the advocate subsequently cures the defect. If due to a *bona fide* mistake the vakalat was not filed in the first instance and the objection was complied with by filing a vakalat before final orders were passed on the execution petition, it cannot be said that the presentation was not proper or illegal going to the root of the validity of the petition and the jurisdiction of the Court to deal with the same is not ousted.

Case-law discussed.

Appeal against the order of the District Court, Cuddaph, in A.S. No. 123 of 1946, preferred against the order of the District Munsif Court, Proddatur, in E.A. No. 139 of 1946, in O.S. No. 534 of 1930.

B. V. Ramanarasu for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous second appeal arises out of proceedings taken in execution of a final mortgage decree. The petitioner is the son of the judgment-debtor. The final decree was passed on 25th July, 1932. The decree-holder died after the final decree and his son, one Lingasubbayya, appears to have filed three execution petitions, the first on 21st January, 1935, the second on 20th

* A.A.A.O. No. 219 of 1947. 3rd March, 1950.

January, 1938 and the third on 31st January, 1941. The third execution application was dismissed on 21st February, 1941. Lingasubbayya's sons filed an execution petition on 29th January, 1944, which was also dismissed on 24th February, 1944. They again filed the present execution petition, E.P. No. 366 of 1944, on 24th July, 1944, just a day previous to the expiry of the 12 years' period from the date of the final decree.

The present execution petition was signed and verified by Lingasubbayya's sons and was also countersigned by one Mr. C. S. Narasimhachariar as vakil for the decree-holder, Veerasubbayya. Mr. Narasimhachariar had no vakalat for Lingasubbayya's sons, the legal representatives of the decree-holder. Mr. Narasimhachariar's son, Mr. Srinivasachariar, however, who was working with his father had a vakalat for the respondents who are the legal representatives of the decree-holder. Objection was taken to the validity of the said execution petition on the ground that the execution petition was presented by a counsel who had no vakalat for the respondents and that, therefore, it was a nullity. It may be mentioned that subsequent to the filing of the petition, which was on 24th July, 1944, a vakalat was filed by Mr. Narasimhachariar and also by another counsel, but that was done on 6th July, 1946, after the expiry of 12 years from the date of the final decree. It was contended that the subsequent filing of the vakalat, in any event, could not cure the defect, if any, in the presentation of the execution petition. Not content with the objection raised to the issue of the execution, the appellant filed E.A. No. 139 of 1946 in E.P. No. 366 of 1944, under section 47, Civil Procedure Code, praying that no execution be issued for realising the amount in pursuance of the final decree in O.S. No. 534 of 1930. This application was heard along with the execution petition and both the courts have held that the presentation of the execution petition without a vakalat was only an irregularity and not an illegality which invalidated the proceedings and that irregularity having been subsequently set right by the filing of a vakalat, the defect, in any event, had been set right, and that the execution petition must, therefore, be deemed to have been presented properly on the date when it was presented, and allowed execution to issue.

The decision in *Sri Sri Sri Nandamani Ananga Bhima Deo* v. *Sri Madano Mohono Deo*[1], is relied upon by the counsel for the appellant in support of his contention that E.P. No. 366 of 1944 not having been presented by a counsel duly authorised in writing on behalf of the respondents could not be said to be a valid presentation inasmuch as the act of the counsel in presenting the execution petition was a mere nullity, and that therefore, no order could be passed on the execution petition which has not been validly presented. The provision in the Civil Procedure Code which governs the filing of execution petitions is Order 21, rule 11 which lays down that in respect of a decree for payment of money, an oral application of the decree-holder at the time of the passing of the decree may be made and if it is otherwise under clause (2) it is provided that every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case and shall contain the particulars mentioned in the said sub-clause. The rule is, however, silent as to by whom the filing or presentation of such a written application should be. With reference to plaints, Order 4, rule 1, Civil Procedure Code, states that every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in its behalf. Though in respect of plaints there is provision for presentation to the court or to the officer, even that is absent with reference to execution applications as provided for in Order 21, rule 11. With reference to suits and appeals by paupers, Order 33, rule 3 and Order 44, rule 1, mention that they have to be presented by the party in person. No such specific manner of presentation is indicated with reference to either plaints or execution petitions. In respect of an execution petition even an oral application can be made, but if it is to be in writing, it must be signed and verified by the applicant and should contain particulars enumerated in clause (2) of Order 21, rule 11.

1. (1936) 71 M.L.J. 604 : I.L.R. 1937 Mad. 320.

In the present case a written execution petition was filed and it cannot be disputed, though it was contested at a late stage that there was nothing to show that at the time of the presentation the party was not present, thereby suggesting that the presentation could have been made by the party, in which case the question of invalidity of presentation would not arise, that the presentation was by Mr. Narasimhachariar who had a vakalat for the decree-holder alone but not a vakalat for the present respondents. The question is whether such presentation is invalid as rendering the execution petition so presented as having no legal effect. Order 3, rule 1, states,

"Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf,"

and rule 4 relates to appointments of pleaders and provides that every appointment should be in writing signed by the party or his agent and that such appointment shall be filed in court. It is therefore contended that Mr. Narasimhachariar was not entitled to act without a written authority, that is, a vakalat, and he was therefore not a person who can be said to represent the party in respect of the act of presentation of the execution petition within the meaning of Order 3, rule 1. The position therefore is that the execution petition was presented by a person who was not duly authorised in writing as required under the procedure laid down and it is for consideration whether such a presentation has invalidated the execution petition and the court has becone incompetent to pass any orders on such presentation.

The Code does not lay down any specific provision with reference to the presentation of an execution petition as already pointed out. But it must be assumed that the presentation of the execution petition or any other proceeding in court must be by the party, in the case of a plaint by the plaintiff or in other cases by the petitioner, and in his absence by a person who is authorised to represent him. It cannot be denied that Mr. Narasimhachariar had the authority from the respondents to act for them, though such authority was not reduced to writing in the shape of a vakalat at the time of the filing of the petition. The provision of Order 3, rule 1, has been introduced in the interests of a plaintiff or petitioner to avoid the practising of any fraud by third parties by seeking to represent persons, though not authorised to do so. Once it is shown, as in this case, that Mr. Narasimhachariar was requested to represent the respondents which could be further supported by the filing of the vakalat by Mr. Narasimhachariar for the respondents subsequently, and due to a *bona fide* mistake that the vakalat was not filed in the first instance which was complied with subsequently before final orders were passed on the execution petition, it cannot be said that the presentation was not proper or illegal going to the root of the validity of the petition. A similar question arose before the Allahabad High Court recently and under almost identical circumstances in the Full Bench case in *Kanayalal* v. *Panchayat Akhera*[1], where it was held that an application for execution which, in all other respects, is in order and which has been admitted and registered by the execution court is not to be considered to have not been "made in accordance with law" merely because it was handed over to the officer of the court by a pleader who had not got a vakalatnama from the decree-holder and that the improper presentation of such an application was, however, not an illegality but a mere irregularity which did not make the application not "made in accordance with law". I am in entire agreement with this conclusion of the Full Bench of the Allahabad High Court. With reference to a similar question which arose, where it was a case of presentation of a plaint and not an execution application, a Special Bench of the Allahabad High Court took a similar view in the case reported in *Wali Mohammad Khan* v. *Ishak Ali*[2]. Sulaiman, Acting C.J., who gave the opinion of the Bench observes as follows at page 511 :

"If the legislature had intended that the absence of the presentation of the plaint by the plaintiff or by some person duly authorised by him would altogether oust the jurisdiction of the court the

1. A.I.R. 1949 All. 367 (F.B.). 2. A.I.R. 1931 All. 507 at 511.

language used would have been definite and specific. Instead of that, section 26 merely provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed, without saying in express terms that the presentation should be by the plaintiff or his duly authorised agent. As there is no specific rule either requiring or expressly authorising the plaintiff to present the plaint, it is doubtful whether Order 3, rule 1, of the Code would apply to such a case. If it does not apply, the presentation by a person orally authorised to do so would be valid. But even, if it does, we are clearly of opinion that the omission to comply with this provision would be a mere irregularity and not an absence of jurisdiction. The court receiving a plaint which has not been properly presented would have jurisdiction to dismiss it and pass orders on it. It would not be acting without jurisdiction if it did so. We do not mean to imply that a plaintiff has the right to get his plaint presented by a man in the street. If the person presenting it was not properly authorised, the presentation would be irregular. The court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence, and it is fair and just to allow the defect to be cured, the court would undoubtedly do so. It is not absolutely helpless in the matter."

There is also a Bench decision of the Bombay High Court in *Hirabai* v. *Bhagirath Ramchandra*[1], which takes a similar view as that of the Allahabad High Court. It was a case of a plaint and it was held that the failure to comply with the provisions relating to the presentation of plaint is a mere irregularity so that if the person presenting it is not properly authorised to do so, the presentation is irregular but does not oust the jurisdiction of the court and that the court would have jurisdiction in such a case to permit the irrgularity to be cured and that the suit must be deemed to have been filed when it was first instituted.

I am in general agreement with the observations of Sulaiman, Ag. C.J., in *Wali Mohammad Khan* v. *Ishak Ali*[2], excepting that it cannot be said that Order 3, rule 1, could not be applicable to the case in question. But, however, I am of opinion that the omission to comply with the provisions is a mere irregularity and does not amount to absence of jurisdiction. There is no contravention of any specific provision of law relating to the filing of the execution petitions as there is nothing in Order 21, rule 11 (2) which requires the petition to be presented by a particular person or in a particular manner. In the absence of such a provision a presentation in the manner as has been done in this case could only be said to be a mere irregularity and would not amount to an absence of jurisdiction or to be in express contravention of law. In this case however, both the courts have very rightly held that there has been a *bona fide* mistake which was subsequently rectified by the presentation of a vakalat. The court finding that there has been a *bona fide* mistake received the vakalat and registered the execution petition. What was a formal defect in procedure was subsequently rectified, and having done so there could be no reason why it should not be held that the execution petition was properly presented on the date when it was presented. Once it is held that the presentation in the circumstances was a formal defect and an irregularity and not an illegality, the fact of the filing of the vakalat on 6th July, 1946, after the period of 12 years provided under section 48, Civil Procedure Code, would not affect the position since the filing of the execution petition having been made within the period of limitation subject to any formal defect had been rectified subsequently, the petition must be held to have been in time. In support of this position reference may be made to the decision of the Privy Council in *Mohini Mohandas* v. *Dungsi Budan Sahadas*[3]. In that case three suits were filed by one of three joint creditors, the others being named as co-plaintiffs with him in the plaints but the plaint was signed by him alone and not by the other two joint creditors and there was nothing to show that the other two creditors repudiated the suits even though it purported to have been on behalf of the three creditors but signed only by one of them. The question was whether the other plaintiffs must be considered to have been plaintiffs, in the circumstances, from the beginning or from the date when certain orders intended to cure the defects were passed. Their Lordships held that the other two plaintiffs became parties to the suits from the time the plaints were filed and that the suits were not barred by lapse of time though by the time the defect was cured limitation had set in so far as the other two plaintiffs were concerned. This appears

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1. I.L.R. 1945 Bom. 819.
2. A.I.R. 1931 All. 507 at 511.
3. (1889) 17 Cal. 580 (P.C.).

to be to be further authority for the position that the mere fact that the absence of signatures and verification of some of the plaintiffs to a plaint where they had a common interest did not affect the jurisdiction of the court and did not render the entire proceeding as illegal, and that they are only defects in procedure which could be rectified subsequently, and did not render the proceeding initially invalid.

The Bench decision of this court in *Sri Sri Sri Nandamani Ananga Bhima Deo* v. *Sri Madano Mohono Deo*[1], is based on different set of facts. In that case the point that arose for decision was whether the decree-holder applied in accordance with law for execution when he filed the execution petition in 1923. The previous execution petition was in 1920 and the subsequent execution petition was in 1925. The question that arose was whether the 1923 petition was made in accordance with law to the proper court for execution within the meaning of Article 179, Limitation Act, corresponding to the present Article 182 (5), Indian Limitation Act. The 1923 execution petition was presented by a pleader who had no vakalat, and therefore, if it was held that that petition was a nullity, the 1925 petition should be barred. But the 1923 execution petition was withdrawn and dismissed. Burn, J., who delivered the judgment of the Bench after referring to Order 3, rule 4, referred to the contentions of the respondent as being that the act of the pleader in presenting the execution petition was a mere nullity and that it was not a question of a defect in the pleader's authority, or a question of an irregularity, or even of an illegality in anything that he did but it was a question of want of capacity to act and agreed with the said contentions of the respondent. With reference to the contention of the appellant in that case, that such execution petitions, having been admitted by the court and action having been taken by the issue of notices to judgment-debtors and adjourning them for several days, could not, after all that has been done, be treated as mere waste paper, or as if they had not been presented at all, the learned Judge observed that that argument would have great force if anything had really been done upon those execution petitions but the end of them was that they were withdrawn and were accordingly dismissed without execution having really taken place. In that case no vakalat was filed before it was withdrawn and dismissed and the court was, therefore, not called upon to consider whether the subsequent filing of the vakalat could have rectified the defect, if any, in the presentation, and the execution petition, having been withdrawn and dismissed and taken off the file without a vakalat and the petition having admittedly been presented by a person who had no authority and finally the same having been withdrawn and dismissed, it could not therefore be said that that execution petition could save the bar of limitation as having been filed in accordance with law under the present Article 182 (5) of the Limitation Act. When the 1925 petition was considered, the 1923 petition had become closed and disposed of as dismissed since it was withdrawn, it being indisputably a petition not properly presented and any impropriety or irrgularity in the presentation not having been rectified and in 1925 such defect was impossible of being cured or rectified. I am, therefore, of opinion that the decision proceeded on a different set of facts though the learned Judges observed that the presentation of the execution petition was a mere nullity. From the other observations of the learned Judges and the fact that no vakalat was subsequently filed to rectify it it cannot be stated that the learned Judges would not have come to a different conclusion if, during the pendency of the 1923 petition, a vakalat was filed and the court accepted it; and it is doubtful whether the learned Judges would still have held that the presentation was a nullity. In that case there was no scope for rectifying, as the petition was closed and the question whether rectification of what ought to have been did not arise. I therefore feel that the decision would not apply to the present case.

I therefore hold that the presentation of the execution petition is valid and execution has rightly been issued by the lower court. The appeal therefore fails and is dismissed with costs. No leave.

V.P.S. —————— *Appeal dismissed.*

1. (1936) 71 M.L.J. 604 : I.L.R. 1937 Mad. 320.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Tripuramallu Venkatappayya and others .. *Appellants**

v.

Vema Venkata Subba Rao and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Final order—Order for attachment made.—Subsequent order recording fact of attachment and striking off of petition—Absence of prayer for sale—Application, if a step-in-aid of execution.

The mere fact that a prayer for attachment asked for in an execution petition has been granted does not automatically involve a dismissal of the execution petition. There must be a judicial order dismissing the execution petition. Hence when a prayer in an execution petition for attachment is ordered on a particular date and on a subsequent date, the Court after recording the fact that the attachment had been effected strikes off the petition, then it is the latter date which is the date on which the final order on the petition is passed.

The omission of a prayer for sale in an execution application is not fatal and even if it did not satisfy the requirements of Order 21, rule 11, Civil Procedure Code, it could be considered as an application to take a step-in-aid of execution.

Appeal against the order of the Court of the Subordinate Judge, Guntur, dated 14th March, 1947, in A. S. No. 4 of 1947, preferred against the order of the District Munsiff Court, Guntur, in E. P. No. 143 of 1946, in O. S. No. 448 of 1933.

Ch. Suryanarayana Rao for Appellants.

G. Venkatarama Sastri for Respondents.

The Court delivered the following

JUDGMENT.—The judgment-debtors are the appellants in this second appeal and the question that arises for consideration is one of limitation. On 11th August, 1934, the District Munsiff of Guntur passed a decree for money in O. S. No. 448 of 1933. The suit was dismissed by the appellate Court in A. S. No. 66 of 1935 on 16th October, 1935. There was a second appeal to this Court (S. A. No. 117 of 1936) in which a decree for a smaller sum than that decreed by the trial Court was passed on 21st April, 1939. The decree-holders filed E. P. No. 528 of 1941 for attachment and sale of the properties which had been given as security in order to avert an attachment before judgment prayed for by the plaintiffs. That "execution petition" was ordered by the District Munsiff; but dismissed on appeal on the ground that the security enured only for the decree that was passed by the trial Court. There was a further appeal to this Court in C. M. S. A. No. 137 of 1944 and this Court affirmed the decree of the appellate Court on 14th July, 1944. The next execution petition which is really material to the present case was E. P. No. 65 of 1943 filed on 19th January, 1943, for attachment of certain house property. There was no prayer in the execution petition for sale of the property sought to be attached. On 23rd January, 1943, the Court passed an order for attachment and after the attachment had been effected by the Amin, the execution petition came on for orders before the Court on 16th February, 1943. The Court after recording the fact that the attachment had been effected struck off E. P. No. 65 of 1943. E. P. No. 143 of 1946 from which this civil miscellaneous second appeal has arisen was filed on 16th February, 1946, and the judgment-debtors raised the objection that the execution petition was barred by limitation under Article 182 of the Limitation Act. The question therefore is whether the order dated 16th February, 1943, passed on E. P. No. 65 of 1943 would serve to save limitation under Article 182, clause (5) of the Limitation Act.

I am of the opinion that the order is effective to save limitation for E. P. No. 143 of 1946. I am unable to accept Mr. Sundaram's contention that E. P. No. 65 of 1943 must be deemed to have been disposed of on 23rd January, 1943, when the Court ordered attachment. The mere order for attachment does not satisfy a decree-holder. The property must be actually attached and the attachment must

* A.A.A.O. No. 93 of 1948. 27th March, 1950.

be formally recorded by the Court by an order in the execution petition. This was done on 16th February, 1943. The mere fact that a prayer asked for in an execution petition has been granted does not automatically involve a dismissal of the execution petition. There must be a judicial order dismissing the execution petition, See *Rajah of Karvetnagar* v. *Venkatareddi*[1]. That order was passed in the present case on 16th February, 1943. Therefore, the present execution petition is in time.

With reference to Mr. Sundaram's further contention that E. P. No. 65 of 1943 was not an application in accordance with law, it must be observed that the execution petition was filed and numbered by the Court as a proper execution petition and the prayer for attachment was a legitimate mode of execution. The omission of a prayer for sale is not fatal, for there may be cases where a sale of the property attached could not be ordered. Even if E. P. No. 65 of 1943 did not satisfy the requirements of Order 21, rule 11, Civil Procedure Code, still, it could be considered as an application to take a step-in-aid of execution and the order passed on 16th February, 1943 can be considered as a final order passed on such application. For these reasons, I hold that E. P. No. 143 of 1946 was in time and that the decision of the Courts below is correct.

The civil miscellaneous second appeal is dismissed with costs.

(No leave).

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Murugesa Mudaliar .. *Appellant**

v.

Gopalakrishna Mudaliar .. *Respondent.*

Evidence Act (*I of* 1872), *section* 68—*Signature of scribe—When can be regarded as attestation.*

The signature of a scribe may itself in certain circumstances be regarded as an attestation which stands duly proved by his evidence. The decision in *Paramasiva Udayan* v. *Krishna Padayachi*, (1917) I.L.R. 41 Mad. 535, stands unaffected by the decision of the Judicial Committee in *Sarkar Barnard & Co.* v. *Alak Manjary Kuari*, A.I.R. 1925 P.C. 89. It is a question in each case which turns upon its own circumstances whether a scribe can or cannot be regarded as an attesting witness. A scribe may be an attesting witness as well as the writer. But the fact that he signed as an attesting witness must be duly proved.

Appeal against the decree of the District Court, Chingleput in A. S. No. 164 of 1946, preferred against the decree of the Court of the Subordinate Judge, Chingleput, in O. S. No. 21 of 1944.

S. Thyagaraja Aiyar for *S. Ramachandra Aiyar* for Appellant.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—In a neat, concise and pointed argument Mr. Thyagaraja Ayyar has taken three points in this case, with which I shall presently deal. It is necessary, however, for me to set forth a few facts before I actually deal with those points.

The suit out of which this second appeal arises was instituted for the cancellation of a certain order made on an application for re-delivery by the plaintiff. The circumstances in which the application for re-delivery was made are these. The present defendant, appellant before me, is the auction purchaser in execution of a certain decree by a third party against one Kumaraswami Mudali. The purchase was in September, 1942, and the Court delivery pursuant thereto was in October, 1942. The present plaintiff applied for re-delivery on the ground that his younger brother Selvaraja Mudaliar had a usufructuary mortgage,

1. (1915) 29 M.L.J. 96 : I.L.R. 39 Mad. 570.

* S.A. No. 841 of 1948. 22nd March, 1950.

Exhibit P-1, of the year 1936, from Kumaraswami and that there was later, in the year 1940, a release by him of the mortgage right in the plaintiff's favour. The application was dismissed and the present suit was filed for setting aside the order of dismissal. The case of the defendant, it may be stated, is that the usufructuary mortgage in favour of the plaintiff's younger brother was a sham and nominal document. This plea was rejected by the Courts below and the suit has been decreed.

The first point raised is that although the concurrent finding of fact of the Courts below is that the usufructuary mortgage in favour of the plaintiff's younger brother is a real and not a sham document, the finding of the lower appellate Court suffers from the infirmity that it does not deal with a particular point of detail, which the trial Court found in regard to Exhibit P-5, *viz.*, that although it was not a fabrication, it was an ante-dated document. This Exhibit P-5 is a letter passed by Kumaraswami to the plaintiff's younger brother Selvaraj which states that the usufructuary mortgage, Exhibit P-1 is a real document. Exhibit P-5 bears the same date as Exhibit D-1 which is a letter by Selvaraj in favour of Kumaraswami to the effect that the usufructuary mortgage was a nominal document. The Courts below had to choose between Exhibit D-1 and Exhibit P-5 and pronounce upon the reality or otherwise of the usufructuary mortgage. There was other material too which the Courts below had to consider for the purpose of their conclusion on the question whether the usufructuary mortgage was a sham or a real document. In spite of the fact that the question whether Exhibit P-5 is, or is not, an ante-dated document, has not been quite explicitly considered by the lower appellate Court, I am satisfied that there is really no ground made out for interference with the finding of the lower appellate Court that Exhibit P-5 is a real document. After all, the presumption is that a document was executed on the date which it bears and I must take it that the lower appellate Court was not satisfied that the presumption in law to that effect in any way stood displaced in the present case.

The next point urged by Mr. Thyagaraja Aiyar is that the usufructuary mortgage, which is a document required by law to be attested, cannot be used as evidence in the present case because there has been no compliance with the requirement of section 68 of the Indian Evidence Act. The document is attested by two persons —one Raman Nair and one Singaravelu. In regard to these two persons what the appellate Judge finds is that nobody knows where the one man is and so far as the other is concerned he was summoned as a witness by the plaintiff but did not appear in pursuance of the witness summons. The Courts below seem to have therefore thought that under section 69 of the Indian Evidence Act, if there was evidence about the handwriting of the attestation of the attesting witness or witnesses that would be quite sufficient proof of the mortgage document. So, says the learned appellate Judge in paragraph 14 of his judgment :

> "the execution of Exhibit P-1 has been spoken to by Selvaraj examined as P.W. 1. He deposed that Kumaraswami Mudali executed it and that witnesses duly attested it. No questions were put in cross-examination to P.W. 1 about this matter. P.W. 2 is a document writer who wrote Exhibit P-1. He deposed that he wrote it; that witnesses duly attested it and that he also witnessed the execution. The only question put in cross-examination to him about this matter was that he has not signed Exhibit P-1 as an attestor but signed it only as the scribe."

I am not satisfied that the view taken by the Courts below in regard to this aspect of the matter is erroneous. I consider that although in terms neither P. W. 1, nor P. W. 2 has stated that each particular attestation on Exhibit P-1 is in the handwriting of the particular attestor, that is substantially the gist of their evidence which the Courts below were entitled to accept as such.

Another interesting point has been raised by Mr. Thyagaraja Aiyar and that is that the ruling in *Paramasiva Udayan* v. *Krishna Padayachi*[1] on which the lower appellate Court has relied for holding that the signature of the scribe P. W. 2 may itself be regarded as an attestation which stands duly proved by his evidence in the box, stands overruled by the decision of the Privy Council in *Sarkar Barnard*

1. (1917) I.L.R. 41 Mad. 535.

& Co. v. *Alak Manjary Kuari*[1]. There the Judicial Committee summarily dismissed, as altogether hopeless, without itself discussing the merits, an appeal from a decision of the High Court of Patna which raised the question, whether a person who puts his signature to a mortgage deed, not in the capacity of a witness but only as signifying his approval of the transaction, is, or is not, an attesting witness. In the judgment of the High Court against which the appeal to the Privy Council was so dismissed, it is stated that a person whose name appears on the deed merely as a scribe is not such a witness as is required by section 59 of the Transfer of Property Act although he might have actually seen the deed executed. It is also stated that it was impossible to distinguish the case of a person who puts his signature with a view to signifying his approval of the transaction evidenced by the deed from the case of a scribe who signs the document after seeing its execution by the executant. On the strength of these observations, it is contended by Mr. Thyagaraja Aiyar that the ruling of this Court in *Paramasiva Udayan* v. *Krishna Padayachi*[2] that in all such cases the real question is whether the scribe was also in fact a witness to the execution of the document is erroneous. I am not satisfied that this argument is sound. The ruling of this Court in *Paramasiva Udayan* v. *Krishna Padayachi*[2] as well as the Privy Council ruling in *Sarkar Barnard & Co.* v. *Alak Manjary Kuari*[1] are both referred to in Mullah's Commentary on the Transfer of Property Act, third edition at page 19 side by side with each other in the foot-notes in a passage which I may here quote. Says the learned commentator :

> "It is also necessary that the attesting witness should have signed for the purpose of authenticating the signature of the executant, and not as a scribe or as a person merely indicating his consent to the transaction. A scribe, however, may perform a dual role. He may be an attesting witness as well as the writer. The fact that he signed as an attesting witness must be properly proved."

I am of opinion therefore that the soundness of the ruling in *Paramasiva Udayan* v. *Krishna Padayachi*[2] stand unaffected by the decision of the Judicial Committee in *Sarkar Barnard & Co.* v. *Alak Manjary Kuari*[1]. It is a question in each case which turns upon its own circumstances whether a scribe can, or cannot be, regarded as an attesting witness. In the result this second appeal fails and is dismissed with costs.

(Leave to appeal is refused.)

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Venkayalapati Kotaiah of Narasaraopet .. *Appellant.**

Criminal trial—Extra-judicial confessions—When can be acted upon.

The grounds of rejection as well as reception of extra-judicial confessions in evidence are well marked ; if confessions constitute the best evidence as a person may be reasonably assumed not to admit facts detrimental to his interests, they may also retard the progress of justice as there is ample scope for abuse in the hands of unscrupulous witnesses, over-zealous officers of state, and, in exceptional cases of the accused themselves, dominated by the idea of self-immolation actuated by design or hallucination or even mental defect. It is therefore a question of fact in each case, and it is for the jury or judge as the case may be, to find out whether such a confession is voluntary or induced by any of the aforesaid reasons. It cannot be laid down as an inflexible rule of law that in no case an extra-judicial confession will afford the sole basis of conviction. But in cases of homicide and such other similar grave offences it would not be safe to convict a person on the confession alone unless corroborated by other evidence ; but then it is a rule of prudence rather than of law.

Appeal against the order of the Court of Session of the Guntur Division in Case No. 41 of the Calendar for 1949.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Accused.

The Assistant Public Prosecutor (*S. Govind Swaminathan*) for the State.

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1. A.I.R. 1925 P.C. 89.
2. (1917) I.L.R. 41 Mad. 535.

* Crl. Appeal No. 828 of 1949. 18th April, 1950.

The Judgment of the Court was delivered by

Subba Rao, J.—The Sessions Judge of Guntur convicted the accused under section 302 of the Indian Penal Code and sentenced him to transportation for life. The corpse of Sayammal, the wife of the accused, was found at 12 noon on 1st June, 1949, on a cot in the shed belonging to the accused. There were as many as ten injuries on the neck and hand of the deceased. The doctor who conducted the autopsy issued a *post mortem* certificate which disclosed that the deceased died of shock and hæmorrhage due to the multiple injuries inflicted on the deceased with an axe like M. O. 1. As P. W. 1 he opined that death must have been caused five hours before the commencement of the *post mortem* examination which he did at 4-45 P.M., that is, according to his view the deceased must have died at or about 12 noon.

There is some evidence in this case which establishes a powerful motive for the offence. P. W. 10 is residing in a house beyond two houses of the accused. A few days prior to the incident, at midnight, she saw one person entering the accused's house and she informed the same to one Pulliah, her neighbour. Pulliah, as P. W. 11, deposed that, on being informed of the said fact, he told the same to one Ramaniah, Venkataramiah and others, that when they called the accused, his wife, *i.e.*, the deceased, told them that a man known to her had come and that when they caught the person who had entered the house and was trying to run away, the deceased interceded and asked them to leave the man. He further stated that the name of the man was Hanumantha Rao and that he informed that fact to the accused. Venkataramiah, as P. W. 12, corroborates P. W. 11 in regard to this incident. Ramaniah, as P. W. 13, further stated that the deceased and the accused's mother abused them for catching hold of Hanumantha Rao. The fact that a stranger entered the house of the accused at midnight, that P. Ws. 11, 12 and 13 caught him and left him off as the deceased and the accused's mother interceded, and that that fact was intimated to the accused would afford sufficient basis for a deep-rooted suspicion in the mind of the accused about the character of his wife.

P. Ws. 3, 4, 5 and 7 say that, after the murder of Sayammal the accused stood at his threshold at about 12 o'clock, and said that he had killed his wife. P. W. 3 lives in the same street as that of the accused. P. W. 4 is a neighbour; P. W. 5 lives in the next street of the accused and P. W. 7 lives opposite to the accused's house. We have carefully gone through their evidence, and nothing has been elicited in the cross-examination which in any way detracts from their veracity. Indeed, P. W. 7, a man aged 70 years goes a little further and says that he saw the accused entering the cattle shed and that after a few minutes he came to the threshold and said that he killed his wife and that he must be saved. But, in the cross-examination he admits that he told the police that he came out of his house after hearing the alarm. We may therefore ignore the statement that this witness saw the accused entering his cattle shed prior to the murder. These witnesses also say that, when they saw him at the threshold, there was blood on his hand, shirt and *dhoti*.

The accused also made a confession (Exhibit P-2) to the village munsiff on 1st June, 1949, at 12-30 implicating himself in the murder.

The learned Sessions Judge, on a consideration of the evidence, held that that statement was made after the accused was taken into the custody by the Head Constable and that therefore it was not admissible in evidence. For the same reason we also ignore that statement. But the Sessions Judge, having regard to the other evidence in the case, held that the accused committed the murder.

In appeal the learned counsel for the appellant, Mr. K. S. Jayarama Ayyar, contended that the conviction was based only on an extra-judicial confession, not corroborated by any other relevant evidence and that therefore the conviction was bad.

Though the law in respect of extra-judicial confessions appears to be well settled, curiously enough there is not a single reported decision of this Court in the long history of criminal justice. Therefore, it would be convenient at this stage to consider the law on the subject.

Greenleaf in his Treatise on the Law of Evidence (1883), Part 1, 14th Edition at page 279, states :

"Whether *extra-judicial confessions uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner, has been gravely doubted. In the Roman law, such naked confessions amounted only to a *semiplena probatio* upon which alone no judgment could be founded ; and at most, the party could only in proper cases be put to the torture . . . . . In each of the English cases usually cited in favour of the sufficiency of this evidence, there was some corroborating circumstance. In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction ; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law."

The learned author in Wigmore on A Treatise on the System of Evidence in Trial at Common Law, Vol. III (1904), at page 2070, states the rules obtaining in England and in America in the following manner :—

2070. (1) English Rule :—

"Whether the uncorroborated confession of the accused in a criminal case is alone sufficient to support a conviction is a question which for more than a hundred years has been culpably left unsettled in English law. Frequent opportunities were presented for settling it, but they were not improved ; and the law was left in an unfortunate state of obscurity, subject to much difference of opinion.

The proposed rule appeared in two variations ; by one, the corroborative evidence might be of any sort whatever ; by the other, it must specifically relate to the *corpus delicti, i.e.*, the fact of injury. The latter form tended to prevail ; but in neither form did the rule obtain a general footing. So far it can be supposed to obtain at all to-day in the English and Irish Courts, it is apparently restricted to the case of homicide."

2071. (2) Rule in the United States :

"The conflicting state of the English rulings left it open to the different courts of this country to choose which rule they might please. Except in a few jurisdictions where no final settlement has been reached, they seem to have preferred wherever the question has come up for decision, to adopt the fixed rule that corroboration was necessary—chiefly moved, in all probability, by Professor Greenleaf's suggestion that 'this opinion certainly best accords with the humanity of the criminal code and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases'.

In a few jurisdictions the rule is properly not limited to evidence concerning the *corpus delicti* ; *i.e.*, the corroborating facts may be of any sort whatever, provided only that they tend to produce a confidence in the truth of the confession . . . . . .

But in most jurisdictions the stricter form of rule is taken, and the evidence must concern the *corpus delicti* ;"

Russell, in his Treatise on Crimes and Misdemeanors of 1909, VII Edition, Vol. II at page 2156 expressed the *statement of the law* in the following terms :

"An extra-judicial confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroboration *aliunde* in the case of most crimes ; but such a confession is not, as a rule, accepted by itself in cases of murder or bigamy, or offences involving title to property, all of which may involve mixed questions of law and fact . . . ."

Again, at page 2157 :

"A confession, to be admissible, must be free and voluntary ; that is, must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence by persons in authority, because under such circumstances, the party may have been influenced to say what is not true."

In Roscoe's Digest of the Law of Evidence and Practice in Criminal Cases of 1921, 14th Edition at page 37 the learned author states the *scope* of extra-judicial confessions in the following manner :

"Whether extra-judicial confessions . . . . . uncorroborated by any other proof of the *corpus delicti* are of themselves in general sufficient whereon to justify a conviction, has been the subject of grave doubt.

But perhaps the true rule is that: 'An extra-judicial confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction without any corroboration *aliunde* in the case of most crimes, but such a confession is not as a rule, accepted by itself in cases of murder, or bigamy or offences involving title to property, all of which may involve mixed questions of law and fact'."

Phipson on the Law of Evidence, 1942, 8th Edition, at page 249 expressed the same rule as follows:

"A confession duly made and satisfactorily proved is, in general, sufficient to warrant a conviction without corroboration. But this general rule has been thought not to apply to confessions of murder."

Coming to the case-law on the subject, a passage from the judgment of Fitzgerald, J., in *R.* v. *Unkles*[1], may usefully be extracted:

"The rule is rather one of judicial practice than part of the law of evidence . . . . . It would perhaps at present be more correct to define it thus, that a party accused of homicide ought not to be convicted on his own confession merely, without proof of the finding of the dead body or evidence *aliunde* that the party alleged to have been murdered is in fact dead."

In *Nazir Jharudar* v. *The Emperor*[2], the learned Judges say:

"As has often been said, where a case is dependent upon circumstantial evidence, we often find a confession to bolster up that circumstantial evidence."

It is no doubt true that this caution must be borne in mind in appreciating the evidence in each case.

In *Harold White* v. *The King*[3], the Judicial Committee also administered a similar caution in appreciating evidence in regard to confessions; their Lordships say:

"Confessions are not always true, and they must be checked, more particularly in murder cases, in the light of the evidence on record to see if they carry conviction. It would be dangerous in the extreme to act on confessions put into the mouth of the accused by a witness with a strong motive for implicating some one else in the murder and uncorroborated from any other source."

These observations were made having regard to the facts of the particular case before the Judicial Committee, and they cannot be understood to have laid down an inflexible rule of law that convictions should not be made on uncorroborated confessions.

In *Brahmayya* v. *King*[4], we had occasion to deal with a retracted judicial confession, and we held, having regard to the facts of that case, that a conviction can be based on a retracted confession without corroboration if the reasons given by the accused for withdrawing from the confession are palpably false. We also expressed the view that, as a rule of prudence, it is generally unsafe to convict a person on a retracted confession alone.

Having regard to the aforesaid opinions of the learned authors and the case-law on the subject, the law in regard to extra-judicial confessions may be stated thus. The grounds of rejection as well as of the reception of confessions in evidence are well marked; if confessions constitute best evidence, as a person may reasonably be assumed not to admit facts detrimental to his interests, they may also retard the progress of justice as there is ample scope for abuse in the hands of unscrupulous witnesses over-zealous officers of state, and, in exceptional cases, of the accused themselves, dominated by the idea of self-immolation actuated by design or hallucination or even mental defect. It is therefore a question of fact in each case, and it is for the Jury or the Judge, as the case may be, to find out whether such a confession is voluntary or induced by any of the aforesaid reasons. Though we cannot lay down as an inflexible rule of law that in no case an extra-judicial confession will afford the sole basis for conviction we are of the opinion that in the case of homicide and such other similar grave offences it would not be safe to convict a person on the confession alone unless corroborated by other evidence. This is a rule of prudence rather than of law. The nature and the quality of corroborative evidence must again necessarily depend upon the facts of each case.

We shall now proceed to apply the aforesaid principles to the facts of this case. On a careful scrutiny of the evidence the following facts emerge:

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1. Ir. Re. 8 C.L. 50, 58.
2. (1905) 9 C.W.N. 474 at 477.
3. (1945) M.W.N. 560.
4. (1949) 1 M.L.J. 386.

(1) The incident in the night a few days prior to the murder discloses a sufficient motive for the crime.

(2) The dead body was found covered with wounds and smeared with blood, on a cot in the shed belonging to the accused and the bloodstained axe was lying near by.

(3) The medical evidence approximately fixes the offence at about 12 noon.

(4) At or about that time the accused stood on the threshold of his house and said that he had killed his wife, within the hearing of the witnesses.

(5) There was blood on his hands, shirt and *dhoti*.

(6) Only in the Sessions Court the accused made an attempt to explain the blood stains on his body by stating that he wept over his wife's body. The explanation to our mind appears to be an afterthought; and does not carry conviction.

On these facts the extra-judicial confession made by the accused is amply supported by corroborative evidence not only of the *corpus delicti* but also by the other facts stated above. Further, the statement of the accused standing on the threshold of his house and crying out that he killed his wife may also be relied upon as a piece of circumstantial evidence. The accused who loved his wife, killed her with an axe because of his own overpowering suspicion of her unchastity when she was lying on a cot in his shed, threw the axe near the cot, and came out with bloodstained clothes and, in a fit of agony and penitence, proclaimed that he had killed his wife. His conduct soon after the murder, *viz.*, standing at the threshold smeared with blood and proclaiming his offence is really an important piece of circumstantial evidence which the lower Court was certainly right in taking into consideration in convicting the accused.

We therefore hold that there is sufficient legal evidence for convicting the accused. The conviction and sentence are confirmed and the appeal is dismissed.

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Padma Bivi Ammal .. *Petitioner**

v.

J. M. Mohammad Mohideen Rowther and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (IV-A)—Suit for partition—Plaintiff's case that certain releases are void or in the alternative voidable—Plaintiff must seek to set them aside and pay adequate court-fee.

In a suit for partition, the plaintiff put forward his case in the plaint that two documents purporting to be deeds releasing her rights in the suit properties, were forged and therefore void and in the alternative that they were vitiated by fraud, misrepresentation and undue influence.

Held: In view of the alternative plea, the plaintiff must seek to set aside the alleged release deeds and the plaintiff, before she can get rid of the documents must pay the appropriate court-fee for their cancellation. The recital in the deeds that money had been received does not 'secure' any money to the plaintiff and the analogy for lien of purchase money does not apply as such lien is conferred by statute and does not flow from the document. The phrase in section 7 (IV-A) 'documents securing money or other property having such value' includes sales and also release deeds.

Sodanna v. *Krishnamurthi*, A.I.R. 1938 Mad. 824, followed.

Petitions under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge, Tanjore, dated 31st August, 1949, in O. S. Nos. 10 and 11 of 1949, respectively.

G. R. Jagadisan for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *G. Jagadisa Aiyar* for Respondents.

* C.R.P. Nos. 1306 and 1307 of 1949. 25th February, 1950.

The Court delivered the following

JUDGMENT.—The plaintiff in O. S. Nos. 10 and 11 of 1949 on the file of the Sub-Court, West Tanjore, is the petitioner in both these cases. The question for determination in both these petitions is the same and therefore they may be dealt with together.

The plaintiff is a Muslim lady. Two of her sons, Mohamed Ismail and Mohamed Ibrahim, died some time before the suits were filed. She sued for partition of her one-sixth share in the properties of her deceased sons. On 4th January, 1946, two documents had come into existence, under which for a consideration expressed in those documents to be Rs. 5,000 the plaintiff released her rights in the properties of her sons in favour of some of the defendants in the suits. It is obvious that if these documents are valid and binding on the plaintiff her suits must fail. The plaintiff's case in respect of these release deeds is set out in paragraphs 4 to 7 of the plaint. Therein the plaintiff alleged that her son, Abdul Aziz, took her mark in two documents, of the contents of which she was apprised. Abdul Aziz told her that some documents were required, in order that she might not be put to the inconvenience of attending public offices and Courts in connection with the management of the estate of her deceased sons,—the suggestion thus far being, apparently that she was executing some power of attorney. But actually undue advantage was taken of the possession of these documents and the alleged release deed brought into existence. Thus far the case of the plaintiff would be a simple one and in substance to the effect that these documents were really forged ones. Under section 464, Indian Penal Code, a person is said to make a false document who dishonestly or fraudulently causes any person to execute a document, knowing that such person by reason of deception practised upon him does not know the contents of the document. Whether we read the averments of the plaintiff as amounting to an allegation that her mark was taken to blank pieces of paper, on which these release deeds were subsequently engrossed, or, whether her mark was taken to documents already written up, she being told that they were some other kind of documents, in either case, the documents would be void, and the plaintiff would be entitled to ignore them and ask for partition. In the plaint, however, there are certain other allegations which suggest that the case of the plaintiff is not merely one of fraud making the documents void but something more or something in the alternative. The allegations in this regard are not all set out consecutively being spread over a number of paragraphs; but, when read together, they do definitely suggest that the plaintiff was putting forward an additional or alternative case, namely, that the documents were vitiated by undue influence and that therefore they are voidable. Thus in paragraph 4 we find:

"The plaintiff now understands that he had taken undue advantage of it and practised *undue influence and fraud* and brought about the alleged release deeds . . . ."

Again, in paragraph 5:

"The plaintiff is a purdanashin woman unable to read or write or even sign her name. She was very old and advanced in age, being 75 years old at that time . . . . . She had no independent advice. She was then immersed in grief at the death of her two sons abovenamed in quick succession and consequently she was in a very weak state of mind and health . . . . . . She was not a free agent in the alleged execution of the documents above referred to . . . ."

Finally in paragraph 7:

"The plaintiff submits that the said deed was really not executed by her or with *her free consent* and knowledge and that it had been obtained from her by misrepresentation and fraud, and is of no effect."

The language used is reminiscent of and was very probably suggested by several decisions of the Judicial Committee and would have been wholly out of place unless at the back of the plaintiff's mind there was the intention to put forward an alternative case, of undue influence. If a document is impeached on the ground of undue influence, it would be not wholly void, but only voidable, and the plaintiff, before she can get rid of it, must pay the appropriate Court-fee for its cancellation.

This makes it necessary for me to refer to some of the other points raised by Mr. Jagadisa Aiyar. In these two "release deeds," it was alleged that the plaintiff had received a sum of Rs. 5,000 for giving up her rights in the properties of her sons. We must therefore, argued Mr. Jagadisa Aiyar, read these documents as "securing" a sum of Rs. 5,000 to the plaintiff within the meaning of section 7 (iv-A) of the Court-Fees Act. He sought to reinforce this argument by way of analogy to a vendor's lien for unpaid purchase money. A sale deed may recite that a certain consideration had been received. If, nevertheless, it is established that no consideration was actually paid, it will be open to the vendor to enforce his (vendor's) lien. In that light, a sale deed can be treated as "securing" the sale price to the vendor; similarly, the release deeds in this particular case may be treated as "securing" a sum of Rs. 5,000 to the plaintiff. I do not consider that the reasoning of Mr. Jagadisa Aiyar is sound. What are called release deeds in this case do not "secure" the sum of Rs. 5,000 in any sense in which that word is understood. There is a recital in the deeds that the money had been received. The recital may be true, or it may be false; but that recital does not "secure" any money to the plaintiff. Nor does the analogy of a lien for unpaid purchase money really apply. That lien is conferred by statute and does not flow from the document.

The second argument of Mr. Jagadisa Aiyar is that section 7 (iv-A) would apply only where a person is a party to a document and that when the allegation is that he had been really deceived into affixing his signature to the document, he cannot be really treated as a party to the document and that therefore he is not bound to seek it to be set aside. He referred to the decision in *Raja Singh* v. *Chaichoo Singh*[1], where it is pointed out that there is no real execution of a document unless the mind goes with the hand that affixed the signature. In other words, before a document can be said to have been executed, it is not sufficient to show that a particular person affixed his signature. It must also appear that he signed it, knowing that he was signing that particular document and intending to do so. In the present case, according to the allegations in the plaints, it would not be right to say that the plaintiff put her mark to these documents, knowing them to be release deeds. In this view of the matter, argued Mr. Jagadisa Aiyar, she cannot be asked to pay court-fee for its cancellation. This argument would have been sound, if the allegations in the plaint had been confined to the plea of fraud and deception making the plea in effect a plea that the documents were forgeries. But as already stated, there is an alternative case set out in the plaint, namely, that the document is voidable.

The last argument of Mr. Jagadisa Aiyar amounts to this. The documents purport to be release deeds and it would not be right to treat them as documents "securing" property, having a money value, so as to make applicable sub-paragraph (2) of section 7 (iv-A) which provides that the value for purposes of court-fee shall be deemed to be the value of the property in respect of which the document was executed. It is true as has been pointed out in earlier cases that the phrase "documents securing money or other property having such value" is not a happy one. But it is clear that this phrase has been held to include sales and also release deeds (see *Sodemma* v. *Krishnamurti*[2]), where the learned Judge states as follows:

> "It seems to me that the document which is sought to be set aside must of itself have secured the property, that is, there must have been a conveyance of the said property or a release of rights thereunder which would operate as an extinguishment of the right of the person conveying or releasing."

It is now too late to seek to alter the meaning in which that phrase has so far been understood.

In the result, both the civil revision petitions are dismissed with costs (one set in C. R. P. No. 1306 of 1949 only.)

Time for the payment of court-fee: two months from the date of the receipt of records.

V.P.S. — *Petitions dismissed.*

1. A.I.R. 1940 Pat. 201. 2. A.I.R. 1938 Mad. 824.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

Payingatan Chappan and others .. *Appellants**

v.

Kelu and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), section 33—'Suit for eviction'—Meaning of—Benefit of the right to purchase Kudiyiruppu—If available to a sub-tenant.

The expression 'suit for eviction' in section 33 of the Malabar Tenancy Act, must be controlled by reference to the general scheme of the Act as appearing in sections 14 and 20 of the Act. So construed in conformity with the rest of the provisions of the Act and under general law, suits for redemption of an othi cannot ordinarily be treated as suits for eviction or recovery of possession.

Section 33 when it speaks of suits for eviction contemplates a suit of the kind referred to in sections 14 and 20 of the Act and as such a suit is between the tenant and his immediate landlord, the benefit conferred by section 33 must be confined to the tenant who is sought to be evicted in a suit for eviction and cannot be extended to a sub-tenant of the tenant. The tenant in the context can only refer to an immediate tenant of a landlord.

Hence, in a suit by jenmi for redemption of a Malabar othi, a tenant of the othidar (even though he might satisfy the definition of 'tenant' under the Act) cannot apply under section 33 of the Act for purchasing the kudiyiruppu in which he has been residing for the requisite period.

Appeal against the decree of the District Court of North Malabar in A. S. No. 91 of 1946, presented against the decree of the Court of the District Munsiff of Payyoli in O. S. No. 57 of 1945.

S. Venkatachala Sastri for Appellants.

A. Achuthan Nambiar and *V. P. Gopalan Nambiar* for Respondents.

The Court delivered the following

JUDGMENTS: *Satyanarayana Rao, J.*—Defendants 1, 2, 3, 5 and 6 are the appellants in this second appeal. This second appeal raises an important and interesting question under the Malabar Tenancy Act, 1929 (Act XIV of 1930). The suit out of which this second appeal arises was instituted for redemption of an othi (usufructuary mortgage), and for recovery of possession of the plaint scheduled properties, which consists of two items, on payment of the othi amount of Rs. 50 and the value of the improvements after making certain other deductions which are not very material. The document on which the suit was based is Exhibit P-1 an othi marupat dated 15th January, 1921, executed by one Kannan, a predecessor of the first defendant, in favour of Chandu, a predecessor of the plaintiff. Defendants 2, 3 and 6 were impleaded as persons who were in actual possession of the items. Defendants 2 and 6 obtained a sub-lease from the first defendant of item 1 and the third defendant a sub-lease from the first defendant of item 2. The principal question apart from the question of the valuation of the improvements claimed by the defendants related to the right of the sub-lessees defendants 2, 3 and 6 to purchase kudiyiruppu under section 33 of the Malabar Tenancy Act. Defendants 2 and 6 applied in the suit R. I. A. No. 2154 of 1945, claiming benefit of section 33 of the Act and the third defendant made a similar application R. I. A. No. 2384 of 1945, for purchasing the kudiyiruppu in item 2 of the plaint schedule. The applications were resisted by the plaintiff on the ground that the Act had no application to the suit, as it was a suit for redemption of an othi and not a suit for eviction, and secondly the relationship created by the document Exhibit P-1 between the plaintiff and the defendant was not that of a landlord and tenant but that of a mortgagor and mortgagee. These two contentions of the plaintiff were upheld by the trial Court and the learned District Munsiff decreed the suit for redemption of the othi in favour of the plaintiff on payment of the othi amount of Rs. 50 and also the value of the improvements as determined by him under issue 3. Against this decision there was an appeal by the unsuccessful defendants to the District

*S.A. No. 676 of 1947. 8th February, 1950.

Court of North Malabar. The District Court substantially agreed with the view of the District Munsiff and confirmed his decision. Hence this second appeal.

The only question, therefore, that arises for determination is whether the defendants 2 and 6 and the third defendant are entitled to claim under section 33 of the Act to purchase the rights in the kudiyiruppu by paying the market price of the land.

The view of the Courts below, that Exhibit P-1 created only a relationship of a mortgagor and mortgagee between the plaintiff and the first defendant and that therefore the defendants were not tenants cannot be accepted. The definition of a "tenant" in section 3 (*b*) of the Act includes an intermediary also within it. It reads as follows:

> "Tenant means any person who has paid or has agreed to pay rent, or other consideration for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanamdar, a kuzhikanamdar and a verumpattamdar of any description."

This definition was considered by the learned Chief Justice and my learned brother in a recent decision in *Govindan Nair* v. *Appukutty*[1]. The question that arose for consideration by the Bench was:

> "Whether an othidar or a usufructuary mortgagee who has in his turn parted with the actual possession of the land to others would be a tenant entitled to the benefit of the provisions of Madras Act XVII of 1946."

Section 2 (*b*) of that Act provides that the expressions "eviction", "holding", "rent" and "tenant", shall in relation to cases governed by the Malabar Tenancy Act, 1929, have the same meaning respectively in that Act. The othi deed which was considered by the learned Judges constituted a relationship of an intermediary within the meaning of the definition even if he was not strictly a tenant and the mortgagor was not strictly a landlord in the sense of a lessor. In view of this decision it must now be held that the relationship that was constituted by this document between the plaintiff and the first defendant was that of a landlord and tenant as defined by the Malabar Tenancy Act, 1929. The opinion to the contrary of the Court below is clearly wrong.

The further question that arises for consideration is if the first defendant is a tenant within the meaning of the Act, are defendants 2, 3 and 6, who are the sub-tenants of the first defendant entitled to the benefit of section 33 of the Act. The contention that has been strongly pressed before us by the learned advocate for the appellants is that the definition of tenant in the Act is wide enough to include even a sub-tenant and therefore, even if defendants 2, 3 and 6 were not immediate tenants of the plaintiff and even if plaintiff is not their immediate landlord, they would be entitled to the benefit of section 33 as the word "tenant" in the section should not be restricted to an immediate tenant of the plaintiff, who is a landlord. In order to understand the scope of section 33 it is necessary to examine the scheme of the Act, as the matter in my opinion, cannot be disposed of by merely looking at the definition of "tenant" under section 3 (*b*) of the Act. In support of the argument our attention was drawn to the various provisions in the Act, where the Act, when it is intended to refer to an immediate landlord expressly stated so, as for example in section 11 and other sections. From this it was argued that as 'tenant' is used in a general sense in the section the claim under the section by a tenant need not necessarily be against his immediate landlord, but it may be even against the landlord of his landlord.

Section 33, which is the first section in Chapter VI relating to kudiyiruppus runs as follows:—

> "In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date."

This right, therefore, of a tenant is available only in a suit for eviction. Eviction is defined in the Act in section 3 (*e*) as meaning:

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1. (1949) 1 M.L.J. 475.

"recovery of possession of land from a tenant and includes the redemption of a kanam."

So that the definition contemplates two classes of suits—suits for recovery of possession of land and suits for redemption of a kanam. This definition indicates that but for the inclusive provision suits for redemption cannot ordinarily be treated as suits for recovery of possession. Apart from this definition it is common knowledge that under the Court-Fees Act a suit for redemption requires payment of court-fee under section 7-d (*ix*) while suits for possession fall under section 7 d (*v*). Under law generally there is a clear distinction between suits for recovery of possession as such and suits for redemption. No doubt, in a suit for redemption, if the amount payable to the mortgagee, as determined by the preliminary decree, is deposited, the mortgagor would be entitled thereafter to recover possession. Notwithstanding this fact suits for redemption are not treated as suits for recovery of possession. Further, as the Act intended to confer the benefits contemplated by it only to certain classes of tenants and not upon others the definition purposely did not include other suits for redemption within the definition of eviction. This can be made clear by comparing the definition of ejectment contained in the Malabar Compensation for Tenants Improvements Act, 1899 (Madras Act I of 1900) with the definition of "eviction" in the Malabar Tenancy Act, 1929. The former Act includes in the definition of "ejectment" redemption or recovery of possession of land mortgaged. So that all suits for redemption whether they are suits for redemption of kanam, othies or other mortgages, are within the definition and the definition of 'tenant' in that Act is also wide enough to include even mortgagees or sub-mortgagees within it, the object of that Act being to confer the benefit of recovering the value of improvements on all tenants. Whether the mortgage was by way of kanam or by othi or in other forms, the tenant is entitled to the benefit of the value of the improvements as provided under that Act. It is therefore difficult to treat the present suit for redemption of an othi as a suit for eviction within the meaning of section 33 of the Act.

Apart from this, in my opinion, more light is thrown upon the class of suits contemplated by section 33 by an examination of the other provisions of the Act where provision is made for eviction under certain contingencies by the landlords of certain classes of tenants. The Act refers to a jenmi, kanamdar, kuzhikanamdar and verumpattamdar cultivating verumpattamdar and customary verumpattamdar. It confers under Chapter III a fixity of tenure upon the cultivating verumpattamdar. (*Vide* section 10). In that Chapter provision is made under section 14 for eviction of the cultivating verumpattamdar from his holding at the instances of *his* landlord but the eviction is confined to grounds specified in the section and to no others. As regards the other tenants the right of the landlord to evict them is conferred by section 20. That section contemplates an eviction of customary verumpattamdar, kuzhikanamdar or kanamdar at the instance of *his* landlord and here again only on specific grounds and on no others. Reading the two sections together the persons against whom suits for eviction can be instituted under the Act are either the cultivating verumpattamdar under section 14 or customary verumpattamdar, kuzhikanamdar, or kanamdar under section 20. But the Legislature is careful enough in these two sections to indicate that such a suit can be instituted only by his landlord, meaning his immediate landlord, so that if the immediate landlord of the kanamdar wants to institute a suit for ejectment of his kanamdar and there are sub-tenants under the kanamdar, he cannot institute a direct suit against the sub-tenants without impleading the kanamdar under whom the sub-tenants have derived title. But if the suit is one for eviction of the kanamdar and the persons who derived title from him, it can only be on the grounds enumerated in section 20 and no others. Similarly, if the landlord wants to institute a suit against his tenant, he can only do so on the grounds mentioned in section 20. So that in all cases of landlords, for eviction of either cultivating verumpattamdar or customary verumpattamdar or kuzhikanamdar or kanamdar, the eviction can only be in one of the modes indicated in the Act and on the grounds specified in it and on no others. The reason is in the case of eviction under section 20 it is open to a tenant in such a suit to apply for a renewal of the lease in

his favour by his landlord and the object of the Act is thus to confer fixity of tenure to that extent upon the other intermediate tenants. As stated already, the fixity of tenure of the cultivating verumpattamdar was recognised by a statutory declaration of that right under section 10 of the Act. Section 26 which has been referred to in the course of the arguments enables the tenant who is in actual possession of the holding and who had obtained a renewal of the lease from his immediate landlord either before the Act or under section 25 (2) of the Act practically to compel, as it were his landlord to obtain a renewal of his lease from his landlord, if his landlord abstains from obtaining the said renewal. Section 43 of the Act is the only section in which, apart from section 26, the rights of the sub-tenant are adverted to in cases where there is a restoration of the rights of the tenant either under section 15 (1) or section 21 (1) of the Act.

The effect of these relevant provisions in my opinion, is to establish that the Act does not contemplate any other mode of eviction of a tenant except on the grounds specified in the Act, and against persons indicated in the sections 14 and 20 of the Act. Section 33 therefore, when it speaks of suits for eviction, contemplates a suit of the kind referred to in section 14 or in section 20 and no others. There is no other mode of eviction of a tenant under the Malabar Tenancy Act except under section 14 and under section 20. Such a suit is between the tenant and his immediate landlord, which is made clear by the languages of sections 14 and 20. Therefore the benefit conferred under section 33 of the Act must be confined to the tenant who is sought to be evicted in a suit for eviction which has been permitted by the Act to be instituted by the immediate landlord of the tenant. The benefit cannot, therefore, extend to a sub-tenant of the tenant as the landlord of the tenant cannot eject the sub-tenant of the tenant directly by a suit instituted against him. The tenant in the context can only refer to a tenant of an immediate landlord. If really section 33 was intended to confer benefit on the sub-tenant as well there is no reason for not making reference to him as it did in section 43. Further the beneficial provisions of the Act are intended to be confined only to certain classes of tenants is clear from sections 21 and 22 which provide that customary verumpattamdar, kanamdar, kuzhikanamdar alone are entitled to apply under the Act for a renewal of a lease. Those are the very persons against whom a suit for eviction lies under section 20. Though from the definition of the word 'tenant' it is possible to contend that it includes also sub-tenants having regard to the fact that the relief can be claimed by a tenant only in a suit for eviction as contemplated by the Act, it must follow that a sub-tenant is not entitled to claim benefit of the provision in section 33 and is not entitled to offer to purchase the right in the kudiyiruppu. Act I of 1900 is wider in its ambit and is intended to confer the benefit of the rights recognised under that Act on tenants such as lessees, sub-lessees, mortgagees, sub-mortgagees and so on. While the Malabar Tenancy Act of 1929 is restricted in its scope and benefits of the provisions of that Act are confined to the verumpattamdar, cultivating verumpattamdar, customary verumpattamdar, kuzhikanamdar, kanamdar, the main advantages conferred under the Act are the fixity of tenure, the restricted right of ejectment and fixation of fair rent so far as those tenants are concerned. Of course a tenant even in a suit for ejectment contemplated by the Act is entitled to take advantage of the provisions of the Act I of 1900. But if he takes advantage of these provisions, it is needless to say, that he is not entitled to invoke the provisions relating to the renewal of lease and other similar advantages. Section 49 of the Malabar Tenancy Act provides that the provisions of the Improvements Act shall apply in all cases of eviction to which this Act applies. The object of this provision, I think, is to give an option to the tenant whether he was taking advantage of the provisions of Improvements Act of 1900 or whether he would have recourse to the beneficial provisions of the Act of 1929.

In my opinion, therefore, from an examination of the scheme underlying the provisions of the Act, the benefits under section 33 do not extend to a sub-tenant.

There is a decision of Happell, J., in *Pottentakath Kunholan* v. *Krishnan*.[1] In that case the question that arose for decision was whether the usufructuary mortgagee from the sub-kanamdar was entitled to the benefits of section 33 of the Malabar Tenancy Act. The applicability of section 33 seems to have been conceded and the only point argued was that the respondents were not tenants as they were usufructuary mortgagees within the meaning of section 58 (*d*) of the Transfer of Property Act, and that such usufructuary mortgagees were not tenants and that the intention of the Legislature was not to include within the definition of a tenant a usufructuary mortgagee and to confer upon him the benefits of section 33 of the Act. In view of the later decision of the learned Chief Justice and my learned brother in *Govindan Nair* v. *Appukutty*[2], the view of Happell, J., seems to be wrong. In order to decide whether any relationship is created in such circumstances, the test need not necessarily be whether the transferee of the mortgagee is liable to pay rent under the deed or not, but *whether* the relationship brought about by the document was not that of an intermediary within the meaning of the statute, as the definition of tenant under section 3 (*v*) of the Act includes expressly an intermediary also. If as the learned Judges held in that case the othidar was an intermediary and therefore a tenant within the meaning of the Act the view of Happell, J., must be deemed to have been overruled by the decision of the Bench.

There is no decided case on the point and we have to consider the question upon the language of the statute and the scheme underlying its provisions. For these reasons I think, the decision of the lower Court that the appellants are not entitled to the benefit of section 33 of the Malabar Tenancy Act is correct and the second appeal fails and is dismissed with costs.

Viswanatha Sastri, J.—The point that arises for our decision in this second appeal is whether in a suit by a jenmi for redemption of a Malabar othi, a tenant of the othidar is entitled to apply under section 33 of the Malabar Tenancy Act, hereinafter referred to as the Act, for purchasing the kudiyiruppu in which he has been residing for the requisite period. In *Pottentakath Kunholan* v. *Krishnan*[1], Happell, J., accepting the concession made by the learned advocate for the landlord in that case held that a sub-tenant was entitled to the benefit of section 33 of the Act. The point, however, has now been fully argued before us by the learned counsel for both sides. I am free to confess that during the course of the arguments my mind oscillated considerably, and I have not reached a confident conclusion though I have settled down to the view that I must agree with my learned brother.

The object of section 33 is to secure to kudiyiruppu holders freedom from eviction by enabling them to purchase the kudiyiruppu. It is no doubt true, as pointed out by the learned advocate for the appellants, that this object would be defeated in many cases if it were to be held that a sub-tenant is not entitled to the benefit of that section. At the same time the section subjects landlords to a compulsory acquisition of their property against their wishes and in this sense it interferes with proprietary rights. But hardship is not a final consideration in a matter of construction and our duty is to see not what the Legislature might in our judgment reasonably have done, but what it has actually done. It is, however, a relevant consideration in a matter of construction that a large number of cases coming within the apparent scope of the enactment should not be denied the relief which the Act gives unless the Court is driven to that conclusion. Not only cases where the subject-matter of the suit is a kudiyiruppu, but also cases where it is part of the subject-matter of a suit for eviction, fall within the ambit and scope of section 33. In suits for eviction against kanam or kuzhikanam tenants or even verumpattamdars it is usual to find one or more persons who are in possession of kudiyiruppus under them impleaded as parties and the kudiyiruppu holder is often the last of a series of tenants, one holding under the other. The question is whether section 33 restricts the right of purchasing the kudiyiruppu to the tenant who holds immediately

1. (1942) 2 M.L.J. 154. 2. (1949) 1 M.L.J. 475.

and directly from the landlord who seeks to evict him. In this case, the kudiyiruppu is sought to be purchased by a tenant of an othidar from the jenmi.

The term 'landlord' as defined in section 3 (o) of the Act means a person under whom a tenant holds and to whom he is liable to pay rent or michavaram. A kanamdar, a sub-kanamdar, a kudiyiruppudar or a verumpattamdar would be a landlord *vis a vis* the tenant holding under him and a jenmi would be the landlord of the kanamdar. The expression 'landlord' is therefore wide enough to include all persons above the last of a series of derivative tenure-holders. The word "Tenant" as defined in section 3 (v) of the Act means any person who has paid or agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter. The definition is very wide and includes not only the tenant holding from and standing in direct relation to a landlord like the kanamdar under a jenmi, but also the tenant of the kanamdar and the sub-tenant of that tenant. We have held that an othidar who had parted with possession to his own tenant would be an intermediary and therefore a tenant. The definition of 'landlord' and 'tenant' is so comprehensive as to include persons besides those standing in direct and immediate relationship of landlord and tenant. A jenmi would be a landlord in relation to a tenant of kanamdar. In respect of property held under a kanam, the "tenant" would include not only the kanamdar but also kuzhikanamdar and verumpattamdar and the tenants holding under them. In Malabar, it is very common to find in respect of a single holding several persons holding under derivative titles as kanamdars, sub-kanamdars, kuzhikanamdars or verumpattamdars. Except the jenmi other persons holding lands are tenants but they may at the same time be landlords so far as persons holding under derivative titles from them are concerned. A kanamdar is a landlord so far as a tenant holding under him is concerned; but he is also expressly included in the term "tenant". Similarly a kuzhikanamdar or non-cultivating verumpattamdar comes within the definition of a 'tenant' in section 3 (v), though he may be a landlord so far as persons holding under him are concerned. To this extent, the argument of the appellant is supported by the definitions of "landlord" and "tenant". 'Evictions' is defined in section 3 (e) as the recovery of possession of land from a tenant and includes the redemption of a kanam. Normally speaking, a suit for eviction is different from a suit for redemption. The word 'eviction' is ordinarily confined to suits by a landlord against his tenant or by a person having title against a trespasser for recovery of possession, and as my learned brother has pointed out, it is apparently in the sense of a suit by a landlord against a tenant that the expression has been understood in the Act. Otherwise, if a suit for eviction was meant to include a suit for redemption, there would have been no necessity to expressly include a suit for the redemption of a kanam within the definition of "eviction". The incidents of a suit for redemption and a suit for eviction vary considerably. In a suit for redemption, apart from the fact that the valuation has to be with reference to the principal amount of the mortgage, accounts between the mortgagor and the mortgagee have to be taken according to the rules prescribed by the contract and statute and relief granted as a result of the taking of such accounts. In an ordinary suit for eviction by a landlord against his tenant, there may be a claim for recovery of arrears of rent; but there is no further liability on the part of the person in possession to render accounts. It is true, as pointed out by the learned advocate for the appellant, that in section 3 (1) of the Malabar Compensation for Tenants' Improvements Act (Act I of 1900), a lessee, sub-lessee, mortgagee and sub-mortgagee are all included in the definition of a 'tenant' and under section 3 (2) of that Act 'ejectment' includes redemption or recovery of possession of the land held on a mortgage. Section 6 of that Act entitles a tenant as defined in that Act to be paid compensation on ejectment. But the wide definition of "ejectment" in that Act cannot be bodily imported into the Malabar Tenancy Act, which is a self-contained enactment so far as ejectment of tenants by landlords is concerned.

Attention is drawn by the learned advocate for the respondent to the definition of the word 'rent' in section 3 (u) of the Act as referring to what is payable in

money or kind or in both to a person entitled to the use or occupation of a land by another permitted by the person so entitled, to have use or occupation of the land. It is argued for the respondent that section 34 (4) of the Act, which requires a tenant desirous of purchasing a kudiyiruppu to deposit the arrears of rent or michavaram payable by the tenant throws light on the interpretation of section 33 of the Act and demonstrates that it is only a tenant of the landlord seeking eviction and not a sub-tenant that is entitled to the relief given under section 33. I do not see how this result follows. The reference to the rent or michavaram in section 34 (3) (a) and (4) of the Act may be to the rent or michavaram payable to the landlord who is seeking eviction by his own tenant and not the rent or michavaram payable by the tenant seeking relief under section 33 to his own immediate landlord or intermediary. This interpretation is consistent with the general principle that the rights of a landlord should not be jeopardised or prejudiced by the granting of a sub-lease by the tenant. Or it may be, that the expression " the arrears if any, of rent payable by the tenant" in section 34 (3) (a) has to be construed as being applicable only to cases where arrears of rent are due by the tenant seeking relief under section 33 to the plaintiff landlord, and not to other cases. But whichever way it is looked at, I do not consider that section 34, sub-sections (3) and (4) throw light on the interpretation of section 33 (1). The considerations that I have adverted to above are in favour of construing section 33 (1) as applying to the case of a sub-tenant seeking to purchase the kudiyiruppu. This point of view receives indirect support from other sections of the Act which use the expressions " immediate landlord ", or " his landlord ", or " his tenant " or " landlord's landlord ", whenever a direct relationship of the landlord and tenant is intended by the Act (*see* sections 11, 13, 14, 16, 17, 18, 20, 26, 28, 30, 32 and 44). It is a relevant argument that apt language of a different kind is used in section 21, which refers to the landlord who obtains such eviction, and in section 22 (2), which refers to the landlord from whom renewal is claimed and that it would have been easy for the Legislature to have repeated such qualifying terms in section 33 if the object was to confine its application to tenants holding directly under the landlord who seeks eviction.

Notwithstanding these weighty considerations I feel the force of the observations of my learned brother that neither in the contemplation of the Act nor under the general law, can a suit for redemption of an othi be considered to be a suit for eviction. It is also a cogent argument that the reference to a suit for eviction in section 33 must be to a suit for eviction contemplated by and instituted under the provisions of the Act. As my learned brother has pointed out sections 14 and 20 of the Act are exhaustive of the modes in which eviction can be sought under the Act and of the grounds on which eviction of tenants is permissible. The Act does not provide for eviction of persons other than those referred to in sections 14 and 20 though such persons holding under the persons enumerated in sections 14 and 20 might also be impleaded in suits for eviction and relief granted against them under the general law. In this view, the expression ' suit for eviction ' in section 33 must be controlled by reference to the general scheme of the Act as appearing in sections 14 and 20. I am unable, therefore, to differ from my learned brother's conclusion that section 33 reasonably construed and in conformity with the rest of the provisions of the Act, is susceptible of the interpretation that it has no application to the tenant of an othidar who seeks to purchase the kudiyiruppu in a suit for redemption by the jenmi. I agree that the second appeal fails and has to be dismissed with costs of the plaintiff-respondent.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Gadea Nagabhushana Reddi and another .. *Petitioners*.*

Constitution of India, Art. 226 (1)—*Writ of prohibition—When and against whom could be issued—Congress election committee—Irregularities in conduct of elections—Writ or directions if could issue.*

On the question whether a writ of prohibition under Article 226 (1) of the Constitution could be issued against the Election Sub-Committee of the All-India Congress organisation and similar political party or organisation.

Held : The Congress cannot be held to be a public body, however powerful it may be and however much the members of the various States' Governments and the centre may be drawn from its ranks. Therefore a writ, which is only available to an aggrieved party as against inferior courts, tribunals and bodies entrusted with powers by the law of the land to affect rights of parties, cannot issue in the case of such private bodies. Further, no power also exists to issue directions to a private association, because certain irregularities have been alleged as having been committed in the conduct of elections. The general rule applied to the case of writs of mandamus, prohibition and certiorari, namely, that writs will not issue if there is another adequate remedy should apply to the issue of a direction, order or writ under Article 226 (1) inspite of the apparently wide language employed. In this case the petitioners could well have filed an ordinary suit in the civil court and obtained immediate relief by way of injunction. Hence the application is not maintainable under Article 226 (1) of the Constitution.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to (1) issue a writ of prohibition against the Election Sub-Committee of the A.I.C.C., the President of the A.P.C.C. and the District Congress Committee, the Presidents, Taluk and Town Congress Committee, and the Returning Officers of the various Taluks and Towns in the district of Guntur ; (2) Issue an interim prohibitive order prohibiting the Returning Officers of the Taluks and Towns in the District of Guntur from holding congress primary Panchayat Elections ; (3) Issue directions to the various authorities to prepare the electoral rolls of Primary Congress members and qualified members as per the rules of the Constitution and circulars issued by the various authorities, and (4) give such other directions and grant such further reliefs as the circumstances of this case warrant, and this Hon'ble Court thinks fit.

C. R. Pattabhiraman, R. Ramasubbu Iyer and *N. Koteswara Rao* for Petitioners.

The order of the Court was made by

The Chief Justice.—This is an application for the issue of a writ of prohibition against the Election Sub-Committee of the All-India Congress Committee, the President of the Andhra Provincial Congress Committee and the District Congress Committee, the Presidents, Taluk and Town Congress Committees and the returning officers of the various Taluks and Towns in the District of Guntur for the Primary Congress Panchayat elections prohibiting them from holding Congress Primary Panchayat Elections in the District of Guntur, and to issue an *interim* prohibitive order prohibiting the Returning Officers of the Taluks and Towns in the District of Guntur from holding Congress Primary Panchayat elections and to issue directions to the various authorities to prepare the electoral rolls of primary Congress members and qualified members as per the rules of the Constitution and circulars issued by the various authorities and give such other directions and grant such further reliefs as the circumstances of this case warrant and this Court thinks fit. The application has been filed by two persons alleging themselves to be primary members of the Indian National Congress entitled to vote at the election of the Primary Congress Panchayat in the Tenali taluk, Guntur district.

We have heard fully Mr. C. R. Pattabhiraman, learned counsel for the petitioners, on the question, whether this Court can give the relief which the petitioners pray for in the petition under any provisions of law. The learned counsel relied upon Article 226 (1) of the Constitution as giving us the power to give the several directions which he seeks in the petition. He stressed on the wide language employed in the Article and in particular referred to the words " to any person or

* C.M.P. No. 5536 of 1950. 11th July, 1950.

authority" and "for the enforcement of any of the rights conferred by Part III and for any other purpose". He practically conceded—and if he had not conceded we are prepared to hold—that a writ of prohibition as understood in the English law might not be available in this Court. But learned counsel argued that Article 226 is not confined to the issue of recognised writs like mandamus, prohibition or certiorari. It includes other writs and orders and directions without any restriction whatsoever as to their scope. In answer to a question from us he was compelled to confess that the logical result of the construction sought to be placed by him on the language of the Article would be to enable any person aggrieved to obtain any relief by an application under this Article. Take for instance the case of money due under a promissory note to the payee of the note. Ordinarily, the only remedy available for the creditor to recover the money due to him is by way of a suit in the appropriate Court. But, as the language of Article 226 (1) is very wide and refers to the issue of directions to any person for any purpose, logically, the creditor instead of filing a suit can straightaway approach this Court for a direction to the debtor to pay him the money. As the only limitation contained in Article 226 is that the power is confined to the territories in relation to which this Court exercises jurisdiction, presumably any person in the State of Madras can approach this Court under Article 226 for a direction against any other person in this State for any purpose. The construction of Article 226 would practically abrogate the entire judicial system and the machinery set up for the administration of justice in the State. We do not think that Article 226 should be construed in this manner in spite of the wide language on which the counsel relied.

The application in question purports to be for the issue of a writ of prohibition. Ordinarily, this writ is available only against inferior Courts and Tribunals and bodies entrusted by the law of the land with powers to affect the rights of parties. No case has been brought to our notice in which this writ has issued to a private organisation, however widespread and powerful it may be. Mr. Pattabhiraman stated that the respondents against whom the writ was sought were officers of the Congress party. We do not think that the Congress party could be held in law to be a public party. It may be a very powerful, if not the most powerful, political body in the land and the members of the Governments of the various States are persons belonging to that party. Nevertheless in law, it cannot be held to be a public body entrusted by the law of the land with powers and duties relating to the rights of people.

If, therefore, a writ of prohibition in the strict sense of that term cannot issue in this case, can we say that Article 226 gives us the power to issue directions to a private association, because certain irregularities are alleged to have been committed in the conduct of election to the various branches of that organisation? Or should the aggrieved persons be left to pursue the ordinary remedy by way of suit and injunction? In our opinion, the general rule applied to the case of writs like mandamus, prohibition and certiorari, namely, that these writs will not issue if there is another adequate remedy should apply to the issue of a direction, order or writ under Article 226 (1) in spite of the apparently wide language employed. In this case, the petitioners could well have filed a suit and obtained immediately an urgent order of injunction and thus obtained the same reliefs which they seek from this Court. Then of course the suit should be filed in the Court having territorial jurisdiction in the matter.

For these reasons, we hold that this application is not maintainable under Article 226 (1) of the Constitution and it is therefore dismissed.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

M. Ranganatham Pillai, L. R. of the deceased Vaduvambal Ammal .. *Petitioner**

v.

T. Govindarajulu Naidu .. *Respondent.*

Presidency Small Cause Courts Act (XV of 1882), section 41—Licence from grantor—Suit for ejectment against licensee and another—Death of licensee—Suit not maintainable against legal representative of licensee.

A licence is not annexed to the property in respect of which it is enjoyed nor is it a transferable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents.

Where in a suit for ejectment against two defendants, the defence of the second defendant was that with the death of the first defendant there would be no proceeding to be continued against the second defendant as 'holding under or by assignment from' first defendant within the language of section 41 of the Presidency Small Cause Courts Act.

Held : That there would be no suit against second defendant as with the death of the first defendant there was an end of it and it could not be continued against second defendant as the purely personal right which existed between grantor and licensee cannot be made the basis for having the second defendant as the legal representative for continuing the suit.

Vadapalli Narasimham v. *Dronamraju Seetharamamurthi*, (1907) 18 M.L.J. 163 : I.L.R. 31 Mad. 163 and *Chinnan* v. *Ranjithammal*, (1930) 60 M.L.J. 709 : I.L.R. 54 Mad. 554, applied.

Hirendra Bhusan v. *Purnachandra*, (1948) 52 C.W.N. 843 at 848, dissented from.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, dated 16th August 1948 in Ejectment Suit No. 2667 of 1946, etc.

P. S. Ramachandra Ayyar for Petitioner.

C. R. Rajagopalachari and *B. T. Sampath* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises an interesting question of law—whether the ejectment suit No. 2667 of 1946 which was laid against Vaduvambalammal under section 41 of the Presidency Small Cause Courts Act lapsed with the death of Vaduvambalammal so that the suit could not be maintained as against her brother, Ranganatham Pillai as her legal representative. The argument for the second defendant, the petitioner in this case, against whom the ejectment suit was decreed by the Court below is that the cause of action contemplated by section 41 of the Presidency Small Cause Courts Act, where a licensee happens to be the person against whom a proceeding is sought to be taken in the first instance is something which necessarily expires with the death of the licensee. It is urged that with the death of the first defendant there was no proceeding to be continued against the second defendant as "holding under or by assignment from" the first defendant within the language of the section of the Act.

Reliance is placed for the submission on *Chinnan* v. *Ranjithammal*[1], which holds after defining the legal incidents of a licence with reference to the English authorities as well as the provisions of Chapter VI of the Indian Easements Act that the legal representative of a deceased licensee must be deemed to be a trespasser. It is there pointed out at page 710 of the report after referring to sections 59 and 62 of the Easements Act :

"These provisions do not in terms lay down that a licence is revoked by a conveyance of the property. On the other hand, the English law, which undoubtedly forms the basis of the Indian Statute seems clear that the licence terminates. 'If a man gives a licence and then parts with the property over which the privilege is to be exercised' says Pollock, C.B., in *Coleman* v. *Foster*[2], 'the licence is gone. A licence is a thing so evanescent that it cannot be transferred'.

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*C.R.P. Nos. 1441 of 1948 and 1751 of 1949. 30th March, 1950.

1. (1930) 60 M.L.J. 709 : I.L.R. 54 Mad. 554. 2. (1856) 1 H. & N. 36 : 156 E.R. 1108.

The same view is to be found expressed in *Wallis* v. *Harrison*[1]. There can be no doubt that the transferee is not bound by the licence. But does the licensee, from the moment the transfer takes place, become a mere trespasser, or should he be considered until the contrary appears, to hold under an implied licence? We do not think that it will become necessary in this case to decide that point, because, if the information given to us is correct (no evidence was taken), Poonjolai died in or about 1904, and there seems no doubt that the licence expired with his death. The learned City Civil Judge seems to be in error in holding that the defendants came in as licensees, if by that he means that, after Poonjolai died, the licence was (renewed) in their favour. Nor do we think, that the licence granted to Poonjolai became vested in them as his successors. A licence is not annexed to the property in respect of which it is enjoyed nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents (section 56). Accordingly in their occupation of the plot and especially so since the death of Poonjolai, the defendants have been mere trespassers . . . . . We need not look further for authority than to *Vadapalli Narasinham* v. *Dronamraju Seetharamamurthi*[2] for the proposition that the representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance would seem to be true also of a licensee."

This decision has been distinguished by the Court below on the ground that there the proceeding was at the inception itself brought not against the licensee as here but against his legal representative. That, in my opinion, is a mode of differentiation based on an accident of fact and not on an essential of legal principle and cannot therefore be accepted. It is urged for the respondent that a different view is to be found expressed in *Hirendra Bhusan* v. *Purnachandra*[3] in these terms :

"According to section 41 'occupant' comprises, a 'tenant or occupier or any person holding under or by assignment from him', and the first paragraph of the section suggests that by 'occupier' is meant a person occupying the property by permission of the applicant or any person through whom the applicant claims, that is to say, a licensee. The effect of the section, generally stated, therefore, is that the landlord may demand possession of a tenant or a licensee or a person holding under or by assignment from such tenant or licensee, as the case may be, and if the demand be not complied with, he may apply for summons against the person who failed to deliver possession on such demand."

That is so, but, in my opinion, this view is erroneous. It does not and cannot fit into the principle of the discussion in *Chinnan* v. *Ranjithammal*[4], a Bench decision of this Court, and I cannot therefore accept it.

It is further urged for the respondent, firstly that the provisions of Order 22, Civil Procedure Code, have been made applicable by rules to proceedings under the Presidency Small Cause Courts Act, and secondly that section 48 of the Act provides that in all proceedings under Chapter VII of the Act the Small Cause Court shall follow the procedure prescribed for a Court of first instance by the Civil Procedure Code. Order 22, rule 4, Civil Procedure Code, however contemplates the survival of the right to sue which in the view already propounded in the foregoing cannot be postulated in the present case. Likewise, section 48 of the Presidency Small Cause Courts Act contains the words "as far as may be" which preclude the wholesale attraction of Order 22, Civil Procedure Code, to a case like the present. I am satisfied that the point taken for the petitioner must prevail.

It is submitted that my view considerably curtails the beneficial operation of section 41 of the Presidency Small Cause Courts Act. That may be ; but it is for the Legislature to consider the desirability of an amendment of the statute. I can only interpret it ; I cannot re-write it. C.R.P. No. 1441 of 1948 is allowed with costs here and in the Court below.

In consequence C.R.P. No. 1751 of 1949 is also allowed but without costs.

K. C. *Petitions allowed.*

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1. (1838) 4 M. and W. 539 : 150 E.R. 1543.
2. (1907) 18 M.L.J. 26 : I.L.R. 31 Mad. 163.
3. (1948) 52 C.W.N. 843 at 848.
4. (1930) 60 M.L.J. 709 : I.L.R. 54 Mad. 554.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Abdul Razack Sahib and others .. *Appellants* *

v.

A. Abdul Hamid Sait and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 92—*Appeal—Public charitable trust—Trustees recognised—Suit for proper accounting and for receiver—Suit if falls within section* 92—*Advocate-General's previous sanction—Necessity—Civil Procedure Code* (*V of* 1908), *sections* 151 *and* 152—*Amending decree in regard to pleader's fees—Legality.*

Where a plaintiff on behalf of all persons interested in a fund prayed *inter alia* for a declaration that the defendants being the trustees of a trust, they should render true and proper accounts and to forward the funds collected to proper destination and for the appointment of a receiver, on the question whether the suit fell within section 92, Civil Procedure Code,

Held : As the suit is not for recovery of property from strangers or persons who according to the plaintiffs have no right to be in possession of the trust properties and moreover as the prayers are for correct accounting, etc., from trustees recognised by the plaintiff, the case would fall under clauses (*d*) and (*h*) of section 92 and the previous sanction of the Advocate-General would be necessary for its institution and in the absence of it would not be maintainable.

Where a judgment has fixed the pleader's fee and the decree has been drawn up in accordance with the judgment, even if the amount fixed is wrong, it is not open to the Court to amend the decree. The only course open to the aggrieved party to set matters right is to apply for a review of the judgment or to prefer an appeal. Sections 151 and 152, Civil Procedure Code, cannot be invoked in substitution of the specific remedies of review and appeal.

Appeal against the decree of the Subordinate Judge's Court, Nilgiris at Ootacamund, dated 14th August, 1946, in O.S. No. 106 of 1945 (and amended as per order, dated 6th November 1946, in I.A. No. 324 of 1946).

John and Row and *Sayeed Bashiruddin Ahmed* for Appellants.

V. Rajagopalachari for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The lower Court was right in dismissing the suit on the ground that the sanction of the Advocate-General had not been obtained for its institution. The suit clearly fell within the scope of section 92, Civil Procedure Code. The plaintiff on behalf of all persons interested in a fund which they call the " Mecca Mathinya Imthath Fund " prayed *inter alia* for a declaration that the defendants were the trustees of a trust known as "Mecca Mathinya Imthath Fund", for a true and proper account of the funds collected by the defendants, for a direction to the defendants to forward the funds collected by them to their proper destination and for the appointment of a receiver. It is well settled that to determine whether a suit falls within section 92, Civil Procedure Code, we have to look at the plaint and the allegations therein and not to the written statement. The plaint clearly proceeds on the footing that the defendants are trustees though the plaintiffs allege that the defendants had committed breach of trust. Because the defendants were repudiating the obligations on their part, the plaintiffs also wanted a declaration as to the trust nature of the funds collected by the defendants and their position as trustees. But the inclusion of such a prayer would not take the suit out of the category of suits falling under section 92, Civil Procedure Code. This is not a case in which the plaintiffs are suing to recover trust property from strangers or persons who according to the plaintiffs have no right to be in possession of the trust properties. On the other hand, the plaintiffs say that the defendants are trustees and are lawfully in possession of the funds ; only they charge them with dereliction of duty. The prayers fall clearly within the scope of clauses (*d*) and (*h*) of section 92. Learned counsel for the plaintiffs appellants relied upon certain decisions in support of his contention that the suit did not fall within section 92, but none of the decisions has any real bearing on the question which falls to be decided in this case. In *Jamal-ud-din* v. *Mujtab Husain*[1], the only prayer was for a declaration that the property

*Appeal No. 652 of 1946. 28th February, 1950.

1. (1903) I.L.R. 25 All. 631.

in suit was endowed property and could not be inherited as ordinary property. The learned Judge pointed out that section 539 of the then Code corresponding to section 92 of the present Code provided for a case in which there was an alleged breach of any express or constructive trust created for public, charitable or religious purpose or whenever the direction of the Court is deemed necessary for the administration of any such trust. But the suit before them was not brought for any of the purposes enunciated in section 539, nor was it instituted for the granting of any such further or other reliefs as mentioned towards the end of that section. The learned Judges therefore held that the suit was maintainable without the sanction of the Advocate-General. *Evalappa Mudaliar* v. *Balakrishnammal*[1] was concerned with a suit brought under section 92, Civil Procedure Code. All that the learned Judges decided there was that to a suit under section 92 a person who sets up title adverse to the trust could also be impleaded as a defendant though a decree could not be passed against him to deliver possession of the property. We need not refer in any detail to the Full Bench decision in the *Tirumalai Tirupati Devastanam Committee* v. *Krishnayyan*[2], which cannot possibly have even the remotest bearing on the point now in dispute. In *Ganapati Pujari* v. *Kaniyalal Marwari*[3] which was also relied upon it was held that as none of the reliefs prayed for in the case was of the nature set out in clauses (*a*) to (*h*) of sub-section (1) of section 92, there was no bar on account of the absence of the consent of the Advocate-General. It may be mentioned that in that case the suit was for a declaration that the property in dispute belongs to the general public and for eviction of the defendant from the same and for a permanent injunction restraining the defendant from obstructing the general public from performance of pooja therein. There was no indication whatever in the plaint in that case that the defendant was treated as a trustee. In the present case, it has been already pointed out that the entire plaint proceeds on the assumption that the defendants were trustees. There is nothing in *Abdul Majid* v. *Sheik Akhtar Nabi*[4], which in any way assists the appellants. On the other hand, the *ratio decidendi* of that case is directly against the contention of the appellants. The learned Judges held that in a suit under section 92, it was competent for the Court to decide whether the trust in respect of which the suit was brought was a public charitable trust so as to attract the application of the section. No doubt it was held that in a suit under section 92, Civil Procedure Code, no declaration of title or decree for possession could be obtained against total strangers to the trust. But where the relief is claimed against even constructive trustees and trustees *de son tort* the suit would fall within section 92.

It follows that the learned Subordinate Judge was right in holding that the suit was not maintainable without the sanction of the Advocate-General.

The objection was taken to an amendment of the decree in respect of the pleader's fee payable. The learned Judge in dismissing the suit with costs of the defendants (one set) fixed the pleader's fee at Rs. 200 to be divided equally between the two sets of defendants. The decree quite properly embodied this direction. On 12th October, 1946, nearly two months after the delivery of the judgment, an application was filed on behalf of the defendants (I.A. No. 324 of 1946) praying that the decree may be amended by allowing one set of pleader's fee based on the jurisdictional value of Rs. 30,000. The application was opposed, but the learned Judge granted the application because he was convinced that the pleader's fee should have been calculated according to rule 37 (*b*) (1) of the Legal Practitioners' Fees Rules. We do not wish to say anything on the applicability of that rule to this case. It may be the learned Judge was right in thinking that the pleader's fee which should have been properly allowed was a fee calculated under that rule. But in the concluding paragraph of the judgment, the learned Judge had specifically fixed the pleader's fee at Rs. 200. He might have been wrong in doing so, but the decree, if it has to be in conformity with the judgment, could only provide for the

1. (1927) 53 M.L.J. 183.
2. (1943) 1 M.L.J. 388 : I.L.R. 1943 Mad. 619 (F.B.).
3. (1933) I.L.R. 13 Pat. 65.
4. (1935) 39 C.W.N. 1103.

pleader's fee as fixed in the judgment. Now, assuming that the learned Judge was mistaken in fixing the fee at Rs. 200 in the judgment, the only course open to the defendants to set the matters right was to apply for a review of the judgment or to prefer an appeal to this Court. Sections 151 and 152, Civil Procedure Code, in our opinion, cannot be invoked in substitution of the specific remedies of review and appeal. Under these sections relief cannot be granted which properly falls within the scope of review and appeal. The learned Judge was in error in allowing the application for amendment of the decree. The decree in so far as it was amended shall be set aside and the decree as originally framed shall be restored. As the appellants have substantially failed in the appeal, they shall pay the costs of this appeal to the contesting respondents.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Rajala Hanumanthappa .. *Petitioner.**

v.

Mundluru Gangappa .. *Respondent.*

Legal Practitioners' Fees Rules, rule 33—Senior engaged for arguments along with junior in appeal—Fees allowable—Senior if should have been on record even from the filing of appeal to be entitled to his fees.

Rule 33 of the Legal Practitioners' Fees Rules does not intend, and could not have intended that a senior would be entitled to his fee only if he was on record from the date of the settlement of issue in a suit or from the date fixed for the appearance of the respondent in the appeal. The rule is expressly made applicable only to the case of juniors and it would be against reason and common sense alike to apply it to seniors.

The phrasing of rule 33 does not show that the senior should be first in the field and that the junior must be engaged by him to assist him. The rule will equally apply to a case of a junior who is first in the field and engages a senior at a later stage.

Hence in an appeal admitting of the appearance of both a senior and a junior practitioner and the payment of fees to both, the senior practitioner need not have been on record in the appeal from the date fixed for the appearance of the respondent in the appeal to be entitled to claim his fees. Even if he is engaged at the time of the arguments, he would be entitled to his fees.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Judge, Anantapur, dated 14th August, 1948, in I.A. No. 175 of 1948 in A.S. No. 139 of 1947.

P. M. Srinivasa Ayyangar for Petitioner.

K. Umamaheswaram for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises an interesting point of law, *viz.*, whether in an appeal admitting of the appearance of both a senior and a junior practitioner, and the payment of fees to both, the *senior practitioner* should be on record in the appeal from the date fixed for the appearance of the respondent in the appeal before his fee can be claimed, as held by the learned District Judge of Anantapur.

The facts were briefly these. A.S. No. 139 of 1947 was valued at Rs. 5,000 and, of course, admitted, under the Rules, of a senior and a junior practitioner appearing. The junior, Mr. Kodanda Rama Rao, was admittedly on record from the date fixed for the appearance of the petitioner, the first respondent. But, as usually the case, when the stage for final hearing (and arguments) came, on 3rd April, 1948, he indented on a senior, Mr. P. M. Srinivasa Aiyangar, who admittedly appeared and argued the appeal. Ultimately, the learned District Judge had to consider whether Mr. Srinivasa Aiyangar's fees, certified at Rs. 125, and Mr. Kodanda Rama Rao's fees certified at Rs. 100 could both be passed. He held that, as Mr. Srinivasa Aiyangar had not been on record from the date fixed for the appearance of the first respondent in the appeal, both the fees could not be allowed, but only Rs. 125, as per Mr. Srinivasa Aiyangar's fee certificate, as he wanted to allow the

* C.R.P. No. 346 of 1949. 17th April, 1950.

higher of the two fees, as the maximum fee allowable even to one vakil was Rs. 250 in this appeal (which was valued at Rs. 5,000) and as this was not objected to by the other side. There was both illogicality and incorrectness in this finding, as urged by Mr. Srinivasa Aiyangar, for the petitioner, before me. If Mr. Srinivasa Aiyangar, as *senior* should have appeared from the date fixed for the appearance of the first respondent before the senior fee could be allowed, only Rs. 100, certified as received by Mr. Kodanda Rama Rao, the *junior*, should have been allowed, and not Rs. 125, as certified by Mr. Srinivasa Aiyangar, the *senior*. Therein lay the illogicality. Nor could Mr. Srinivasa Aiyangar, the *senior* be *razed* down to *junior* status, when there was a *junior* already on record, for fees purposes, by the learned District Judge.

The incorrectness of the lower court's order arose from its applying the provisions of rule 33 of the Legal Practitioners' Fees Rules, applicable to *juniors* to *seniors*. Rule 33 runs as follows :

> "In courts subordinate to the High Court when the amount or value of the claim in a suit or appeal exceeds Rs. 1,000, an additional fee, calculated at one-third the fee allowable under rules 31 and 32 above, shall be payable to a junior practitioner engaged with a senior practitioner, provided that the junior practitioner was on record from at least the date of the settlement of issues in a suit or from the date fixed for the appearance of the respondent in an appeal."

Obviously, it does not intend, and could not have intended, that a *senior* would be entitled to his fee only if he was on record from the date of the settlement of issue in a suit or from the date fixed for the appearance of the respondent in an appeal. Just as in grave medical cases a senior doctor comes on the scene usually only when the junior doctor feels doubtful about his own ability and calls him in and the senior doctor's fees will have to be given, provided he appeared before death and examined the patient, so too, the senior lawyer will only be called in when the *junior* feels doubts about his own competence and engages a *senior* who appears at the final hearing, or even at the stage of arguments, and is on record only before the suit or appeal is finally heard and decided. Often, it is the case, in the mofussil, that a senior Madras counsel is indented on at the eleventh hour, after the evidence is over, just for arguing the case before the Judge on the materials on record, and that will be no reason whatever for disallowing the *senior* his fee. Indeed, on seeing a *senior* appearing on the other side a *junior* in the mofussil often takes an adjournment for engaging a *senior* on his side also, on the principle that a cannon must fight cannon. By the very nature of his status, a *senior* cannot be expected to be on record from the date of the settlement of issues or the date fixed for the appearance of the respondent in an appeal, and to be wasting his time unnecessarily there when a *junior* could do the job as well in the earlier stages, and it is also desirable to encourage him to do so, in the interests of cultivating his legal talents and preventing the waste of time of high power senior legal practitioners. It is also clear to me that it is against reason and commonsense alike to apply a rule, like rule 33—expressly made applicable to *juniors* to *seniors*. A rule applicable to junior coparcener of a Hindu joint family cannot ge applied to the manager. So too here, such rules must be strictly limited to the persons they apply to, and not extended to others of a different category.

In the end, therefore, I am of opinion that, in the circumstances of this case, both the senior's and the junior's fees, allowable under the Rules, should have been allowed, *i.e.*, Rs. 125 for the *senior*, as certified by him, and Rs. 83-5-4 for the *junior* being one-third of the fee allowable, which is Rs. 250 in this case. I am not impressed by Mr. P. M. Srinivasa Aiyangar's argument that the whole of Rs. 100 should have been allowed for Mr. Kodanda Rama Rao, on the ground that he (Mr. Srinivasa Aiyangar) was only *the second vakil*, and not merely Rs. 83-5-4. The matter has all along proceeded on the basis that Mr. Kodanda Rama Rao was the *junior* vakil, and that he had called in Mr. Srinivasa Aiyangar as *senior*. The petition before the learned District Judge was to amend the decree by including Rs. 125 the fee due to Mr. Srinivasa Aiyangar, the *senior practitioner*, in addition to the Rs. 100 already allowed to the *junior*, Mr. Kodanda Rama Rao. I cannot now allow the new theory that both the practitioners were *equal colleagues* and acted as one

unit. Of course, two, or even twenty vakils may appear for one party, and may appear as one unit or team, all being equal and joint, there being no senior or junior. In such a case, only one joint fees certificate will usually be filed, and one of the vakils so appearing will not be called senior and one junior, as here, and only one fee can be allowed, and not both the *senior* and the *junior* fees. That is not the case here. So, Mr. Kodanda Rama Rao, the *junior* must lose the excess of Rs. 16-10-8 claimed by him and for him, though, even if he is allowed the Rs. 100 in full, the total fees of junior and senior would only be Rs. 225, or below Rs. 250, allowable even to one vakil under the rules. Of course, the *senior*, Mr. Srinivasa Aiyangar, could have stipulated a fee and received a fee of Rs. 250, and certified to it. Then both his fee of Rs. 250 and the junior fee of Rs. 83-5-4 would have been allowable. But the *junior* could only be allowed a maximum fee of Rs. 83-5-4 (one-third of the fee allowable) though he received Rs. 100 and certified to it. Rule 33 must be strictly enforced here also, though it will operate against the petitioner, as it was applied earlier when it operated for him.

Mr. Umamaheswaram, for the plaintiff-respondent, urged that rule 33 would apply only in a case where a *senior practitioner engaged a junior practitioner*, along with him, in an appeal, and the junior practitioner, so engaged, was on record from the date fixed for the appearance of the respondent in the appeal. But the phrasing of rule 33 does not show that the senior should be *first in the field*, and that the junior must be *engaged by him* to assist him. The rule will equally apply to a case of a junior who is first in the field and engages a senior at the critical moment to aid him in the trial or arguments, as the case may be.

The phrase is : "a junior practitioner engaged with a senior practitioner," and not "a junior practitioner engaged with a senior practitioner *already on record*." The rule must, as already said, be interpreted strictly, and in its natural sense, be it for or against the petitioner or respondent.

In the end, therefore, the lower Court's order is modified and revised, and an additional fee of Rs. 83-5-4 for Mr. Kodanda Rama Rao, the junior, allowed, the fees of Rs. 125, already allowed by the learned District Judge, being held to be the senior's fees.

As the point has not been shown to be covered by a direct decision of any High Court before, and is apparently decided by me for the first time, I direct all the parties to this petition to bear their own costs.

V.S. — *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Kamala Bai Ammal .. *Appellant**

v.

Theethachari *alias* Appu Rao and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 4 (h)—Exemption under—Availability—Conditions—Debt due to woman—Character and status of creditor when debt is sought to be enforced—Relevancy.

Under section 4 (*h*) of the Madras Agriculturists Relief Act to get an exemption, it would be enough if the debt was due to a woman on 1st October, 1937, provided she does not possess property of the value mentioned in that clause. If once that condition is satisfied at its origin the Court need not concern itself with the character or status of the creditor at the time when the debt is sought to be enforced.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in O. S. No. 195 of 1945.

T. M. Krishnaswami Aiyar and *T. K. Subramania Pillai* for Appellant.

V. Seshadri and *K. S. Ramamurthi* for Respondents.

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*Appeal No. 672 of 1946. 11th April, 1950.

The Judgment of the Court was delivered by

Subba Rao, J.—The question in this appeal turns upon the construction of section 4, clause (*h*) of Madras Act IV of 1938. One Ranga Rao executed a deed of mortgage dated 8th December, 1930, for a sum of Rs. 2,750 in favour of his daughter Seethammal. In execution of a money decree obtained by a creditor against Ranga Rao, the mortgaged properties were purchased by one Krishna Rao, subject to the suit mortgage. Krishna Rao in his turn sold the equity of redemption in the properties to the sister-in-law the first defendant. Second defendant, the husband of the first defendant, is a subsequent mortgagee. Defendants 3 and 4 are the lessees of the properties. The 5th defendant is a sub-mortgagee from Seethammal. Seethammal died on 24th August, 1945. The plaintiff, as her heir, filed O. S. No. 195 on the file of the Court of the Subordinate Judge of Coimbatore for recovery of a sum of Rs. 7,389-2-8 the amount due under the mortgage bond. The defendants contended that the suit mortgage was not supported by consideration, that it was bad for non-joinder of parties, that the suit document was taken by the plaintiff *benami* in the name of his wife and that the first defendant was entitled to a scaling down of the decree. The learned Subordinate Judge held against the defendants on all the points. He held that as the mortgagee was a woman on 1st October, 1937, the debt due to her was exempt from the operation of the Act. In the result he gave a preliminary decree for the recovery of the suit amount. The first defendant has preferred the above appeal.

The learned counsel for the appellant argued that section 4 (*h*) of the Madras Agriculturists Relief Act does not apply to the suit debt as the plaintiff is not a woman at the time the debt is sought to be enforced though the creditor was a woman on 1st October, 1937. The relevant provisions may be extracted :—

"Section 3 (iii)—"debt" means any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue court or otherwise, but does not include rent as defined in clause (iv), or 'kanartham' as defined in section 3 (*l*) (1) of the Malabar Tenancy Act, 1929;"

"Section 7. Notwithstanding any law, custom, contract or decree of court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this Chapter."

Section 13 provides for the scaling down of interest due on any debt incurred by an agriculturist after the commencement of the Act. Section 4 runs thus :

"Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads :

* * * * *

(*h*) any debt or debts due to a woman on the 1st October, 1937, provided that the value of the property owned by her on that date, including the principal amount of the debt or debts so due, did not exceed six thousand rupees."

A combined reading of the aforesaid provisions disclose the intention of the Legislature. Under the Act all debts payable by an agriculturist are liable to be scaled down. Section 4 excludes certain category of debts from the operation of the Act. The debts so excluded are defined and put under various heads. It is very difficult to ascertain any consistent principle for the classification adopted by the Legislature. The only logical basis is that the section defines the category of debts excluded from the operation of the Act. The debts excluded are narrated and the section does not purport to deal with the qualification of a creditor when he seeks to enforce his debt. The wording of section 4 (*h*) is clear and unambiguous and does not admit of any doubt. A debt due to a woman on 1st October, 1937, who on that date did not own property of the value mentioned therein, is excluded. The point of time when the debt must satisfy the conditions laid down is 1st October, 1937. It lays down only two conditions, (1) that on 1st October, 1937, it should be a debt due to a woman, (2) on that date she did not own property of the value mentioned in that clause. If these conditions are complied with, the debt is excluded from the operation of the Act.

Mr. T. M. Krishnaswami Aiyar, the learned counsel for the appellant, argued that the Legislature intended to protect only woman creditors and therefore the

clause must be so construed as to carry out the intention of the Legislature. He suggests that the debt to be exempted must comply with two conditions (1) it must be a debt due to a woman at the time when it is sought to be recovered, (2) that it should be a debt on the 1st October, 1937, complying with the other conditions of that clause. He forcefully narrated the anomalies that would follow if this construction was not adopted; for, he contended that the object of the Legislature would be frustrated if the creditor, though a man would be entitled to the exemption, whereas the intention was only to protect the interests of women. The construction suggested by him would involve the adding of some words which are not found in the clause. What is exempted is a debt, and the debt exempted is qualified by the provisions of the clause. It does not say that the creditor should be a woman at the time of enforcing the debt. Arguments based upon anomalies and unjust preference to a particular class of creditors do not appeal to us. An expropriatary Act of this type necessarily must contain arbitrary provisions, and it is not our province to question the policy of the Legislature, but to give effect to the clear words used. Indeed, there would be obvious anomalies even if we accepted the argument of the learned counsel. A creditor may be a woman on 1st October, 1937. She may assign the debt to a man who in his turn may assign it to a woman. Assignments may be made even pending a suit. We do not think that the exemption should be made to depend upon such changing circumstances.

We shall now proceed to consider the decisions cited. The application of section 4 (*h*) of the Act was first considered in *Ramaswami* v. *Alangayamnal*[1]. The creditor in that case, being a woman, claimed the benefit of the exemption under section 4 (*h*) of the Act. Besides the decree debt sought to be scaled down, she was entitled to a half share in a mortgage debt from another person, but had no other property, and the principal amount of those debts did not exceed Rs. 3,000. It was argued for the debtor that the creditor was not entitled to the exemption claimed as she owned, on the material date, other property, namely, half a share in the mortgage debt referred to. The learned Judges held that debts due from an agriculturist to a woman on 1st October, 1937, were not to be scaled down under the Act if on that date the principal amount of such debts did not exceed Rs. 3,000 and the woman did not own any property other than such debts apart from her personal belongings. In the course of the judgment the following observations were made:

> "There is nothing to indicate that the words 'any debt or debts' in clause (*h*) refer to the debt or debts in respect of which the application for scaling down has been made. On the other hand the opening words of the section, 'Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads' show that the exemption relates to certain classes of debts and has no particular reference to the debt sought to be scaled down. The exemption under section 4 (*h*), as we understand the provision, covers a particular category of debts, limited in regard to the nature and extent, while insisting, as a condition of its application, that the creditor woman should not have owned on the date specified any other property, that is to say, property not falling under that category apart from property excluded by the explanation."

Though this is not a direct decision, the construction put upon the words by the learned Judges will certainly help us to decide the present case. The categories of debts mentioned in section 4 are exempted from the operation of the Act. In *Muthal Achi* v. *Doraiswami Pillai*[2], the original creditor was a male, but the debt was assigned to a woman and on 1st October, 1937, the creditor happened to be a woman. The learned Judge says that:—

> "Having taken the assignment the plaintiff became the owner of the debt and when she claims the benefit of the exemption provided by the Act for woman creditors, it is no answer to say that the original payee under the suit note was a male."

The learned counsel relied upon the words "provided by the Act for women creditors" and argued that the creditor who seeks to get an exemption must be a woman. The question argued before us could not have been raised

1. (1940) 1 M.L.J. 534: I.L.R. 1940 Mad. 2. (1942) 2 M.L.J. 123.

688.

in that suit and the general observations of the learned Judge could not be relied upon in support of an argument that was not raised before him. Further, the learned Judge did not say that the creditor who is enforcing the debt must be a woman. The words used could as well be understood to refer to the son of the creditor on 1st October, 1937. *Kanyakaparameswaramma* v. *Kotayya*[1] is also a decision on the interpretation of this section. The plaintiff's suit was on a promissory note dated 24th November, 1937. The said promissory note could be traced to the earliest promissory note dated 27th December, 1931, which was the starting point of liability. Exemption was claimed by the creditor under section 4 (*h*) of the Act. The learned Subordinate Judge held that as the latest promissory note was executed on 24th November, 1937, there was no debt due to a woman on 1st October, 1937. The learned Judges negatived the contention and held that the clause must be read as exempting from the operation of the Act all that class of categories of agriculturists which are included in clause (*h*) regardless of whether after 1st October, 1937, a fresh document was or was not executed by the same debtor in respect of the debt. The learned Judges observed :

"We hold in connection with section 10 (2) (ii) of Act IV of 1938 that the intention of the Legislature was to specify the classes of liabilities in respect of which the scaling down provisions were not to operate and that the exclusion of liabilities of these categories is not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one in respect of which a charge was provided ..... Clause (*h*) of section 4 does not say expressly what is to happen if the debt due to a woman on 1st October, 1937, is transferred or renewed or reduced by a payment in the interval between 1st October, 1937, and the date when the matter comes before the court. While conceding that a different view might be taken, we are of opinion that this clause must be read as exempting from the operation of the Act all that class of liabilities of an agriculturist which are included in clause (*h*) regardless of whether after 1st October, 1937, a fresh document is or is not executed by the same debtor in respect of that debt."

This principle applies with equal force to the facts of the present case. The only question to be considered is whether this particular debt has been excluded from the operation of the Act. The fact that subsequently the woman creditor died and is succeeded by a male creditor does not affect the question. Clause (*a*) of section 4 fell to be considered in *Thirugnanavalli Ammal* v. *Venugopala Pillai*[2]. The plaintiff, after having paid the revenue to the Government on behalf of the defendant, filed a suit for recovery of the same from the defendant. The defendant, being an agriculturist, claimed relief under the Act. The plaintiff claimed that the debt due to him was exempted from the operation of the Act by section 4 (*a*) as the liability in the beginning was with regard to revenue payable to the Provincial Government within the meaning of section 4 (*h*) of the Act. The learned Judges accepted the contention and said thus at page 126 :

"Undoubtedly the liability of the judgment-debtor to the Provincial Government was in respect of revenue. In the beginning the liability was one falling under the category provided in section 4, clause (*a*) ..... In the present case the liability of the petitioner was in the beginning to pay revenue due to the Provincial Government."

If in the case of section 4 (*a*) the liability at its origin was the test of exemption, we do not see any reason why in the case of section 4 (*h*) a different interpretation should be given. The learned counsel relied upon the following observations of the learned Judges in the above case when they distinguished a case falling under section 4 (*h*) from the case they were deciding.

"Under section 4, clause (*h*) the criterion is that of the creditor. Is she a woman holding property not exceeding Rs. 3,000 ? In such a case where the creditor's status is the test, different considerations may arise."

These observations were made when it was urged before them that under section 4 (*h*) this Court had held that if a creditor who would be protected under that clause transferred that right to a person who did not come within the clause he was not protected by the clause. So far as we are aware, there is no decision of this Court where it is held that if the debt is exempted under section 4 (*h*) on 1st October, 1937, it will be liable to be scaled down if subsequent to the Act, the woman trans-

1. (1943) 2 M.L.J. 276.
2. (1945) 1 M.L.J. 20 : A.I.R. 1945 Mad. 125.

ferred the right to a man. Further the observations were made only to explain away a possible contention based upon an analogous provision, and the observations could not be treated as an expression of the learned Judge's final opinion on section 4 (*h*). The construction put upon section 10 (2) (ii) of the Act by a Bench of this Court in *Varadarajaperumal Pillai* v. *Palanimuthu Goundan*[1] may usefully be referred to. The learned Judges say :

"This provision may be read in two ways. It may be read as safeguarding any liability for which a charge under section 55 (iv) (*b*) of the Transfer of Property Act subsists ; or it may be read as protecting any liability of the category of liabilities in respect of which a charge is provided under section 55 (iv) (*b*) of the Transfer of Property Act. We are of opinion that the latter interpretation is the correct interpretation and that the intention of the Legislature was to specify those classes of liabilities in respect of which the scaling down provisions of the Act were not to operate and that the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one belonging to that category in respect of which the Transfer of Property Act provided a charge."

In our view, the same principle should be applied even in interpreting section 4 of the Act. Section 4 of the Act defines the category of debts excluded from the operation of the Act, and the categories so excluded are defined with precision in the various sections of the Act. We, therefore, hold that, under section 4 (*h*) to get an exemption, it would be enough if the debt was due to a woman on 1st October, 1937, provided she did not possess property of the value mentioned in that clause. If once that condition is satisfied at its origin, we are not concerned with the character or the status of the creditor at the time the debt is sought to be enforced.

We, therefore, agree with the lower Court that the first defendant is not entitled to have the decree scaled down under Madras Act IV of 1938. In the result, the appeal fails and is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Dukkipati Venkata Subbarao .. *Appellant**

v.

Pandrangi Kanakaraju and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 22—Necessity for notice—On whom notice is to be served—Limitation Act (IX of 1908), Article 181.

(i) Notice under Order 21, rule 22 of the Civil Procedure Code is a necessary condition for conferring jurisdiction upon the executing court to sell the judgment-debtor's properties and a sale without such notice is a nullity.

(ii) If the initial notice under Order 21, rule 22 was served on the parties the sale would not be void even though at the later stages notice was not served on all the parties, if as a matter of fact the estate was sufficiently represented by one of the parties.

(iii) The sale would be valid if the notice under Order 21, rule 22 was served on a person who was held by the Court to be the representative of the deceased party, even though it subsequently turned out that he was not the real or only representative of the deceased party.

(iv) After a decree is passed, the question of representation of a party is no longer governed by Hindu law but by the relevant provisions of the Code.

So, where minor defendants were represented during the pendency of the suit by the father and after his death after a decree was passed, by their mother and no notice was served on them represented by their mother, but only on another major defendant who was the elder brother of the minor defendants, who never represented his minor brothers, so far as the minor defendants are concerned, the sale of their share of the family properties in execution of the decree is a nullity and it is open to them to ignore it. The period of limitation is governed by Article 181 and they need not take note of the void sale till their possession was effectively interfered with.

Case-law discussed.

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1. (1940) 2 M.L.J. 838 : I.L.R. 1941 Mad. 132.

* A.A.O. Nos. 614 and 634 of 1946. 21st March, 1950.

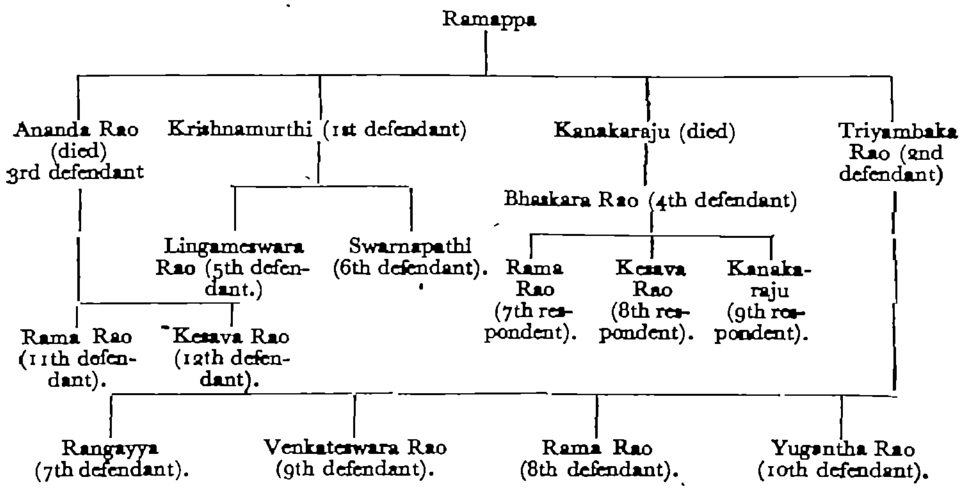
Appeals against the orders of the Court of the Subordinate Judge, Masulipatam, dated 17th and 15th April, 1946, in E. A. Nos. 44 of 1944 and 1035 of 1942, respectively in O. S. No. 127 of 1930.

P. Somasundaram, Y. Nagabhushanam and *A. Sambasiva Rao* for Appellant.

T. M. Krishnaswami Aiyar, C. V. Narasimha Rao and *U. S. Madhava Rao* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J. (C.M.A. No. 634 of 1946) :—These two Civil Miscellaneous Appeals arise out of two orders passed by the Court of the Subordinate Judge of Masulipatam in execution of the decree in O. S. No. 127 of 1930. To appreciate the facts and the contentions of the parties, the following genealogy will be usefully referred to :



The family owned about 200 acres of land at Doddipatla, Konduru, Ramavaram, Pallavadu, Vemavarappadu and Tamirisa. In 1925 the first and second defendants executed a promissory note in favour of the plaintiff's father for a sum of Rs. 4,000. In 1914, they executed another mortgage deed in favour of the plaintiff's father for a sum of Rs. 13,000. The plaintiff filed a suit (O. S. No. 127 of 1930) on the file of the Court of the Subordinate Judge of Masulipatam for the recovery of the amount due under the promissory note and obtained a decree on 9th March, 1931. Under the decree the amount due was made recoverable personally from defendants 1 and 2 and from the family properties of all the other defendants. In the suit as defendants 8 and 9 were minors, they were represented by their father the second defendant as guardian. After the decree the second defendant and the minors (defendants 8, 9 and 10) were represented by their mother as guardian in execution proceedings. On 17th July, 1936, the decree-holder filed an application for attachment and sale of the immoveable properties belonging to the family. Ex. P-4 shows the progress of that application. On an application filed by the decree-holder, defendants 8, 9 and 10 were declared as majors on 6th August, 1936, and notices were issued to them. The notices were returned with an endorsement that the said defendants were still minors. On 9th November, 1936, the learned Subordinate Judge gave time to the decree-holder to ascertain whether they were majors or minors, but no information was furnished and no steps were taken to serve on the said defendants notices under Order 21, rule 22, Civil Procedure Code. Ex. D-9 (*a*) shows that the sale proclamation notice was served on defendants 7 and 8, but it was not served on defendants 9 and 10 as they were not present in the house. The decree-holder filed E. A. No. 8 of 1939 for permission to bid at the sale and Ex. D-10, the notice of that application,

was returned with an endorsement that defendants 8, 9 and 10 refused to receive the same. On 13th February, 1939, the seventh defendant filed an application asking for an adjournment of the sale, and that was granted. Ex. D-11 (*a*) dated 6th March, 1939, is another application filed for adjournment on behalf of the defendants. It is not clear from this petition whether defendants 8, 9 and 10 also gave *vakalat* to the advocate for an adjournment of the sale. The sale was held on 13th March, 1939, and the properties situate in the aforesaid villages were purchased by the decree-holder. On 26th June, 1939, two petitions were filed by some of the judgment-debtors for setting aside the sale, but they were not re-presented when returned. The decree-holder obtained delivery in July, 1942. On 4th December, 1942, defendants 8 and 10 filed E. A. No. 1035 of 1942, under sections 47, 151 and Order 47, rule 1 of the Civil Procedure Code, for a declaration that the sale held on 13th March, 1939, was void and for setting aside the same and also the delivery of July 1942. The sons and the widow of the 4th defendant Bhaskara Rao filed E.A. No. 44 of 1944 dated 29th November, 1943, under section 47, Civil Procedure Code, for re-delivery of the properties allotted to the share of Bhaskara Rao on the ground that as Bhaskara Rao became insolvent, the decree-holder brought to sale only the three-fourth share of the properties. In the petition filed by the defendants 8 and 10, they pleaded that the sale was void as though defendants 8, 9, and 10 were minors they were treated as majors and no notice under Order 21, rule 22, Civil Procedure Code, were served on them. They also alleged that the sale was vitiated by material irregularities and fraud of the decree-holder which resulted in substantial loss to them, as according to them, properties worth a lakh and twenty thousand rupees were sold for a low amount of Rs. 12,424 subject to a mortgage in favour of the decree-holder. They asserted that the application, though filed more than three years from the date of the sale, was in time, because they were kept out of the knowledge of the right to apply for setting aside the sale by reason of the fraud practised by the decree-holder against them. They also stated that as the sale was a nullity the right to apply accrued to them only when an attempt was made to dispossess them. The decree-holder filed a counter mainly contending that the application was barred by time, that the sale was valid as notice under Order 21, rule 22, Civil Procedure Code, was served on the 7th defendant who was the manager of the family, and, as the interests of the other members were represented by the 7th defendant and other members of the family. He also pleaded that he did not perpetrate any fraud upon the judgment-debtors, but brought the property to sale after giving every opportunity and indulgence to them to settle the matter or otherwise pay off the decree amount. In the other application, the petitioners contended that the properties mentioned in that petition fell to their branch and the decree-holder illegally took possession of their lands and therefore they were entitled to be put in possession of the same. The decree-holder denied the allegations, and stated that the aforesaid properties fell to the share of the other branches and therefore had been rightly sold and legally taken possession of by them. The learned Subordinate Judge held that the sale was void as notices under Order 21, rule 22, Civil Procedure Code, were not served on defendants 8 to 10, that the sale was also vitiated by fraud and material irregularities which resulted in substantial injury to the judgment-debtors and that the suit was in time. In the result he set aside the entire sale. In E. A. No. 44 of 1944 he directed re-delivery of the properties claimed in that petition. The decree-holder has preferred the above two civil miscellaneous appeals.

It will be convenient at the outset to clarify the position so that our attention may be concentrated on the main point that arises in the case. It is not disputed that there was a partition between the four branches. It is equally clear that there was no partition *inter se* between the members of each branch. The execution proceedings show that the properties that fell to the share of Bhaskara Rao were not brought to sale as he became insolvent. We are therefore only concerned with the properties pertaining to the shares of the other three branches. Whether there was a division by metes and bounds or in status, the decree-holder was certainly

entitled to bring to sale the shares of the different branches and the sale having been confirmed and the concerned parties not having taken any steps for setting aside the sale, it is not now open to defendants 8 and 10 to question the sale in respect of the shares of the other two branches. Even in regard to the undivided share of the 7th defendant in the family properties, the petitioners are not in a better position. Under Hindu law the sale of a share of an undivided member of a joint Hindu family is valid, and as the necessary notices were admittedly served on the 7th defendant and he not having taken any steps to set aside the sale befor confirmation, he is also equally precluded from questioning the sale. Assuming that the application filed by the defendants 8 and 10 to set aside the sale was filed on his behalf also, it would be hopelessly barred by limitation. The allegations of fraud made in the petition to get over the plea of limitation are vague, and the evidence adduced in support thereof does not bear out the case of fraud. Section 18 of the Limitation Act is the governing section. Under that section to take advantage of the extended period of limitation, the petitioner will have to allege and prove that by means of fraud he has been kept from the knowledge of his right to make an application. In this case, notices were admittedly served on the defendants other than defendants 8, 9 and 10. Some of them filed applications for setting aside the sale, but did not pursue the matter. They knew of the sale proceedings from the beginning to the end. It is impossible to contend that they were kept out of the right to apply for setting aside the sale by the fraud of the decree-holder. Even the evidence adduced in support of the fraud is very vague. It is said that a kind of a confidence trick was played upon the judgment-debtors. From 1938, according to the evidence, they were encouraged to hope that the matter would be settled and in that hope and on account of their implicit confidence in the decree-holder and his maternal uncle Nageswara Rao, they allowed the sale to be held and did not take any proceedings to set aside the sale as they believed the matter would be settled in spite of the sale. We have gone through the evidence carefully and we are not satisfied that any fraud was perpetrated on the judgment-debtors. Indeed, even if the entire evidence was accepted, it would only show that there were some genuine attempts at compromise between the parties. In any view, as we have held that it is not open to the judgment-debtors other than defendants 8, 9 and 10 to question the sale, it is not necessary to express our final opinion on the matter.

The main question, therefore, that arises in the appeals is whether the sale of the interests of defendants 8, 9 and 10 was a nullity as contended by them. A few admitted facts may be recapitulated. The 8th defendant attained majority on 16th August, 1936, and the 10th defendant on 25th April, 1940. The 9th defendant also only attained majority sometime before the sale. Notices under Order 21, rule 22, Civil Procedure Code, were admittedly not served on them. During the entire proceedings that took place before the sale, notice of the proclamation of the sale was received by the 8th defendant as disclosed by Ex. D.-9 (*a*). The 7th defendant is the eldest brother of defendants 8, 9 and 10 and it is not disputed that notice under Order 21, rule 22, Civil Procedure Code was served on him and he took part in the various proceedings that led up to the sale. Mr. Somasundaram, learned counsel for the appellant, argued that the 7th defendant was the manager of his branch of the family, and, as the notice under Order 21, rule 22 was served on him representing his branch, the sale was good, and that, in any view, as the 7th defendant and the members of the other branches of the family who were equally interested with defendants 8 and 9 admittedly took part in the proceedings, there is sufficient representation of the interests of defendants 8, 9 and 10. Mr. T. M. Krishnaswami Aiyar, on the other hand, contended that the 7th defendant, though the eldest brother of defendants 8, 9 and 10 did not represent the minors at any time as the father represented them when he was alive, and, after his death, the mother was appointed as their guardian, that, after the decree was obtained, the proceedings thereafter were governed by the Civil Procedure Code, that, as the mother represented him as guardian, the 7th defendant could not be by reason of his personal law, entitled to represent his brothers without

an express order of the Court, and that the sale without the requisite notice under Order 21, rule 22 on the persons concerned would be a nullity as the service of the said notice only would confer jurisidction on the executing Court to sell the properties.

In support of their respective contentions a long catena of cases has been cited on either side. To appreciate the principles governing the present case, it will be convenient to consider the said decisions. In *Kunhammad* v. *Kutti*[1], a Mohammadan woman died leaving her husband and several minor children as her representatives. In execution of a money decree obtained against her, the creditor attached certain land which belonged to her and made her husband and two of her children parties to the execution proceedings. The land was sold and purchased by the decree-holder. Her children brought a suit to set aside the sale on the ground that some of them were not parties to the proceedings in execution and the others, being minors at the time had not been represented by a guardian appointed by the Court. The learned Judge held that the sale was valid. It was found in that case that though there was no formal order appointing the father as guardian, he in fact represented the minors. The principle on which that decision really turned was that the father, being in possession of the properties, was the legal representative of his deceased wife within the meaning of section 234 of the Civil Procedure Code and therefore her estate was properly represented. In *Khiarajmal* v. *Daim*[2] the Judicial Committee held that where a Court had no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record, the decrees and sales purporting to be made would be a nullity as against such persons and might be disregarded without any proceedings to set them aside. In *Ganesh Row* v. *Tuljaram Rao*[3], the question for consideration was whether a compromise made by the father pending a suit without the knowledge of the Court when his minor son was represented by another guardian was valid. The Judicial Committee held that the powers of the father were controlled by the provisions of section 462 of the Code and that he could not without leave of the Court, do any act in his capacity of father or managing member of the joint family which he was debarred from doing as guardian *ad-litem*. This was relied upon by the learned counsel in support of his argument that as the minors were represented by their mother as guardian, the 7th defendant could not represent them in his capacity as manager even if he was in fact a manager.

A Full Bench of this Court had to consider in *Rajagopala Aiyar* v. *Ramanujachariar*[4], the validity of a sale without giving notice under Order 21, rule 22, Civil Procedure Code. In that case, at page 301, the learned Judges held that a proper notice under Order 21, rule 22, Civil Procedure Code was the very foundation of the jurisdiction itself and that failure to give it would render a sale inoperative even against a stranger and that therefore the sale held in that case was a nullity. The decision in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[5], does not lay any different principle. A careful reading of the judgment discloses that the learned Judges in that case made a distinction between a notice under Order 21, rule 22 and the execution proceedings subsequent to that stage. The relevant facts in that case are that the 14th defendant was the father of defendants 15 to 17 and they constituted a joint family. In the suit by the creditor, defendants 15 to 17 were impleaded as minors with the 14th defendant as their guardian. A decree was passed against them. In the execution petition they were described as minors represented by their father (the 14th defendant), though by that time the 15th defendant had attained majority. He was not declared a major and he continued to be represented by the 14th defendant as his guardian. Notice under Order 21 rule 22 was served on him. The sale was posted to 5th August, 1924, and, on the same day, the 14th defendant died. The legal representatives of the 14th defendant

1. (1888) I.L.R. 12 Mad. 90.
2. (1904) L.R. 32 I.A. 23 : I.L.R. 32 Cal. 296 (P.C.).
3. (1913) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.).
4. (1923) 46 M.L.J. 104 : I.L.R. 47 Mad. 288 (F.B.).
5. (1928) 30 L.W. 995.

being defendants 15 to 17, they were brought on record as his legal representatives. The sale was concluded on the 11th August, 1924. In an application to set aside the sale, it was argued that as the 15th defendant was a major at the time of the execution petition, he should have had a separate notice and that after the 14th defendant died and thus ceased to represent defendants 15 to 17, fresh notices should have been issued to them. The learned Judges negatived the contention that fresh notice under Order 21, rule 22, Civil Procedure Code, should have been taken on the 15th defendant on the grounds that notice was served on the 14th defendant representing himself and his minor sons. They also indicated that such notice was valid, and that, if the 15th defendant became a major, it was his duty to bring it to the notice of the Court and declare himself as a major. As regards the subsequent proceedings, the learned Judges made the following observations at page 1004:

> "The general principle laid down by the authorities to which we shall refer is that an initial notice under Order 21, rule 22, when issued, is sufficient for the purpose of the law to bring to the court the estate against which execution is being enforced and sufficiently retains it there unless the result of the death of the party to whom notice was originally issued is to leave no one at all on the record to represent the estate and thus to effect the disappearance of the estate from the jurisdiction of the court. If, therefore, there is any person left on the record who can and does sufficiently represent the estate, a fresh notice under Order 21, rule 22 is not required by law."

At page 1007 the same idea is expressed in a different manner—

> "When such a notice has been initially issued, no fresh notice is required by law, to be issued on the death of the judgment-debtor during the pendency of the proceedings if some one who can represent and is representing the estate is already on the record even if he be a wrong legal representative or a legal representative brought in by the wrong procedure."

As the 15th defendant, the major, was on record, and as he represented the estate, the learned Judges held that the sale was valid. Far from supporting the case of the appellant, this decision lays down that the notice under Order 21, rule 22 is a condition precedent for conferring jurisidction on an execution Court to sell the property. In that case, the initial notice was served on the 14th defendant for himself and as the guardian of the 15th and 17th defendants. In the present case, admittedly, no notice under Order 21, rule 22 was served on defendants 8 to 10. Indeed they were declared as majors and no further steps were taken to serve the requisite notice on them. In *Kodandarama Reddiar* v. *Parthasarathi Aiyangar*[1] also the same principle is laid down. Where notice of the execution petition was taken out to a person as a minor represented by his father, though at that time actually he was a major, but the fact was not known to the Court nor to the decree-holder, it was held that such notice was sufficient compliance with the requirements of Order 21, rule 22, Civil Procedure Code and that no question of jurisdiction arose. At page 95, King, J., puts the view as follows:—

> "To us there seems to be a very clear distinction between a case in which no notice is issued at all to a particular defendant and a case in which notice is issued to him as if he were still a minor, the reason for issuing such notice being that both the decree-holder and the court were unaware of the true age of the defendant. We think that to issue such a notice is a sufficient compliance with the requirements of Order 21, rule 22, Civil Procedure Code."

The next case cited is *Bachoo Prasad* v. *Gobardhan Das*[2]. The facts in that case are: In a suit against members of the joint family the minor members were represented by a pleader *M* appointed by the Court to be their guardian *ad-litem*, but in the execution petition no reference was made to the abovenamed pleader. Execution was sought to be taken against the minors describing them as under the guardianship of the minor's father, one Gobardhan. No notice was taken to the Court guardian under Order 21, rule 22. The learned Judges held that the sale held without such notice was a nullity. At page 64 the learned Judges point out:

> "Once the court has found that the legal conditions do not exist for proceeding with an execution, then there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken

1. (1939) 1 M.L.J. 93. 2. A.I.R. 1940 Pat. 62.

in the execution which was not properly contested in the absence of proper notice under Order 21, rule 22 must fall to the ground."

In *Venkataranga* v. *Seethamma*[1], it was held that the creditor who impleads the sons also in the suit against the father and obtains a decree against their shares in the family estate cannot claim to proceed against such shares in the execution of the decree against the father when it can no longer be executed directly against them owing to the bar of limitation. The learned Judges held that though the father was precluded from raising the plea that the decree was barred, as he did not oppose the execution application against him, the son could rely upon the plea of limitation in so far as they were concerned. The reason of the rule is stated at page 277.

"When the son is joined in the suit and a decree is obtained binding his interest also, the claim against him based upon his obligation must necessarily be deemed to have been put in suit and merged in the decree, and the only mode of enforcing such claim, is, as it seems to us by executing the decree against him. The matter is no longer governed by the Hindu law but by the relevant provisions of the Civil Procedure Code."

This decision also was relied upon in support of the contention that the seventh defendant could not in his capacity as a manager represent the interests of defendants 8 to 10 as they were represented by their mother till they were declared majors. In *Deo Narain Singh* v. *Bibi Khaloon*[2], it was held that no fresh notice under Order 21, rule 22, Civil Procedure Code was necessary as an application for the amendment of the execution by reason of addition of other properties was not a fresh application.

The following principles emerge from a consideration of the aforesaid decisions :

(1) Notice under Order 21, rule 22, Civil Procedure Code is a necessary condition for conferring jurisdiction upon the executing court to sell the judgment-debtor's properties, and a sale without such notice is a nullity.

(2) If the initial notice under Order 21, rule 22, was served on the parties, the sale would not be void even though at the later stages notice was not served on all the parties, if as a matter of fact the estate was sufficiently represented by any one of the parties.

(3) The sale would be valid if the notice under Order 21, rule 22 was served on a person who was held by the court to be the representative of the deceased party, even though it subsequently turned out that he was not the real or only representative of the deceased party.

(4) After a decree is passed, the question of representation of a party is no longer governed by Hindu law but by the relevant provisions of the Civil Procedure Code.

Bearing these principles in view, we shall now consider their application to the facts of this case. In the suit defendants 8 to 10 were represented by their father. There was a decree for the payment of money against the assets in their hands. After their father's death, they were represented by their mother. Admittedly, no notice was served on them represented by their guardian. They were declared majors, and, thereafter, no notice under Order 21, rule 22, Civil Procedure Code was served on them. Though the 7th defendant was the eldest brother, there is some evidence in this case that the property of defendants 8 to 10 was being managed only by their mother. In any event, the seventh defendant as a matter of fact never represented them. No notice was served on him in his representative capacity. It therefore follows that the sale of the family properties so far as defendants 8 to 10 are concerned was a nullity, and it is open to them to ignore it.

It is then argued that the application was barred by limitation. It is conceded that if the sale was a nullity, the proper article of the Limitation Act applicable is the residuary article 181. Article 181 of the Limitation Act reads as follows :

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1. (1941) 1 M.L.J. 270. 2. (1949) I.L.R. 27 Pat. 43.

" *Description of application.*	*Period of limitation.*	*Time from which period begins to run.*
181. Application for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Civil Procedure Code, 1908.	Three years	.. When the right to apply accrues."

Therefore, under the aforesaid article, the application should have been filed within three years when the right to apply accrued. The question therefore is when did the right to apply accrue. If the sale was a nullity, defendants 8, 9 and 10 could ignore the sale. Till their possession was effectively interfered with, they need not take note of a void sale. In this view, the right to apply accrued to them only when the decree-holder took possession of the properties in July 1942. So viewed, the application is clearly within time. A similar question was considered by Ananthakrishna Aiyar, J. in *Chengalraya* v. *Kollapuri*[1]. In that case a sale was without service of notice under Order 21, rule 23, Civil Procedure Code and the decreeholder who purchased the property obtained symbolical delivery of the land. At page 15, the learned Judge says,

> " In cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceeding under section 47, the period of limitation being not the period prescribed for setting aside of sales but the general period of three years prescribed by Article 181. If excess sale is void, and no notice need be taken of the same by any parties to the suit, until their rights are actually infringed, I fail to see how excess execution could have any higher effect. . . . . He was not bound to apply to have the order relating to excess delivery set aside. If he could ignore that order, as he could have ignored the excess sale itself, what then is the real act by which he is aggrieved ; in other words, when does the right to apply accrue to him within the meaning of Article 181, Limitation Act? So long as he was in possession, it did not matter to him what orders of excess sales or excess deliveries were passed behind his back. I think the lower appellate court was right in its finding that article 181 applied and that the application was not barred."

We respectfully agree with the observations of the learned Judge and we hold that the right to apply in the present case accrued to the petitioners only when their possession was interfered with in 1942, and, therefore, the application was clearly in time.

A.A.O. No. 614 *of* 1946.—Coming to C. M. A. No. 614 of 1946 we do not see any arguable point. If the properties that fell to the share of Bhaskara Rao were not brought to sale but they were taken possession of by the decree-holder purchaser, his legal representatives were certainly entitled to get a re-delivery of the same. The learned Subordinate Judge in the circumstances directed re-delivery and we do not see any reason to interfere.

The result of our decision would be that the sale of the interests of defendants 8, 9 and 10 in the family properties would be a nullity. The sale of the share of the seventh defendant in the properties that fell to the share of his father, Triyambaka Rao, and the sale of the properties that fell to the share of the two brothers Ananda Rao and Krishnamurthi would be valid. It is in evidence that there was a partition between the four branches and therefore there was no difficulty in excluding the properties that were allotted to Bhaskara Rao at the alleged partition. But in regard to the one-fourth share in the property allotted to the fourth branch, it would be necessary to take appropriate proceedings for a partition *inter se* between defendants 7, 8, 9 and 10. Both the learned counsel appearing for the parties, in the interests of speedy adjudication are willing and indeed anxious to get the properties divided in these proceedings themselves. We therefore remand E.A. No. 1035 of 1942 to the lower court for effecting a partition between defendants 7, 8, 9 and 10. In other respects, C.M.A. No. 634 of 1946 is allowed with proportionate costs. C.M.A. No. 614 of 1946 is dismissed with costs.

V.P.S. *Appeal allowed. E.A. remanded to lower court.*

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1. A.I.R. 1930 Mad. 12.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Madithati Venkata Reddi and another .. *Appellants* *

Madras Criminal Rules of Practice—Rule 85—Omission to warn some of the accused making a confession that it was not intended to take them as approvers—Confession of accused—Admissibility.

Where in a case there are more than one accused, a Magistrate omits to warn some of the accused making a confession that it was not intended to take them as approvers, the omission is fatal to the admissibility of such a confession as it causes a grave doubt on the voluntary nature of such a confession in such cases and there is reasonable ground for supposing that the confessions might have been made on the assumption that the persons confessing would be taken as approvers and escape punishment.

Appeals against the order of the Court of Session of the Cuddapah Division in Case No. 42 of the Calendar for 1949 passed on 30th November, 1949.

P. Basi Reddi for Accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the State.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—These are two appeals by Venkata Reddi and Vebulu, the 3rd and 4th accused in S. C. No. 42 of 1949 on the file of the Sessions Judge, Cuddapah. They have been convicted under Sections 302 and 34, Indian Penal Code and sentenced to transportation for life, and also under Section 201, Indian Penal Code and sentenced to rigorous imprisonment for two years to run concurrently with the sentences under section 302, Indian Penal Code. The facts are briefly these. One Redanna was living in Ponnellavandlapalli in Rayachoti Taluk in Cuddapah District. Though he was married he was not on good terms with his wife for some time before this murder and he was carrying on with a woman called Chinna Ammani of Ragatiguntapalli, an adjoining village. Accused two was also carrying on with the same Chinna Ammani. Redanna wanted to have this Chinna Ammani exclusively for himself, by marrying her, and accused 1 and 2 went and told him on 8th April, 1949, that they would get him married to Ammani that midnight. So, taking some jewels of his and borrowing some jewels as a loan from a barber P.W. 1, Redanna set out with accused 1 and accused 2 on the night of 8th April, 1949 with intent to get the marriage performed that midnight. Accused 1 and 2 who are closely related, took the help of accused 3 and 4, two persons alleged to be hired assassins, and all the four are said to have murdered Reddanna that night while sleeping and waiting for the girl Ammani who was said to be on her way by accused 2 pressing his throat with terrific force and the remaining accused holding his arms and legs, near *Marrimani* Bhavi in a jungle and buried his corpse there. Thereafter, fearing that the corpse might give out a stink which would be noticed by people in the neighbourhood frequenting that place, they are said to have removed the corpse to Yedullagunta Valley in the jungle and buried in in a pit there. There also they seemed to have feared later on that the body would be discovered by its stink and so removed it and put it in a gunny bag in order to transport it to a more unfrequented place. But small portions of the decomposed corpse, like the skin of the palm of the left hand and the sole of the right foot got left behind in the Yeddullagunta Valley. The rest of the corpse was put in a gunny bag and taken to *Devarathi* Bhavi, a disused well, a mile away, and shoved into it. P.W. 5 the elder brother of Redanna got suspicious about the disappearance of Redanna and he went and gave a complaint to the police on 14th April, 1949 about his disappearance and his suspicions that he might have been murdered. The Police began vigorous investigation. Owing to the great stink in the Yedullagunta valley people came to know that some corpse might have been buried there and P.W. 15 the Circle Inspector of Police went on the 17th with P.W. 10, the Sub-Magistrate, and big men and dug up the spot and recovered the skin of the palm and sole of the foot of a decomposed corpse, and not the other portions. The scar of a cut wound on the skin of the thumb corresponded to such a wound on the thumb of Redanna. Accused 4 was arrested on suspicion on the night

* Crl. Appeals Nos. 15 and 16 of 1950. 14th April, 1950.

of 21st April, 1949 and he offered to show the main corpse of Redanna. He took the Circle Inspector of Police and the Sub-Magistrate and the big men to *Devarathi* Bhavi and pointed out the gunny bag containing the remaining portion of Redanna's corpse. According to the medical evidence of P.W. 9, that corpse could be identified by the hair, teeth etc., by persons who knew the man and witnesses who were related to Redanna or knew him well identified the corpse, by the curly hair, coated teeth, jutting forehead bone and other signs and features and also a key of Redanna (M.O. 1) found with the remains. The lower court believed the evidence of the prosecution witnesses that the remnants found in the gunny bag represented the corpse of the murdered Redanna. P.W. 9, the doctor swore that the murder should have taken place 14 days before, that is on the 8th. The evidence to show that the death had been brought about by throttling or strangulation rested only on the confessions of accused 4 and 3. There was no direct witness to speak to the muder. P.W. 7, who keeps a private school, swore that accused 1 and 2 approached him to aid in this murder, but he excused himself as he was already involved in another murder case and it was all such a bother. The confessional statements were recorded from accused 3 and 4 by the Sub-Magistrate P.W. 10 on 28th April, 1949 and 24th April, 1949 respectively. They gave a detailed account of the murder but minimised the part taken in the murder by accused 3 and 4 and exaggerated the part played by accused 2. But one important thing was that the Magistrate omitted to warn accused 4 or accused 3 that it was not intended to take them as approvers as required by Rule 85 of the Criminal Rules of Practice. It has been held by a single Judge of this Court in *Govinda Subbaramayya* v. *Emperor*[1], and by a Bench of this Court in Referred Trial No. 55 of 1947 (an unreported case), that such an omission is fatal to the admissibility of such a confession as it causes a grave doubt on the voluntary nature of such a confession in cases where there are more than one accused and there is a reasonable ground for supposing that the confessions might have been made on the assumption that the persons confessing would be taken on as approvers and escape punishment. In the present case some persons had been suspected in the first instance of this murder and eight persons were actually charge-sheeted of whom four were committed to the Sessions and two finally acquitted. It is obvious, therefore, that this is one of those cases which would come within the scope of the two rulings quoted above which in our opinion have laid down a salutary rule of prudence in such cases. Accused 3 and 4 detracted from their confessions in the committing Magistrate's Court. Accused 4 when taken before the District Magistrate for recording his statement in order to be tendered a pardon and taken on as an approver refused to make a statement and said that he knew nothing about the murder. It is obvious that the confessions of Accused 3 and 4, which are the main pieces of evidence against them regarding the conviction under section 302, Indian Penal Code are of no value in the circumstances. Nor were these retracted confessions corroborated in any material particulars regarding the murder itself. The fact that accused 3 and 4 were charged for another muder, as hired assassins and acquitted shortly before this case was launched for lack of evidence, is of course irrelevant. So, we set aside the convictions of both the appellants under section 302, Indian Penal Code and sentences of transportation for life and acquit them both of that offence, by giving them the benefit of the doubt. It is regrettable that despite the many rulings of this Court emphasising the need to follow Rule 85 of the Criminal Rules of Practice, some Magistrates are still not following that rule strictly and putting all the questions and warnings required thereunder. We hope that such cases of carelessness on the part of Magistrates will not recur hereafter.

Now we come to the convictions of the appellants under section 201, Indian Penal Code. There is no satisfactory evidence at all regarding this offence so far as accused 3 is concerned. His confession was four days later than that of accused 4 and led to no new incriminating discovery. His being alleged to be a hired assassin and a confederate of accused 4 in two murders is of no use. We set aside

1. 1937 M.W.N (Crl.) 34.

his conviction under section 201, Indian Penal Code and the sentence thereunder and acquit him of this offence also. But regarding accused 4 there is sufficient evidence, in our opinion, to support the conviction under section 201, Indian Penal Code. He was the first to give information about the corpse of Redanna thrown into the *Devarathi* Bhavi. Nobody knew about the existence of the corpse that was found in the well in the jungle before he gave information regarding it and there is ample ground for presuming that he had a hand in concealing the corpse in that well in order to prevent the detection of this murder. The identity of that corpse as that of Redanna, who was held to have been murdered on the 8th night, was taken as established by the lower court, which saw the witnesses and heard their evidence, and we are not prepared to take a different view. In the end, therefore, we confirm the conviction of accused 4 under section 201, Indian Penal Code and also the sentence awarded thereunder which was not at all excessive.

V.S. *Appeal allowed.*

Conviction of accused 4 under Sec. 201, I.P.C. confirmed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

V. M. Raghavalu Naidu and Sons by executors C. G. Krishnaswami Naidu and another .. *Applicants* *

v.

The Commissioner of Income-Tax and Excess Profits Tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 41—Applicability—Executors also appointed trustees under will—When can claim to be assessed only as trustees—Completion of administration and ascertainment of residue—Necessity—Amounts paid as maintenance by executors under the directions in the will—Deductions in respect of, if allowable.

A testator appointed some persons as executors who were also to be trustees and gave them various directions in respect of the continuance of the business of the testator and payment of maintenance to his mother and to his widow. The will after providing for the payment of certain specific legacies and administration of some charities left the residue to the three sons of the testator as life estate holders with a gift over of the estate to the grandsons by such sons. The executors after obtaining probate continued the business of the testator, paid one of the specific legacies, made book entries in regard to the maintenance amounts and otherwise carried on the duties of executors. The executors were assessed in respect of the income of the estate as an association of persons under the Income-tax Act. On a contention by the assessees that they should have been assessed as trustees under section 41 of the Act and that the amounts paid as maintenance should be deducted,

Held, the decision of the question depends upon when the executors of the will cease to be executors and become trustees. Executors do not become trustees for the beneficiary in the case of specific bequest until assent and in the case of a residuary bequest until the residue is ascertained and the assent of the executor is either expressly given or inferred from conduct. In the circumstances, it was clear that the administration of the estate by the executors was not complete during the relevant period, that their executorial duties had not been discharged and the residue of the estate had not been ascertained so as to constitute it a trust fund. The executors not having been divested of the estate and the residue not having been ascertained, the estate cannot be considered to have vested in them *qua* trustees. Without the coming into existence of the property which has to be held in trust, there could be no trust and without the termination of the duties of the executor there could be no trustee. The executors continued to be executors and had not become trustees, and their being assessed as an association of persons was perfectly justified.

The amounts paid as maintenance was not an allowance charged upon the estate either by decree of Court or otherwise and to which, the testator himself had no right or title to receive. The executors received the income as executors and applied the income in the course of the administration of the estate and are treated as mere current outgoings of the estate. No deduction is allowable in respect of such payments.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922, (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in R.A. Nos. 167, 168 and 169 (Madras) of 1947-48 on its file.

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* Case Referred No. 3 of 1948. 2nd February, 1950.

The Advocate-General (*K. Rajah Ayyar*) and *K. Srinivasan* for Applicants.

C. S. Rama Rao Sahib for Respondent.

The Court delivered the following

JUDGMENTS : *Satyanarayana Rao, J.*—This is a consolidated reference under section 66 (1) of the Indian Income-tax Act by the Appellate Tribunal relating to the relevant assessment years 1942-43 and 1943-44, and also to the chargeable accounting period 29th January, 1941 to 18th January, 1942, under the Excess Profits Tax Act.

The questions referred to us are

(1) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the executors did not cease to be executors, and, therefore, section 41 of the Income-tax Act had no application?

(2) Whether on the facts of the case the Tribunal was right in upholding the decision of the department that the maintenance paid to the widow and the mother of the testator under the will was not an allowable deduction under the Income-tax Act?

The assessee is V. M. Raghavalu Naidu & Sons (by executors C. G. Krishnaswami Naidu and M. R. Krishnaswami Naidu). They were assessed to income-tax during the assessment years as an association of persons. The executors were appointed under the will of one V. M. R. Seshachalam Naidu who died in 1936 leaving behind him a will, dated 20th April, 1936. At the time of the death of the testator, he was carrying on a lucrative timber business in Madras and had also agencies at Karachi, Calcutta and branches at Negapatam, Cocanada and Bombay. He also owned saw mills at Rangoon. He left behind him at the time of his death his mother and his widow besides three daughters and three sons. By clause (3) of the will he appointed his son-in-law G. G. Krishnaswami Naidu and his manager whom he described as Basin Bridge Depot Manager, M. R. Krishnaswami Naidu, as executors and trustees of the will. The same clause also provided that his daughter Jumna Bai and his sons Badri Narayanan *alias* S. Badrinath and Sampath Kumaran shall as soon as each of them attain the age of majority, *i.e.*, age of 18, also become executors and trustees in addition to the two named persons and carry out the provisions of the will. C. G. Krishnaswami Naidu was appointed executive trustee. Under clause 6 of the will he directed that the business should be continued after his death so long as the business is running at a profit and should not be wound up even after the sons attained the age of majority and assume the management. Among the properties left by him this business was the most important asset and he had also other moveable and immoveable properties. Under clause (8) there was a provision to purchase immoveable properties, after the total capital of the business reached Rs. 10,00,000, *i.e.*, five lakhs for the business in India and five lakhs for the business in Burma. The executors under this clause should set apart immoveable properties of the value of Rs. 50,000 every year which they should acquire out of the profits of the business. Under clause (9) the executors were empowered to convert the business in India into a limited concern soon after the capital of the business in India reaches five lakhs of rupees. Clauses (10) and (11) provide for payment of an amount to the mother and also some amounts to his widow for the maintenance of herself and the children. By clause (12) he made provision for certain pecuniary legacies most of which are payable at a future date on the happening of the events mentioned therein. This clause also directs that the mortgage deed executed by the testator's wife's sister's son in his favour should be cancelled and delivered to him. Clause (13) provides for the setting apart of half anna per rupee of the nett profits of the business every year and also half anna per rupee from the interest on capital, and for payment of the said sum to V. M. R. & Son Trust, which was established by the testator's mother so long as the charity continues to be carried on. Under clause (17) the testator expressed his desire that his three sons-in-law should be trained in the business and that they should be taken as partners in the business and given a share of one and half annas in the

rupee for the first ten years and two annas in the rupee thereafter till their 55th year. There is also a provision for a monthly payment for their remuneration and maintenance from the time of their joining the service and working in the business. Clause (18) provides for the disposal of the residue. Under it the three sons are entitled to take the estate as tenants-in-common subject to the legacies and dispositions contained in the will but they would be entitled to enjoy the income and profits of the estate without any power of alienation during their lives and after their death the estate should be taken by the grandsons by the sons, natural or adopted. The grandsons, it is provided, should be entitled to take the estate *per stirpes* provided however that their right to partition and possession of the estate shall be postponed until the majority of such of the grandsons as may be alive at the death of the last of the sons of the testator.

After the death of the testator, the two executors applied for and obtained probate in O.P. No. 164 of 1936 on the file of the High Court on the 1st of August, 1936. The usual accounts, it is stated, were also submitted by the executors in due course. The business was continued by the executors. The major part of the income which was assessed by the Income-tax Officer consists of the profits of the timber trade, the rest of it being income from business in paints and cocoanuts, rents and profits or property and interest on securities.

The main contention of the assessees was that they should not be assessed as an association of persons but should be assessed as trustees under section 41 of the Indian Income-tax Act. This section deals with cases of what may be described as vicarious assessments and if there are trustees constituted under a deed or a will, the measure of the liability is the actual interest of the beneficiary concerned. The trustees and other representatives contemplated by the section are in the nature of the persons who merely receive the income but transmit the same to the beneficiaries. In other words, the estate of the beneficiary it is that is charged to income-tax under the section. The other contention raised by the assessees was that the sum of Rs. 12,950 in the assessment year 1942-43 and Rs. 12,900 in the subsequent year were paid by them as maintenance allowance to the widow and the mother of the deceased and that those amounts should be deducted from the income of the estate during the respective assessment years, the contention being that the maintenance allowance were an allocation by the deceased of part of his income which were charged upon the estate and the executors had no right to such income. The amount actually paid during the period was not in dispute. These two contentions were rejected by the Income-tax Officer and by the Appellate Assistant Commissioner. On further appeal, the Appellate Tribunal confirmed the decision of the department. Hence this reference.

The main contention urged by the learned advocate on behalf of the assessee was that the administration of the estate was completed, the residue was ascertained, the executors assented to the legacies and thereafter there were no further duties as executors to be discharged by them and therefore they became trustees for the beneficiaries ; and the assessment should have been made under section 41 of the Act. This is the contention covered by the first of the questions referred to us.

As Kekewich, J., observed in *Timmis*, In re : *Nixon* v. *Smith*[1] :

" There are few things more difficult than to determine when an executor ceases to have duties *qua* executor or *virtute officii*, or, as it is phrased in the Finance Act, 'as such.' There are few wills which come before the Court which do not contain directions to persons as executors and as trustees, and it is a common case that the same persons are executors and trustees."

This exactly describes the situation in the present case. The two persons were appointed as executors and trustees under the will and one of them is an executive trustee. Do the two persons still continue to be executors or have they become trustees ? An " executor is a person to whom execution of the last will of a deceased person is, by testator's appointment, confided " [*vide* section 2 (c)

1. (1902) 1 Ch. D. 176 at 182.

of the Indian Succession Act]. He is the legal representative of the deceased. It therefore follows that he represents the estate of the deceased in the right of the testator. So long as he continues as an executor he holds the estate as a representative of the deceased and not on behalf of the beneficiaries. A trustee is a person in whom the property is vested for the benefit of the beneficiaries. Until therefore the title of the deceased or the representative character of the executor comes to an end he does not clothe himself even if he is described as a trustee under the will with the legal character of a trustee. If he holds the title as a trustee for the beneficiaries it is then that he acquires the status of a trustee. The point therefore for consideration is when does the executor cease to function as such? In the present case the testator bequeathed certain pecuniary legacies and his estate consisted of a business which he expressly directed that the executors should continue even after the sons attained majority. In the residuary estate a life interest is given to the sons who are to take it as tenants-in-common with a remainder over to the grandsons by the sons. The sons under the will are entitled to certain pecuniary legacies and also a life interest in the residuary. For the executors to become trustees of the residue the funds which they should hold in trust for the residuary legatees must be constituted and must emerge into existence. It is settled law that until the residuary estate is ascertained the residuary legatees acquire no interest in the property and no fund in their favour comes into existence. This has been settled in *Lord Sudeley* v. *Attorney-General*[1]. The position has never been so clearly enunciated as in the speech of Lord Halsbury, L.C., in that case at pages 15 and 16. The following observations at page 15 of the speech are apposite :

"It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say 'I will have this or that part of the assets'. If a trustee is to be the character filled, the *cestui que trust* has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted. In this case the trustees and executors happen to be the same persons; but I think Mr. Channell made the point clear by adopting the hypothesis that the executors and trustees had been different persons Until the thing has been ascertained, until the trust fund has been constituted, the thing of which the trustees are the trustees has not been ascertained. Whether you treat them, therefore, as trustees or executors, the same consideration arises.

"Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, I say that to my mind it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality until that has happened; it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist."

To the same effect is also the decision of the House of Lords in *Barnardo's Homes* v. *Special Income-tax Commissioners*[2]. Referring to *Lord Sudeley's case*[1], Lord Atkinson, at page 11 of that case says this :

"The case of *Lord Sudeley* v. *Attorney-General*[1], decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained."

After the residue is ascertained and the executor assents to the legacy either expressly or impliedly the disposition in the will becomes operative and the beneficiaries have the property vested in them. The assent of the executor before the residue is ascertained would not perfect the title of the residuary legatee as the residue until then does not come into existence. It is in this light that the observations of Viscount Haldane, L.C., in *Attenborough* v. *Solomon*[3] have to be understood. In that case it may be observed the residue was ascertained; all the debts and legacies were paid and there was also assent of the executor. It was therefore held that the dispositions by way of trust took effect and that the executors had no interest thereafter to pledge the property which formed part of the residuary estate. No doubt as pointed out by Viscount Haldane, L.C., in that case at page 85 :

1. (1897) A.C. 11.
2. (1921) 2 A.C. 1.
3. (1913) A.C. 76 at 85.

"Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs *virtute officii*; and their right *in rem*, their title of property, had been transformed into a right *in personam*—a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision."

To the same effect is also the view of Kekewich, J., in *Timmis*, In re : *Nixon* v. *Smith*[1], where the learned Judge pointed out the ordinary duty of executors to pay the debts, funeral and testamentary expenses, and when that is done he has done all that was necessary and though he still remains executor he has done his duty and is *functus officio*. In that case there were no legacies in the ordinary sense but if there were legacies the executor must pay them after the debts, funeral charges, and testamentary expenses. After such payment the residue may be ascertained and paid off to the residuary legatee. The fact that there was an outstanding mortgage on the property would not prevent the ascertainment of the residue. In *Inland Revenue Commissioners* v. *Smith*[2], Lord Hanworth, M.R., referred to the decisions of the House of Lords already referred to and applied the principles of those decisions to the case before him.

The learned Advocate-General drew our attention to three other decisions of the Courts in England which also throw light on the point now under consideration. In In re *Moore* : *McAlpine* v. *Moore*[3], which arose under the Trustee Act, 1850, Kay, J., observed that :

"Although the Court cannot remove an executor, it can appoint a trustee or trustees to perform the duties of an executor, which in this case means to pay the legacies when they became payable."

This observation evoked comment in later cases as it seemed to imply that a trustee could also perform the duties of an executor such as payment of legacies which is inconsistent with the functions of the office of a trustee who holds the property for the benefit of the beneficiaries. Kay, J., thought in that case that the definition of the words " trust " and " trustee " in the Trustee Act, 1850, as extending to and including the duties incident to the office of personal representatives of a deceased person, justified the course indicated by the learned Judge in that judgment. The Court of Appeal had occasion to consider this case in In re *J. R. Willey*[4], where the Court adjourned the petition to ascertain whether the debts and funeral and testamentary expenses had been paid or not before taking action under the Trustee Act, 1850, by appointing a trustee. Cotton, L.J., is reported to have intimated an inclination of opinion that In re *Moore*[3], went too far, and that a Court acting under the Trustee Act, 1850, could not appoint a person as trustee to discharge the duties which legitimately belonged only to the office of an executor and not to that of trustee. Kekewich, J., pointed out in a later case in *Eaton* v. *Daines*[5], that there was some misapprehension regarding the decision of Kay, J., in In re *Moore*: *McAlpine* v. *Moore*[3], as the case before Kay, J., must have been a case where there was no existing trustee of the trust property remaining in the possession of the executor after it has passed from the office of executor to that of trustee which implies that the administration of the estate by the executor was completed by payment of debts, legacies, funeral and testamentary expenses. Of course, Kekewich, J., in that case agreed with Cotton, L.J., that without payment of debts, legacies, funeral and testamentary expenses, the Court had no jurisdiction either under the Act or otherwise to appoint trustees. The executor represents the testator and is his legal representative. He had duties laid down by the will and by the statute which he alone should perform and could not be taken away out of his hand. These decisions in my opinion do not at all conflict with what was decided by the House of Lords in the cases already examined. On the other hand, they clearly drew the line of demarcation when the property legally passes from the possession of the executor to that of the trustee. The administration by the executor must be completed and the statutory duties must be discharged before the estate could pass

1. (1902) 1 Ch.D. 176.
2. (1930) 1 K.B.D. 713.
3. (1882) 21 Ch.D. 778.
4. (1890) Eng. Weekly Notes 1.
5. (1894) Eng. Weekly Notes 32.

to the trustee. These decisions in my opinion give clear guidance to determine the difficult question when the office of executor terminates and when the office of the trustee commences.

Under the Indian Succession Act the position is the same. The powers and duties of an executor are enumerated in Chapter VII of the Act beginning with section 316. The funeral charges have precedence over the debts and the debts have precedence over the legacies. The effect of assent of the executor or administrator is stated in Chapter VII. Under section 332 the assent of the executor or administrator is necessary to complete a legatee's title to his legacy. It may be noted that the assent is required only to complete the title and not for the acquisition of the title. The title of the legatee is the title under the will and the assent is only to perfect the title and to complete it. Before such assent, however, the legatee's right is only an inchoate one which is transmissible to his personal representatives. Section 333 states that when there is assent of the executor, then the executor is divested of his interest and the assent transfers the subject of the bequest to the legatee. Of course, the assent when once it is given operates retrospectively to the date of the death of the testator. But there is one distinction between a specific legacy and a residuary bequest. The doctrine of relation back does not apply to the bequest of residue, as residue only comes into existence when the administration is completed. This follows on the principles relating to the residuary legacies which have been enunciated by the House of Lords in *Lord Sudeley's case*[1] and *Barnardo's Homes* v. *Special Income-tax Commissioners*[2]. This distinction between specific legacies and residuary legacies was adverted to by Viscount Finlay in *Barnardo's case*[2], at page 8, where it is observed :

> "The doctrine of relation, however, which applies to specific legacies, is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed."

Section 342 of the Succession Act enjoins that the executor when there is a general legacy to be paid at a future time should invest a sum sufficient to meet it in securities of the kind mentioned in section 341 ; and the intermediate interest forms part of the residue of the testator's estate. Under section 343 where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341. It is after all this that section 366 of the Act provides that the surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed under the will. It would be seen from this summary of the relevant sections of the Indian Succession Act that the principles embodied in the Act are not at variance with the principles which have been enunciated and applied in England.

Before dealing with the facts of the case, it may be useful to advert to the duties of an executor when one of the assets of the testator's estate consists of a business. The law on the subject is clearly summarised in 14 Halsbury (Hailsham's Edition) at pages 386 and 387, Part V, Section 1 ; in Williams on Executors, Vol. II, 1930 Edition, page 1171 and in Godfrey on Trusts, pages 268 and 270, 5th Edition. In order to enable an executor to continue the business of the testator, there should be a direction in the will either express or necessarily implied from the terms of the will. If there is no such direction the executor, however, may carry on the business for a reasonable time with a view to wind up the business. The executor is generally liable for the debts incurred during the course of the business which is continued by him but has a right of indemnity against the estate. It is unnecessary to deal with all the principles relating to the rights of creditors and of the executor regarding the payment of the debts as they have been discussed fully in the authorities referred to above ; and they are not very relevant for purposes of this case. In the present case under the will, the executors had an undoubted right to continue

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1. (1897) A.C. 11. 2. (1921) 2 A.C. 1.

the business and the business forms part of the residue of the estate. It is also unnecessary for us in this case to determine finally what exactly are the rights in the business of the sons who take for life and the remaindermen (i.e.), the grandsons by the sons. It will be sufficient to hold that residue includes the business, the profits of which have been included in the assessments now under consideration.

In the light of these principles discussed above, I may now examine the facts in order to see whether the executors have become trustees under the will. The learned Advocate-General during the course of the arguments referred to some of the accounts which have been maintained by the executors to show that the residue was ascertained and the executors assented to the residue. Mr. Rama Rao Sahib, the learned advocate for the Income-tax Commissioner, objected to the production of the accounts at this stage as they were not available and were nor produced before the Appellate Tribunal. Apart from this objection we are not satisfied on a perusal of the accounts that the accounts indicate that the executors had discharged their duties as executors and that the residue was ascertained. It is admitted by the executors themselves that most of the duties enjoined upon them under the will and under the law have not been carried out of the pecuniary legacies, the eldest son alone received some amounts under clauses (a) and (b) of paragraph 12 of the will. The legacies contemplated by clauses (a) to (g) of that paragraph have not become payable and those legacies are to be paid in future. It was the plain duty of the executors to have followed the provisions of section 342 of the Indian Succession Act and should have provided a fund sufficient to meet the legacies which are payable at a future time. They have not done that. Regarding the maintenance allowances also the situation stands in the same position. Under section 343 of the Act as the annuities have not been charged and no fund has been appropriated by the will to answer the annuity, the executors should have taken steps to invest a sufficient sum to produce the annuity and invest for that purpose in securities as contemplated by section 341 of the Act. This also was not done. As regards the cancellation of the deed of mortgage, it may be that they have decided not to enforce it and they have produced the original deed of mortgage with the word "cancelled" endorsed over it but not signed by the executors. However that may be, the provision for payment of the future legacies has not been made. The executors have also not carried out the directions contained in clause 13 of the will. No steps have been taken to pay or set apart the fund to the trust specified in that clause. It is therefore unthinkable that the residue should have been ascertained without provisions for payment of the legacies, the amount of which is not insignificant. As the duties therefore of the executors as such have not yet been discharged they do not cease to be executors and the trust fund, namely, the residue has not come into existence. They do not therefore hold the property, particularly the business, which forms part of the residue as trustees for the beneficiaries. Without the coming into existence of the property which has to be held in trust, there could be no trust and without the termination of the duties of executor there could be no trustee. The conclusion is therefore irresistible that they continued to be executors and had not become trustees; and the assessment as an association of persons by the income-tax authorities is perfectly justified.

Mr. Rama Rao Sahib also raised an alternative contention that even if they are trustees as they carried on business they should be assessed under section 10 of the Income-tax Act on the total income of the business as an association of persons. In support of this argument he relied upon the decision of this Court in *Commissioner of Income-tax, Madras* v. *Mrs. Saldanha*[1], which follows the decision of the Lahore High Court in *Hotz Trust of Simla* v. *Commissioner of Income-tax*[2]. It is unnecessary to express any opinion regarding this contention though I am inclined to hold that there is considerable force in the argument advanced by Mr. Rama Rao Sahib, in view of the decisions.

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1. (1932) 62 M.L.J. 600 : I L.R. 55 Mad. 891 (F.B.).
2. (1930) I.L.R. 11 Lah. 724.

The second of the questions remains for consideration. The argument of the learned advocate was that this income which was paid to meet the maintenance allowance of the mother and the widow of the testator was payable under an overriding title and therefore could not be treated as income received by the executors as forming part of the estate. He also urged that the testator himself was under a personal obligation to maintain the mother and the wife and it is only that obligation that he had recognised and provided for under the will and therefore it is not income which the executors has received as forming part of the estate. If the testator had been alive he could not have claimed the amount as a deduction notwithstanding that under the Hindu Law he is under a personal obligation to maintain his wife and the mother. It is not an allowance which was charged upon the estate by a decree of Court or otherwise and to which the testator himself had no right or title to receive. The income is received by the executors undoubtedly as part of the income of the testator and they applied it for discharging the obligations to pay maintenance to the mother and widow. The decision in *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income-tax, Calcutta*[1], has no application and the case is clearly governed by the principles in *P. C. Mallik* v. *Commissioner of Income-tax, Bengal*[2]. The claim of the executors was therefore rightly rejected.

In the result, the two questions referred to us must be answered in the affirmative and in favour of the Income-tax Commissioner; and the Commissioner is entitled to his costs of this reference which we fix at Rs. 250.

Viswanatha Sastri, J.—The facts that have led to this reference and the questions referred to us have been stated in the judgment just delivered. Numerous English decisions were cited before us by the learned Advocate-General on behalf of the assessees during the prolonged hearing of this case. Notwithstanding the observation of Kekewich, J., in *Timmis*, In re: *Nixon* v. *Smith*[3], that there are few things more difficult than to determine when an executor ceases to have duties *qua* executor or *virtute officii* and becomes a trustee, and that the line is extremely difficult to draw, the law on this topic is now well-settled. In any case it is not difficult to decide on which side of the line the present case falls.

It often happens, as in this case, that the same persons are appointed executors and trustees under a will; but it makes no difference in law whether the trustees are strangers or the executors themselves. It is not uncommon to find specific or pecuniary legacies in a will with a bequest of the residue absolutely in favour of a person. The residue might be settled, as in the present case, for the life of a legatee or legatees with a remainder over to other persons. The property disposed of by a will might, as in this case, consist of moveable and immoveable properties of the testator as well as his business. For the purpose of this reference it is necessary to ascertain the position and right of the residuary legatees *vis a vis* the executors during the years of account 1941-42 and 1942-43. The relevant portions of the will now under consideration have been referred to by my learned brother. Shortly stated, the question is whether during the relevant period the executors were functioning merely as executors and administering the estate or whether they had become trustees for the beneficiaries under the will in respect of the residue.

There is an important distinction between the position and estate of executors and the position and estate of trustees. If trustees are in receipt of income which they have to pay over to beneficiaries, with or without deduction of the trustees' expenses, the income is, at its very inception, the income of the beneficiaries. The income when it comes into the hands of the trustees is the income of the beneficiaries, though it is the hand of the trustees that receives the income and though for purpose of income-tax the trustees are assessed under section 41 (1) of the Income-tax Act. The trustees may receive the income of a settled estate and distribute it among the beneficiaries, but income-tax is levied not on the aggregate income of the estate

1. (1933) 65 M.L.J. 285: L.R. 60 I.A. 196: I.L.R. 60 Cal. 1029 (P.C.).
2. (1938) 1 M.L.J. 704: L.R. 65 I.A. 150: I.L.R. (1938) 2 Cal. 214 (P.C.).
3. (1902) 1 Ch. D. 176.

in the hands of the trustees and at the rate appropriate to such total income, but on the income of each of the beneficiaries at the appropriate rate of tax. Section 41 (2) permits the direct assessment of each of the beneficiaries according to his share of the income of the trust estate. Where, however, the estate is administered by executors, the income received by them pending the conclusion of their administration is not, in law, the income of the legatees or beneficiaries. Where trustees are appointed under a will, whether the trustees be the executors themselves or strangers, the right and interest of the beneficiary in the income of the trust fund differs radically from the interest of the legatee in the income received by the executors during the period of their administration. During such period the income of the estate is the income of the executors and not of the beneficiaries or legatees, though the executors are bound to apply the income in a due course of administration. The executors do not, during the period of their administration, become trustees of any part of the estate for the legatees, unless they have assented to the legacies and the executors are liable to be assessed to income-tax on the entire income of the estate under their administration subject to the exemptions granted by the Income-tax Act, without regard to the rights of the legatees who may eventually be entitled to be paid out of the net assets. The incidence of tax is therefore much heavier in the case of an assessment on the executors as such than in the case of an assessment on the trustees of the estate holding it for the beneficiaries. Hence the controversy often arises as to whether and when the executors of a will have become trustees and the legatees have become beneficiaries.

Chapter VII of the Indian Succession Act, 1925, succinctly defines the duties of executors. Shortly stated, it is their duty to clear the estate—to pay the debts, funeral and testamentary expenses and the pecuniary legacies, and to hand over the assets specifically bequeathed to the specific legatees. When all this has been done, the balance left in the executor's hands is the residue and must be paid over to the residuary legatees under section 366 of the Succession Act or held in trust for them, if the directions in the will require the residue to be so held. Section 211 (1) of the Succession Act constitutes the executor of a deceased person his legal representative for all purposes and vests all the property of the deceased in the executor. Though no time limit is fixed by the section for the duration of the office of executor with its powers and rights, and in this sense an executor remains an executor for an indefinite time the property which he has in the estate that devolves upon him and over which his powers extend, does not remain his indefinitely. By his assent to the disposition in the will they become operative, the executor is *pro tanto* divested of the property which was his *virtute officii*, and the legatees have vested in them as owners, the property in the subject-matter of the bequests. Under sections 332 and 333 of the Succession Act the assent of the executor to a legacy may be express or implied from his conduct. By assent is meant not that the executor concurs in the dispositions in the will but that he assents to the disposition taking effect upon the specific property if the bequest is specific, upon the sum of money if it is pecuniary or upon the residue brought out by the executor at the end of the administration, if it is a residuary bequest. There is the same necessity for the executor's assent to a bequest of the residue as to a bequest of a specific or pecuniary legacy. So soon as he assents to the dispositions of the will—and the assent may be express or implied from his conduct—they become fully operative and the title of the legatees becomes absolute. If there are trusts declared or created by the will in respect of the subject-matter of the bequest the trusts take effect on such assent, the estate vested in the executor as such is divested and vests in the trustees of the will. The fact that the executors are themselves the trustees does not make any difference. Nor does the fact that the bequest is of the residue affect the point, once the residue has been ascertained in due course of administration. See *Attenborough* v. *Solomon*[1].

We are concerned in this case with the rights of residuary legatees under a will which constitutes the executors, trustees of the residuary estate. The conten-

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1. (1913) A.C. 76.

tion on behalf of the assessees is that the executors have become trustees and that the true relationship between the executor and the residuary legatees is now one of trustees and beneficiaries. I am of opinion that this contention is *untenable*. The decision in *Lord Sudeley* v. *Attorney-General*[1] is authority for the position that even if the trustees and executors happen to be the same persons, until the claims of the testator's estate for his debts and testamentary expenses and the pecuniary and specific legacies have been satisfied, the residue does not come into actual existence. It is a non-existing thing, until that event has occurred. The probability that there will be a residue is not enough, but it must be actually ascertained. Dealing with a trust of the residuary estate Lord Halsbury, L.C., observed :

> "Even if the trustees and executors happen to be the same persons, until the estate is *fully administered* (*Italics mine*), until the thing has been ascertained, until the trust fund has been constituted, the thing of which the trustees are trustees has not been ascertained. Till then the right of the residuary, legatee is to require the executors to administer the estate completely."

There is an essential difference between the position of an executor and that of a trustee not only with reference to the chargeability to income-tax but with reference to other branches of the law as well. The powers of a trustee to alienate the trust property are strictly limited, while an executor has plenary power of disposition of the estate vested in him as such. An executor can plead the bar of limitation, while a trustee cannot. Executors do not become trustees for the beneficiary in the case of a specific bequest until assent, and in the case of a residuary bequest, until the residue is ascertained and the assent of the executor is either expressly given or inferred from conduct. In *Barnardo's Homes* v. *Special Income-tax Commissioners*[2] the House of Lords had to deal with this question in a case arising under the English Income-tax Act. There was a bequest of the residue in trust for a charity in that case. The income of the charity was exempt from income-tax, and the question arose whether a refund of the tax paid by the executors in respect of certain dividends, was claimable on behalf of the charity on the ground that eventually the stocks and shares as well as the dividends would come to be held in trust for the charity. The House of Lords negatived the claim holding that during the relevant period, the dividends were not the income of the charity but of the executors, and that the executors and not the charity, were the recipients of the income, the administration of the estate of the executors not having been completed. When the case was before the Court of Appeal, Younger, L.J., (afterwads Lord Blansborough) stated the law in these terms :

> "Until the residue is ascertained, and until its existence as net residue has been acknowledged by the executor, either by payment to the residuary legatee, or if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund but his right is, until that moment of time arrives, to have the estate administered in due course."

The House of Lords affirmed the decision of the Court of Appeal on the ground above stated. The *ratio decidendi* was that during the relevant period executors held the dividends not for the charity but for the general purposes of the testator's estate, and that since the executorial duties had not been fully discharged and the residue had not been ascertained, the executors had not converted themselves into trustees. Viscount Cave dealt with the matter thus :

> "When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him ; but until that time, he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration."

In another case before the House of Lords, *Inland Revenue* v. *Wahl*[3] Lord Buckmaster referring to the previous decision of the House observed :

> "Since the *case of Barnardo's Homes*[2], it has been clearly established that the accumulation of income from a residuary estate before the appropriation of that estate to the residuary legatee, does not cause such income to be regarded as the income of the beneficiary on its ultimate receipt by him

1. (1897) A.C. 11.
2. (1921) 2 A.C. 1.
3. 17 Tax Cases 744, 759.

and, therefore, where, as in that case, the beneficiary was a charitable institution, they are not, entitled to a return of the sums which have been deducted by way of tax from the income at its source."

In view of these pronouncements of the House of Lords it is unnecessary to refer to the other English decisions cited by the learned Advocate-General. Reference may however be made to a decision of the Calcutta High Court in *Ganoda Sundary* v. *Nalini Ranjan*[1], where Woodroffe, J., held that the residuary legatee did not become the owner until after the administration by the executors had been completed and his interest ascertained. The residuary legatee might be interested in the estate subject to the payment of debts and legacies, but he did not become the proprietor or owner of the residue except when a residue had been ascertained which, on completion of administration, is made over to him by the executors. The question in each case is, has the administration reached a point at which you can infer that the administration has been completed, the residuary estate has been ascertained, the bequest of the residue has been assented to and the residuary estate therefore became vested in trustees, be they the executors themselves or strangers? In other words can it be said that the residuary estate had taken concrete shape and could and should have been handed over by the executors to the persons beneficially entitled but for the fact that the estate is settled in trust and vested in the executors as trustees?

Having considered the materials placed before us, I am of opinion that the administration of the estate by the executors in the present case is far from complete, the executorial functions and duties have not been discharged, the residuary estate has not been ascertained and has not come into existence, the trust fund has not been constituted, the executors have not yet become divested of the property and the residue has not vested in them as trustees. It is common ground that some of the pecuniary legacies bequeathed under the will have not yet been paid. The suggestion that the time for payment of those legacies has not arrived is not supported by the answers given by one of the executors to the questions propounded by the revenue authority. Even if the suggestion were correct, it was the duty of the execucutors under section 342 of the Succession Act to have invested a sum sufficient to meet the legacy when due and payable. This has not been done yet. There is also a provision in the will for the payment to the widow of the testator of a monthly allowance of Rs. 50, for her life and of Rs. 1,000 per month until the last of her children attained majority, an event which has not yet happened. No fund or property has been charged with the payment of this allowance or appropriated to it by the will. No provision has yet been made by the executors by way of the creation of a fund to secure the payment of this allowance as required by section 343 of the Succession Act. Indeed these sums so far as they have accrued, have been merely credited to the widow in the accounts and not paid over to her. Even a deed of mortgage directed by the testator to be cancelled and delivered up to the executant a relation of the testator, has not been so delivered, though an entry in the accounts, writing off the debt was shown to us. There is a direction in paragraph 13 of the will, that the executors should set apart and pay half an anna per rupee of the net profits of a timber business carried on by the testator and directed to be continued by the executors, to a charity established by the testator and his mother. No such payment has been made by the executors, and all that is shown is an entry in the accounts crediting the charity with the sums. Lastly the testator enjoins the executors to carry on his business, which is a flourishing and lucrative business in teakwood and timber, for a period of seven years at least, to increase its capital and to convert it into a limited company in certain contingencies. The period of seven years was not over before the relevant years of accounts. If at the end of the period of seven years it was found that the business did not yield a profit of 3 per cent. on the outlay the executors were directed to wind up the business. The ordinary rule that an executor or trustee has no power to carry on his testator's business except so far as is necessary for winding up has no application to the present case as the will not only authorises but requires the executors to carry on the

1. (1908) I.L.R. 36 Cal. 28, 42.

business till the event on the happening of which it has to be wound up occurs. The business is now being carried on by the executors who are empowered and directed to do so by the terms of the will. The question of the admission of a son-in-law of the testator as a partner in the business and of the formation of a limited company, both of which were directed by the testator, are stated to be still under the consideration of the executors.

I have said enough to show that the administration of the estate by the executors was not complete during the relevant period, that their executorial duties had not been discharged and the residue of the estate has not been ascertained so as to constitute it a trust fund. The executors have not been divested of the estate, and the residue, not having been ascertained, cannot be considered to have vested in them *qua* trustees. The question is one of substance and the way in which the estate has been dealt with by the executors by means of entries in their accounts is not conclusive. It is not merely a question of entries in the accounts purporting to be kept by the executors. I am making this observation, because an account has been shown to us—it was not shown to the Income-tax Officer or to the Appellate Assistant Commissioner, and it is a matter of dispute whether it was shown to the Appellate Tribunal wherein certain figures are entered as representing the assets of the timber business carried on by the testator and continued by the executors. It is claimed that the assets of the timber business as entered in the accounts represent the residuary estate. The mere fact that certain figures are entered in the accounts as the assets of the business and these figures are represented as pertaining to the residuary estate does not mean the residuary estate has been ascertained in the manner contemplated by law. It is no doubt true that the business forms part of the residuary estate and until all the specific legacies are paid and a provision is made for the payment of the monthly allowances of the widow and the mother and due provision is made for the remaindermen who are to take after the life-tenants, it is impossible to say that the administration of the estate is over or that the residue has been ascertained. One of the two residuary legatees who has attained majority has been paid Rs. 10,000 on account, while the other residuary legatee who is still a minor has not drawn any money. Both of them have only a life estate with a remainder to their sons in the residue. I do not suggest that there is any difference in principle between a case where the residue is settled as a life estate with a remainder over and a case where the residue is given absolutely to one individual, as regards the application of the legal principles stated above. Nor does the mere existence of an encumbrance prevent the residue from being ascertained or the residuary estate being handed over to the residuary legatee. But in the present case the executorial duties have not been discharged, the administration of the estate is far from complete and the residue itself could not be said to have emerged or been ascertained for the reasons which I have endeavoured to state. It is not permissible to bring into effect by anticipation the trusts of the will relating to the income of the residuary estate by a professed assent of the executors to the residuary legacy, when, in fact, the estate has not been administered and the residuary estate has not been ascertained, *Corbett* v. *Inland Revenue*[1]. In this view it is not necessary to express an opinion on the further contention of Mr. Rama Rao Sahib for the revenue authority that even if the assessees are deemed to be trustees, they could be assessed as an association of individuals carrying on business, on the entire profits of the business under section 10 of the Income-tax Act, as laid down in *Saldanha's case*[2] and the *Hotz Trust case*[3].

The answer to the first question referred to us is therefore in the affirmative and against the assessees.

The second question is comparatively easy of answer. It is admitted that the sum of Rs. 1,050 a month directed to be paid to the widow of the testator has not been paid to the widow but has been merely credited to her in the accounts and debited to the estate. The sum of Rs. 25 per month payable to the mothe

1. (1938) 1 K.B. 567 (C.A.). 2. (1932) 62 M.L.J. 600 : I.L.R. 55 Mad. 891 (S.B.). 3. (1930) I.L.R. 11 Lah. 724.

of the testator is stated to have been partly paid in cash and partly credited to her in the accounts. But it is admitted that the sums credited to her include the income of her own individual property, and it is not possible to say whether the drawings are attributable to the payments directed to be made to her under the will of the testator or to her own private income. Even if all the sums had been paid by the executors to the widow and the mother of the testator, during the course of their administration it would not make any difference in the answer to the question propounded. I have already reached the conclusion that the executors received the income of the estate of the testator *qua* executors and not as trustees during the relevant period. In this view, it would merely be a case of executors applying the income that comes into their hands in the course of the administration of the estate. Both the corpus and the income of the estate are the property of the executors and are applicable by them as a mixed fund for the purposes of administration. The outgoings may come out of the corpus of the estate or out of its income. It has been held that where a testator by his will directed his executors to pay out of the income of the estate sums of money for his annual ceremonies and for obtaining probate or by way of an allowance to certain beneficiaries, payments made by the executors for those purposes in the course of administration could not be deducted in computing their income for purposes of liability to tax. The executors merely stand in the shoes of the testator, and having received the income of the estate and applied it according to the directions in the will, they cannot deduct such expenses in computing their income for such expenses represent merely the application or distribution of income after it has been realised; *P. C. Mallick* v. *Commissioner of Income-tax*[1]. *Mallick and D. C. Aich*, In re[2], *Ramaswami Ayyangar* v. *Commissioner of Income-tax*[3]. The testator was under a personal obligation under the Hindu Law to maintain his wife and mother, and if he spent a portion of his income on such maintenance, he could not have deducted the expenses from his income any more than he could have deducted his own personal expenses. The position of the executor is much the same. The case of *Raja Bijai Singh Dudhuria* v. *Commissioner of Income-tax*[4], cited by the Advocate-General is distinguishable for, in that case, a portion of the income had been diverted by an overriding title, *i.e.*, by a decree of Court creating a charge on the estate and its income. The assessee merely acted as an intermediary who was in physical receipt of the income of the estate but bound by the decree passed against the estate, to pass it on to the decree-holder. It was not a case where the assessee was under a personal obligation to maintain the decree-holder but the estate in his hands was alone liable. It is a well-settled principle of income-tax law that the destination of income, profits and gains realised by an assessee or the manner of their application by the assessee is immaterial in determining the liability of the income, profits and gains to tax. There is here no charge created by the testator or the executors for the "maintenance allowances" which have been treated merely as current outgoings of the estate. It may be observed that the English Courts have always held that the executor was assessable on the whole of his income from the estate till the administration was over; *Barnardo's Homes* v. *Special Income-tax Commissioners*[5], *Inland Revenue* v. *Smith*[6] and *Corbett* v. *Inland Revenue*[7]. The question now under consideration arose for the decision of the Bombay High Court in *The executors of J. K. Dubash* v. *Commissioner of Income-tax*[8] and it was answered against the assessee.

For these reasons I would answer the second question referred to us in the affirmative and against the assessees.

I concur in the direction for costs contained in the judgment of my learned brother.

V. S. ——— *Reference answered against the assessee.*

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1. (1938) 1 M.L.J. 704 : L.R. 65 I.A. 150 : I.L.R. (1938) 2 Cal. 214 (P.C.).
2. (1940) I.T.R. 236.
3. (1943) 2 M.L.J. 563 : I.L.R. (1944) Mad. 635 : (1943) I.T.R. 597.
4. (1933) 65 M.L.J. 285 ; L.R. 60 I.A. 196 : I.L.R. 60 Cal. 1029 (P.C.).
5. (1921) 2 A.C. 1.
6. (1930) 1 K.B. 713.
7. (1938) 1 K.B. 567 (C.A.).
8. (1948) I.T.R. 90.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Sayyaparaju Surayya .. *Appellant**

v.

Nekkanti Anandayya and others .. *Respondents.*

Arbitration Act (X of 1940), *sections* 32, 33 *and* 34—*Scope of—Award not filed into Court—Bar to subsequent suit.*

The object of the Legislature in enacting section 32 of the Arbitration Act is that no suit should be allowed to be instituted for a decision upon the existence, effect or validity of an award and no party to an award shall be allowed to have it set aside, amended or modified or in any way affected otherwise than as provided in that act. Section 33 provides that the validity of an award can only be contested by an application to the Court and not by means of an independent suit. That section is mandatory, because it says that any party desiring to challenge the validity of an award shall apply to the Court and the Court shall decide the question on affidavits, subject of course to the provision in the proviso for other evidence for the taking of which the Court may pass appropriate orders.

The fact that the defendant did not put forward the award in the earlier litigation does not preclude him from making a point of the fact of that award as outstanding and as a bar to the present action of the plaintiff, and no question of constructive *res judicata* arises.

It is well settled law that an alienation by a widow is voidable at the instance of the reversioners, and if one of two reversioners has chosen to attack the alienation and succeeded in establishing the ground for an attack, then it is only to the extent of his share of the property that he can succeed.

Suryanarayana Reddi v. *Venkata Reddi*, (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad. 111, followed.

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, in A. S. No. 83 of 1945, presented against the decree of the Court of the District Musiff, Razole, in O. S. No. 266 of 1943.

V. Parthasarathy and *N. Seetharamayya* for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for recovery of possession, which has been dismissed by both the Courts below. The suit was laid on the basis that there was an alienation by a limited estate holder, in favour of the plaintiff which was quite valid and binding upon the defendant, who happened to be reversioner to the estate. There was, in fact, a small cause suit on a prior occasion by this very plaintiff against this very defendant, who at the time occupied the position of a lessee, for recovery of rent. During the time the small cause suit was pending there was a reference to arbitration, not through Court but outside. The award that resulted from the arbitration declared that the present defendant was a reversioner to the estate of the last male holder and that the plaintiff had no title to the property, which had been the subject-matter of the alienation by the widow of the last male holder. After the award, curiously enough there was still a decree passed in the small cause suit, apparently because the award was not sought to be relied upon by the defendant in answer to the claim for rent made in that suit. In this suit, which thereafter came to be instituted, questions were raised with reference to the binding character of the alienation in question and also with reference to the maintainability of the suit so far as it craved the relief of injunction against any interference by the defendant with the plaintiff's possession. The latter of the questions depended for its decision upon the fact of the plaintiff's possession on the date of the suit or upon the contrary of it. These questions are questions of fact on which there are concurrent findings, which I do not find myself able to touch in spite of the very able argument of Mr. Parthasarathy for the appellant.

Two interesting questions have been further raised, in the course of the hearing one at the instance of Mr. Parthasarathi for the appellant and the other at the instance of Mr. Suryanarayana for the respondents on both of which questions I must say I have listened to very able and interesting arguments. I have, after a careful consideration of what has been said by counsel on both sides in regard

* S. A. No. 1741 of 1946. 6th September, 1949.

to both these points come to the conclusion that while the appellant's counsel is right in his submission that an injunction should have issued, at any rate, with reference to a half of the property in his client's possession, the learned counsel for the respondent is also right in his contention that it is not open to the present plaintiff to question the validity of the award that was made during the pendency of the small cause suit as above referred to.

The point taken for the appellant with reference to the question of injunction which I have indicated just now is this : that since it has been found by both the Courts below that the present defendant is only one of two reversioners entitled to the estate of the last male holder, there is no reason why the plaintiff should be denied any injunction in restraint of any interference of the defendants, at any rate, with reference to a half of the suit property, which must undoubtedly be regarded as hers by title defeasible only at the instance of the other reversioner, who has not chosen to impeach it so far and quite valid so long as such an attack by that reversioner has not taken place. It is well-settled law that an alienation by a widow is voidable at the instance of the reversioners, and if one of two reversioners has chosen to attack the alienation and succeeded in establishing the ground for an attack, then it is only to the extent of his share of the property that he can succeed, because the rights of the two reversioners are the rights of tenants-in-common and no decree can be passed in favour of one reversioner, who has not chosen to challenge the alienation because of the challenge that has been made to it at the instance of the other reversioner.

While this is the position that I am prepared to accept in favour of the appellant on the argument advanced by his learned counsel with reference to the question of injunction, I feel greater difficulty, I must say, in accepting the argument advanced by him by way of answer to the point which has been taken by Mr. Suryanarayana for the respondent, that so long as the award stands unchallengable by the other side, although unfiled, it must be taken to debar the present plaintiff from maintaining his suit. The soundness of the argument of the respondent, or of the reply of the appellant to it really depends upon the effect of sections 31 to 33 of the Arbitration Act of 1940. Section 31 provides *inter alia* that an award may be filed in any Court having jurisdiction in the matter to which the reference relates and also that all questions regarding the validity, effect or existence of an award shall be decided by the Court in which the award has been or may be filed and by no other Court. Section 32, which like section 83 is even more material to the present discussion, acts as a bar to suits contesting the existence, effect or validity of an award. In the full terms in which it is couched it runs as follows :

> "Notwithstanding any law for the time being in force, no suit shall lie on any ground whatever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

Section 33 provides that,

> "Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits."

The proviso to section 33 is not material and I therefore do not reproduce it. On these sections there is a recent decision of this Court in *Suryanarayana Reddi* v. *Venkata Reddi*[1], in which Happell and Govindarajachari, JJ., held that neither these sections nor any other provision of the Indian Arbitration Act precludes a defendant from putting forward an award which has been fully performed by him, but which was not filed under section 14 and according to which judgment was not pronounced or a decree given under section 17 of the Act, in answer to the plaintiff's claim which was the subject-matter of the reference and the award. This decision is undoubtedly in favour of the respondent, who is entitled to say on the basis of it that in the present case the unfiled award operates as a bar to the present action. But, says

1. (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad. 111.

Mr. Parthasarathy for the appellant, the decision in that case presupposed the existence of a valid award, an award of a finished character, as he calls it, which was subjected before it became finished to the procedure provided for by the Act for testing its validity and passing a judgment or decree in accordance with it. He contends that in the present case there was no award of that finished character, as he calls it, which can operate to render the present suit unmaintainable.

The other contention of Mr. Parthasarathy in answer to the decision is that there was the small cause suit, the result of which happened to go in favour of the present plaintiff, because the defendants did not put forward the award in question in answer to that suit. The learned counsel accordingly contends that it is not open to the defendants in the present case to rely upon the award in question. He also points out that the attitude taken up by the defendants in relation to the award in the small cause suit by not seeking to rely upon it was in fact responsible for his own client not taking any steps so far for getting the award set aside.

To take up first the first answer attempted by the learned counsel for the appellant, I am of opinion that it was competent to the plaintiff after the award had been passed to take proceedings for getting it filed in Court and afterwards for getting it set aside on any such valid ground as he might have. The appellant did not avail himself of the procedure created by the Act for getting the award set aside and it is not open to him now to dispute the validity of that award in this proceeding. In my opinion, the Indian Arbitration Act, which is a consolidating enactment must be understood, with reference to the sections now under consideration, as requiring that unless a party aggrieved by an award coming within the purview of the Act takes the necessary steps provided by the Act to have the award set aside, it is not competent to him to dispute it in any later proceeding. I am not satisfied that the decision in *Suryanarayana Reddi* v. *Venkata Reddi*[1], is inapplicable to the present case on the ground that there no question of the invalidity of the award was raised for consideration, whereas in the present case such a case has been actually raised. As I read section 32, the object of the Legislature in enacting it is that no suit should be allowed to be instituted for a decision upon the existence, effect or validity of an award and no party to an award should be allowed to have it set aside, amended, modified or in any way affected otherwise than as provided in that Act. Mr. Parthasarathy contends that here the suit which his client has instituted is not really a suit for a decision upon the validity of the award and therefore is outside the mischief of the first part of section 32. Likewise he contends that the suit of his client cannot be regarded as a suit for setting aside, amending or modifying or in any other way affecting the award. It is rather a suit, as he says, by his client for recovering possession by seeking to get away from an award, which he attacks as invalid on its own face, because it proceeded on the basis that there was only one reversioner to the estate, whereas in fact, the record, if examined, would show that there were two persons entitled to the estate as reversioners of whom one no doubt is the present first defendant. This ground of attack against the award is, in my opinion, not certainly such as could be raised in the present suit, not having been made the subject-matter of any application for challenging its validity as is contemplated by section 33. That section provides, as I read it, that the validity of the award can only be contested by an application to the Court and not, as is attempted to be done here, by means of an independent suit of the kind with which we are concerned in the present case. That section is obviously mandatory because it says that any party desiring to challenge the validity of an award shall apply to the Court and the Court shall decide the question on affidavits, subject of course to the provision in the proviso for other evidence for the taking of which the Court may pass appropriate orders. The clear implication of the section is that that is the procedure, which must be adopted by any party seeking to question the validity of the award and it is not competent to any party to the award to question it otherwise.

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1. (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad. 111.

It is said in this connection by Mr. Parthasarathy that there is a recent decision of this Court in *Mathu Kutty* v. *Varee Kutty*[1], which assists him to get over the trouble created in his way by the decision in *Suryanarayana Reddi* v. *Venkata Reddi*[2]. The decision in *Mathu Kutty* v. *Varee Kutty*[1], however, on examination is found to deal with the question whether a Court called upon to deal with an application under section 34 of the Indian Arbitration Act can avoid the necessity of going into the objections on the basis of which the arbitration agreement is attacked by saying that the only procedure for attacking such an arbitration agreement as provided by the Act is the procedure enacted under section 33. The learned Judge who decided the M. L. J. case observes that the very foundation of the jurisdiction of the Court on the application under section 34 to order stay or not to order stay necessarily depends upon a finding that the Court ought to make with reference to the ground of invalidity that is urged against the arbitration agreement. The learned Judge therefore holds that although the procedure enacted in section 33 may not have been adopted by a party to the agreement, it will be open to him to make out, by evidence that he is entitled to adduce in connection with the application under section 34, that the arbitration agreement is either unreal or invalid on account of fraud, misrepresentation or undue influence or the like. The learned Judge holds relying upon a Bombay case decided by Kania, J., (as he then was) in *Bhagwandas* v. *Atmasingh*[3], that the proper view to be taken of section 34 is that the matter of objections to the arbitration agreement made in answer to the application for stay must be gone into on the application itself. The learned Judge also observes that, if necessary, he would be prepared to treat the memo. of objections filed by the party opposing the application for stay as an application of the kind contemplated by section 33 of the Indian Arbitration Act.

From these remarks that I have made on the decision in the M.L.J. case, it is apparent that that decision has no application to the case on hand. It is true that in the headnote, as it is to be found in the M. L. J. report as also in one sentence of the judgment itself, it is stated that

> Section 33 of the Act gives an independent right to a person, who wishes to challenge the existence or validity of an arbitration agreement or *award* and to anticipate the other side and to initiate proceedings to have those questions determined before hand. It does not prohibit the Court acting under section 34 of the Act from deciding a question, which is raised before it for its decision and the decision on which alone would depend the exercise of its jurisdiction.

The word "award", which is italicised in the sentence I have quoted from the headnote and from the body of the judgment may seem to lend some support to the contention of the learned counsel for the appellant that, if in the case of an arbitration agreement, the right under section 34 is a right altogether independent of section 34, there is no reason why in the case of an award also it should not partake of the character of a right independent of section 33. The substance of the decision of the learned Judge who decided the M.L.J. case is however to be understood as being no more and no less than this: that if a party applying for stay under section 34 is opposed by the other side on the ground that the arbitration agreement itself is invalid, the jurisdiction under section 34 cannot properly be exercised at all by the Court in which the application for stay is made unless it investigates the grounds of objection taken by the party opposing the application for stay. That being the true state of facts in connection with which the decision in the M.L.J. report has to be understood, I have no hesitation in holding that that case cannot be of any assistance to the learned counsel for the appellant for meeting the point taken for the respondents.

The second line of argument adopted by Mr. Parthasarathy for meeting the argument of the learned counsel for the respondents is that on account of the conduct of the defendant in the small cause suit, wherein he did not put forward

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1. (1949) 2 M.L.J. 239.
2. (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad.
3. A.I.R. 1945 Bom. 494.
4. (1949) 2 M.L.J. 231.

the award at all as an answer to the claim for rent, it would not be open to the defendants to make a point of the fact that the award, although unfiled, is outstanding and is a bar to the present action of the plaintiff. The learned counsel also urges that an unfiled award is more or less in the nature of a judgment of Court and where there are two decisions of mutual repugnancy, one earlier and the other later, the law of *res judicata* has it that the two decisions must be treated as cancelling each other and that the matter must be treated as set at large. I am not satisfied that this line of argument can be reasonably accepted, because the decision of the arbitrators, which was rendered outside Court during the pendency of the small cause suit, cannot be strictly likened to a decision of Court, nor am I satisfied that there is any constructive *res judicata* arising in the way of the first respondent on account of his failure to rely upon the award in the former litigation. The small cause suit was concerned purely with a claim for recovery of rent and it was not decreed with reference to any adjudication on any question of title whether arising on the award, or unconnected with it. No argument of actual or constructive *res judicata* can in my opinion be built upon what happened in the small cause suit.

In this view of the matter I am clearly of opinion that notwithstanding the argument of the learned counsel for the appellant on the question whether an injunction may not well issue with reference to the half share of the reversioner other than the first defendant—an argument which I am prepared to accept—the appellant is bound to fail on the point with reference to the bar arising from the award, which has been urged by the learned counsel for the respondent in the course of his argument before me.

In the result the second appeal fails and is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

Messrs. George Oakes, Limited .. *Petitioners**

v.

The Chief Judge, Small Causes Court, Madras and another .. *Respondents.*

Madras Buildings (Lease and Rent) Control Act (XV of 1946), section 4—Landlord's application for fixing fair rent—Maintainability—Right to receive fair rent which is in excess of contractual rent—Relevant date.

The Act confers certain rights and privileges on landlords as well as tenants, though the latter benefited to a greater extent than the former. Section 4 of the Act is a deliberate departure from the corresponding provisions of section 3 of the previous Control Order and expressly includes the landlord as a person entitled to apply to have a fair rent fixed. There is nothing in section 4 to confine its application to contractual rents payable under subsisting lease. The words of section 4 are plain and have only one meaning, *viz.*, that a landlord as well as a tenant could apply under the section.

Where the fair rent fixed under the section is in excess of the rent which was being paid before such date, the landlord cannot claim the difference from any date anterior to the date of filing the application.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for all the Records relating to the matters mentioned in the affidavit of K. Hariharam in support of this application, including the order and decree dated 20th September, 1949, of the 1st Respondent passed in H. R. A. No. 82 of 1949 (in L. Dis. No. 5717/H.R.C./1947 on the file of the Rent Controller, Madras) and to quash the order and decree of the 1st Respondent dated 20th September, 1949, and passed in the said H. R. A. No. 82 of 1949 and all proceedings connected therewith.

Dr. V. K. John of John and Row for Petitioners.

V. Radhakrishnayya for *P. Rajeswaran* for Respondents.

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* C. M. P. No. 8658 of 1949. 27th February, 1950.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—I agree that the application should be dismissed. I only wish to add a few words on the point raised by Dr. John purporting to rely upon the decision in *Raja Chetty* v. *Jagannathadas Govindas*[1] to which I was a party. I do not think that the doctrine of contracting out of the statute can possibly be of any help to Dr. John in this case for two reasons which are, in my opinion, conclusive. The first reason is that the lease in his client's favour was executed on 22nd June, 1946, *i.e.*, before the passing of Madras Act XV of 1946. On the date of the execution of the lease, the landlord had no right under the Rent Control Order then in force to apply to the Controller for fixation of a fair rent. It is only the tenant who could approach the Controller for that relief. Obviously, a person cannot be said to have abandoned a right by reason of an agreement when on the date of that agreement the law did not confer on him that right. I must confess that this aspect was overlooked during the course of the arguments. The second of the reasons is that it is nobody's case that the parties were aware of the fair rent for the building and that what was fixed under the contract was less than the fair rent, but nevertheless, it was agreed that the landlord should not approach the Controller for fixation of a fair rent. In *Raja Chetty's case*[1], the lease was executed long after the commencement of Madras Act XV of 1946, and the parties were aware that under section 7 of the Act, default in payment or tender of rent for one month would entitle the landlord to pray for eviction. In spite of this provision the landlord chose to agree not to evict the tenant until and unless there were arrears of rent for two consecutive months. The facts of the present case are completely different.

If there had been a fixation of fair rent by the Controller before the execution of the lease in favour of the petitioner at a higher figure and in spite of that the landlord entered into an agreement accepting a lower rent, then, undoubtedly he would be bound by that contract; but that is not the case here.

Speaking for myself, I would expect the Controller in most cases to hold that the rent deliberately agreed to by the landlord would not be less than the fair rent, but surely, there might be cases in which the facts and circumstances indicate that the agreed rent is not the fair rent. Both the Controller and the appellate authority have found in this case that the fair rent is higher than the agreed rent. That finding of fact is binding on us.

Though it is not necessary for the disposal of this application, I would like to say something about the doubt expressed by my learned brother whether the decision in *Raja Chetty's case*[1], would impliedly lead to the conclusion that the tenant can also contract himself out of the benefits conferred on him by the Act by taking a lease after the Act containing terms and conditions which operate to curtail the rights and privileges conferred upon him by the Act. There was no doubt in our mind that he could not. I would be prepared to go the length of holding that it would be against public policy and the spirit of the Act. The provisions of section 6 embody the principle that the tenant can be saved from the terms of an express agreement when such terms are to his detriment. But I fail to see why in the absence of a specific prohibition and when there is no offence against public policy, a landlord should not waive a benefit conferred on him by the Act; why, for instance, he should not agree that he would not take out an application for eviction unless there is default in payment of rent for two or three consecutive months.

Viswanatha Sastri, J.—The Madras Buildings (Lease and Rent Control) Act (XV of 1946), hereinafter referred to as "The Act," embodies a compromise between two well-recognised and occasionally conflicting principles, namely, the freedom of citizens to enter into contracts and the duty of the State to prevent the oppressive exploitation of large sections of the public by a few individuals. The Act was a measure intended to be administered expeditiously and equitably, albeit summarily, and not intended to be litigated upon in Courts from the lowest to the highest.

1. (1949) 2 M.L.J. 694.

The relevant facts may be shortly stated. During the currency of the term of a registered lease dated 22nd June, 1946, the landlord, here respondent, applied to the Rent Controller under section 4 of the Act for fixing a "fair rent" for his non-residential building, and the Controller by his order fixed as fair rent, a sum about 50 per cent in excess of the monthly rent stipulated under the lease deed as payable by the tenant, the applicant before us.

Dr. V. K. John, the learned counsel for the tenant, attacks the order of the Rent Controller as being *ultra vires*. He says that the Rent Controller has no power, during the subsistence of a contract of lease, to increase the contract rate of rent, if it happens to be lower than what, in his opinion, would be the "fair rent". He further argues that it is open to a landlord to contract himself out of the provisions of section 4 of the Act and forego the right to recover a "fair rent", by stipulating for payment of rent at a lower rate, where the contract of tenancy is entered into, or, as in this case, renewed after the Act came into force. His argument is that the Act was intended only for the protection of tenants from the rapacity of landlords who often exacted unconscionably high rents from tenants and resorted to arbitrary and capricious evictions, thereby causing serious hardship and suffering to a large section of the public. It is against this background that the Act and every section of the Act should be viewed, according to Dr. John.

It may be observed at the outset that the Act has replaced the Madras Non-residential Building Rent Control Order, 1942. Section 3 of the Control Order provided for an application to the Rent Controller to determine the fair rent in cases where the contract rate of rent was found to be excessive, and empowered the Rent Controller to fix a fair rent. Though section 3 did not in terms, limit the right to apply for fixing a fair rent to tenants, it is obvious that only tenants would be interested in applying for reduction of the contract rate of rent, if it happened to be in excess of the "fair rent". There was no provision in section 3 of the Control Order for fixing a rate of rent in excess of the contract rate and the section was not therefore meant to give relief to landlords. Section 4 of the present Act, however, expressly confers on the landlord as well as the tenant of a building, the right to apply to the Controller for fixing a fair rent and empowers the Controller to fix a fair rent, irrespective of the question whether the contract rate of rent happens to be higher or lower than the "fair rent" eventually determined by the Controller. Indeed, section 4 permits an increase of rent from 50 per cent. to 100 per cent. in the case of non-residential buildings constructed after 1st April, 1940.

A strenuous effort had been made by Dr. John for the tenant to induce us to adopt a construction other than the literal one, of the provisions of section 4 of the Act and to confine its application to statutory tenancies, where tenants continue in possession of buildings not under subsisting leases, but under and by virtue of the provisions of the Act after the expiry of the term. He argues that the Legislature could not have intended so fundamental and revolutionary a change as would enable landlords to nullify the rights secured to tenants under subsisting leases and that section 4 must be so interpreted as to avoid a result so injurious to tenants. The Act was deliberately intended to alter, vary and modify the contractual rights and privileges of both landlords and tenants, and, in my opinion, it is not legitimate to neutralise the operation of the Act by introducing notions taken from the pre-existing law which the Act was intended to abrogate and did abrogate. The argument based on the sanctity of contracts has no persuasive effect on me when I have to construe an Act whose avowed object or purpose is to make that lawful which will not be lawful under a contract of tenancy, and, conversely, to prohibit results which will follow from the enforcement of such contract. Great stress has been laid on the injustice and iniquity of forcing upon a tenant a much higher rent than what he had agreed to pay and the landlord had willingly agreed to accept, by too literal an interpretation of an enactment intended for the relief of tenants. I approach the Act on the assumption that—to quote the preamble—there was need for legislation

"to regulate the letting of residential and non-residential buildings and to control the rents for such buildings and to prevent unreasonable eviction of tenants therefrom".

The regulation of letting and the control of rents might be in the interests of landlords as well as tenants, though in the large majority of cases the tenants would stand to benefit by the Act. It is, in my opinion, a fallacy to assume that in the Act and its scheme there is only one central purpose, namely, the relief of tenants from oppressive rents and unjust evictions, and mould the construction of the sections of the Act so as to carry out this purpose.

If there is an ambiguity or doubt about the language of section 4 of the Act, read by itself or in conjunction with the other sections of the Act, and two constructions are reasonably possible or plausible, one of which would upset fundamental principles of law or produce a manifestly unreasonable or unjust result, while the other is free from such taint, the Court might reject the former and accept the latter. In other cases, we have to see not what, in our opinion, the Legislature might reasonably do, but what it has actually done by way of enacted words. In my opinion, the language of section 4 of the Act is as plain as it could be and there is nothing intrinsically wrong or unjust in a tenant being asked to pay a "fair rent", if the rent stipulated as payable under the lease is lower than the fair rent, when that very tenant is given a right to compel his landlord to accept a "fair rent" as determined by the Controller and forego any higher rent which he himself had agreed to pay under the contract of lease. It is not correct to assume that it is only on tenants and not on landlords that new rights and privileges were conferred under the Act. Overriding the terms and conditions of leases as well as the provisions of section 111 of the Transfer of Property Act, section 7 of the Act confers valuable rights on landlords in the matter of ejectment of tenants who commit default in payment of rent or transfer or sub-let the buildings leased or use the buildings for purposes other than those for which they were leased, etc., (see *Krishnamurthi* v. *Parthasarathi*[1] and *Raja Chetty* v. *Jagannathadas Govindas*[2].) The landlord is bound by the contractual terms of the tenancy only to the extent specified in section 7, sub-section 3 of the Act. Dr. John would apparently concede to the tenant the right to apply for a reduction of the contractual rent, if it is in excess of the fair rent as otherwise one of the main objects of sections 4 and 6 of the Act would be defeated and tenants would be at the mercy of landlords. He would, however, deny a corresponding right to the landlord to apply for the fixing of a fair rent if the contractual rent happens to be less than the fair rent that might eventually be fixed. In the circumstances mentioned in section 5 of the Act, the landlord can apply for an increase of rent even though the lease provides only for the payment of the "fair rent" already fixed. Section 6, clauses (*b*) and (*c*) of the Act clearly imply that applications for fixing fair rents could be made during the continuance of the term of a lease and provide that stipulations in leases for payment of rent in excess of the fair rent shall be unenforceable and contractual rents already paid in excess of the fair rent, shall be refunded by the landlord or otherwise adjusted. In *Rajammal* v. *The Chief Judge, Court of Small Causes, Madras*[3], it was assumed that an application could be made by the landlord under section 4 of the Act to fix a fair rent which, as eventually determined in that case, was in excess of the contractual rent. I see no reason whatever to hold that section 4 of the Act does not apply to a contractual tenancy where the term of the lease happens to be subsisting. Nor can I find any reasonable ground for confining the application of section 4 to what are called "statutory tenancies" where the contractual term has expired and the tenants continue in possession only by virtue of the provisions of the Act. Giving the words of section 4 their natural meaning, there is neither doubt nor ambiguity, and the result of a literal interpretation, in my opinion, appears to be both just and reasonable.

As I have come to a clear conclusion on the construction of section 4 of the Act, I consider it unnecessary to do more than refer to *Glossop* v. *Ashley*[4] and *Phillips* v. *Copping*[5], cited by Dr. John. These decisions were based on the particular

1. (1949) 1 M.L.J. 412.
2. (1949) 2 M.L.J. 694.
3. (1949) 2 M.L.J. 555.
4. (1922) 1 K.B. 1 (C.A.).
5. (1935) 1 K.B. 15 (C.A.).

language of English statutes, whose interpretation taxed the resources of the learned Judges of the Court of Appeal. There is no need to obscure the plain meaning of section 4 of the Act by importing into it the phraseology employed in construing statutes totally different in their wording.

Lastly, it is argued on the strength of certain observations in the recent decision in *Raja Chetty* v. *Jagannathadas Govindas*[1], that it is open to the landlord to waive the right to have a fair rent fixed which might be in excess of the rent payable under the lease deed. In the present case the lease was executed before the Act XV of 1946 came into force and there was then no provision empowering the landlord to apply fixing a rent which might be in excess of the contract rate. It is said, however, that the landlord was presumably aware of the provisions of Act XV of 1946, when he agreed to a renewal of the lease in 1949 on the basis of the old rent thereby waiving the right to apply for an increased rent, though such increased rent might be the "fair rent" under section 4. This contention was not raised in the Court below or before the Controller, and cannot, in my opinion, be allowed to be raised for the first time on this application for a writ. Further, though the lease was renewed in 1949 after Act XV of 1946 came into force, it was renewed in pursuance of an option for renewal contained in the original lease of 1946 and on the same terms as before. In fact, the parties were bound by the terms of the original lease of 1946, which was entered into before the Act of 1946 came into force. The landlord had then no right to apply for a fair rent and consequently there could be no waiver of such a right. I cannot assume or presume that the parties contracted with knowledge of Madras Act XV of 1946 at the time of the renewal of tenancy in 1949. I humbly venture to think that there is no presumption in law that anyone, even a Judge, knows the law especially when it is embodied in special or local legislation which is the subject of amendment from time to time. The maxim '*ignorantia legis neminem excusat*' has a very different scope and application and cannot be pressed into service on this occasion. All that this maxim means is that people may not have had notice of the law, but yet they would be bound by law even without such notice. There are many occasions on which people do not actually know what the law is and yet they are bound. In this sense, ignorance of law does not furnish an excuse for illegal or improper action. I am unable to assume without any evidence that the landlord had knowledge of his right to apply for fixing a fair rent under section 4 of the Act and that with such knowledge, he deliberately consented to abandon his right at the time when the lease was renewed. Perhaps, the truth is that neither the landlord nor the tenant thought about the Act or about a revision of the rents at the time of the renewal. I would be quite as unwilling to cut down by a process of interpretation the protection afforded by the Act to the landlord as I would be to abrogate the protection afforded to the tenant. There are, no doubt, enactments, conferring benefits on citizens, which benefits they can waive, without offending any rule of public policy, as pointed out by my Lord in the judgment in *Raja Chetty* v. *Jagannathadas Govindas*[1]. I am unable to apply the doctrine of waiver by reference to a legal presumption that a landlord must be aware of the provisions of Act XV of 1946. I am equally unable to accept the contention that the mere insertion of terms and conditions in a lease executed after the Act, securing to the landlord rights of a more restricted character than those conferred upon him by the Act, operates in itself as waiver by the landlord of the statutory rights conferred upon him by sections 4 and 7 of the Act. Logically speaking, the argument based on waiver could be advanced against a tenant who has taken a lease after the Act, containing terms and conditions which operate to curtail the rights and privileges conferred upon him by the Act. But sections 6 and 7 of the Act prevent a tenant from contracting out of the terms of those sections and depriving himself of the right to insist on a fair rent and the right to continue in possession even though the stipulated term has expired. Further, section 16 (1) of the Act makes the transgression of section 6 and the exaction of a rent in excess of the rent fixed as

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1. (1949) 2 M.L.J. 694.

fair rent by the Controller, an offence punishable with imprisonment. I therefore doubt whether the learned Judges who decided *Raja Chetty* v. *Jagannathadas Govindas*[1], would have held in such circumstances that the tenant had validly contracted himself out of the right to a fair rent and immunity from eviction conferred on him by the Act. Be it as it may, waiver as a defence must be expressly pleaded and strictly proved by evidence. There is nothing in the circumstances relating to the renewal of the lease, even remotely suggesting that at the time of the renewal the landlord had contracted himself out of his statutory right to apply under section 4 of the Act for fixing a fair rent or that he with knowledge of the provisions of the Act, waived the rights conferred upon him.

To recapitulate, the Act confers certain rights and privileges on landlords as well as tenants, though the latter are benefited to a larger extent than the former. Section 4 of the Act is a deliberate departure from the corresponding provisions of section 3 of the previous Control Order and expressly includes the landlord as a person entitled to apply to have a fair rent fixed. There is nothing in section 4 to confine its application to statutory tenancies or to exclude its application to contractual rents payable under subsisting leases. The words of section 4 are plain and have only one meaning, namely, that a landlord as well as a tenant could apply under section 4 of the Act. This interpretation is reinforced by sections 5 and 6 of the Act. Even if it were relevant, which it is not, there is no injustice or inequity or no such degree of public mischief as should lead the court to an unnatural construction of the section. The defence of waiver by the landlord of his right to apply under section 4 of the Act has no basis whatever in the circumstances of this case.

Where the fair rent fixed under section 4 of Madras Act XV of 1946 is in excess of the rent which was being paid before such date, the landlord cannot claim the difference from any date anterior to the date of filing the application under section 4 which in this case was the 9th October, 1947. Subject to this modification the order of the Chief Judge is affirmed and this application is dismissed with costs.

V.P.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE SOMASUNDARAM.

(In the matter of the elections, Madras Medical Council, 1946.)

Dr. V. Ramakamath and others .. *Petitioners* *

v.

The Surgeon-General with the Government of Madras .. *Respondent.*

Madras Medical Registration Act (IV of 1914), section 22 and rule 19 of the election rules—Power of Governor-in-Council to interfere with decisions of the Council.

The language of section 22 of the Madras Medical Registration Act would certainly cover every action or omission of the Medical Council relating to any matter provided in the Act including elections and proceedings of the Council as regards them. In spite of the provision in rule 19 of the election rules that the decision of the Council shall be final it is open to the Governor to take appropriate proceedings to quash the proceedings of the Council.

The authority to decide whether there has been a neglect to exercise or an excess or abuse of the powers conferred on the Council or a neglect in the performance of duties imposed upon it is the Governor-in-Council and not the Court. But it would be open to the Court to ascertain if there had been a *bona fide* exercise of the power conferred on the Governor-in-Council by section 22.

Where the candidates whose elections were being challenged are found in fact to have attended the meeting of the Council at which the resolution was passed embodying the decision under rule 19, it is opposed to principles of natural justice and the Governor-in-Council would be justified in considering that the Council had abused its powers and taking necessary action.

Necessity for amendment of rule 19 pointed out.

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1. (1949) 2 M.L.J. 694.

* C. M. P. No. 9975 of 1949. 31st March, 1950.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in P. No. 281, Mis., in respect of elections to the Madras Medical Council held in 1946 and to quash the proceedings of the respondent (Surgeon-General, Madras), dated 28th November, 1949, and made therein.

V. Ramaswami Aiyar and *M. Natesan* for the Petitioners.

The Advocate-General (*K. Rajah Aiyar*) for the Government Solicitor for Respondent.

Order of the Court was made by

The Chief Justice.—This is an application for the issue of a writ of *certiorari* to call for the papers and quash the proceedings of the Surgeon-General with the Government of Madras passed in P. No. 281-Misc., dated 28th November, 1949, declaring the election of the petitioners and three other persons as members of the Madras Medical Council void and calling upon the electorate to make a fresh election. The events which led up to this order which is sought to be quashed are as follows : Under section 5, sub-section (1) of the Madras Medical Registration Act, a Medical Council shall be established for the Province of Madras consisting of 15 members. Of these seven members have to be elected by the Registered Practitioners from amongst themselves. In the elections held for electing seven such members in October, 1946, the petitioners and three others were declared duly elected on 27th October, 1946. Of these the first petitioner was unanimously elected as the President of the Council under section 5 (3) of the Act, on 23rd November, 1946. On 6th November, 1946, a letter was addressed by six of the defeated candidates to the Registrar, Medical Council, to circulate to the members of the Madras Medical Council a memorandum of objections in respect of the said election and to summon an extraordinary meeting of the Council to decide the validity of the election. It is not necessary to set out the allegations contained in this memorandum. The Council met on 25th November, 1946 and after taking into account a report from the Returning Officer and the allegations made in the memorandum of objections, and after examining him, the Council passed a resolution as follows :

"This Council after going through the Memorandum and explanation of the Returning Officer Mr. B. Kuttappa and after examining him is of opinion that there are no grounds for allegations of corrupt practice or any other sufficient cause to set aside the elections."

On 15th April, 1947, one of the defeated candidates addressed a letter to the Registrar, Madras Medical Council, requesting that the matter may be again placed before the Council, the members whose election was in question not participating. In this letter three grounds were mentioned for a re-enquiry, namely, (1) that the matter was decided *ex parte* ; (2) that no opportunity was given to the complainants to explain their case and to adduce proofs in support of their contentions and (3) that the persons whose elections were being challenged themselves sat in the Council and decided the matter. It appears that the objectors also addressed the Government in regard to their complaint. The Government asked the Registrar, Medical Council, to report about the decision of the Council on the Memorandum of the defeated candidates and a report was sent. The Registrar on the 5th May, 1947, replied to the defeated candidates who had complained about the disposal of the objection petition denying the allegations made by him. Sometime thereafter on 4th July, 1947, the Government passed an order G.O. Mis. No. 2313-P.H., directing the Surgeon-General to conduct a thorough investigation in the matter of the elections to the Madras Medical Council and to submit a report to enable the Government to decide whether any action under section 22 of the Act was necessary. The President of the Council was requested to provide the required facilities to the Surgeon-General to enable him to make the investigation. On 2nd March, 1948, the Government passed another Order (No. 640-P.H.), which runs as follows :—

"Whereas Dr. D. V. Venkappa and five other persons presented a memorandum dated the 6th November, 1946, to the members of the Madras Medical Council through the Registrar of the said Council alleging certain corrupt practices and material irregularities in the conduct of elections of members to the said Council held during October, 1946 ;

2. And whereas the Madras Medical Council disposed of the said memorandum improperly in that it failed to give the said Dr. D. V. Venkappa and five others, who were complainants before it, an opportunity to substantiate and prove the allegations made in the said memorandum and further allowed the President of the Council against whom certain allegations were made in the said memorandum to be present at the time and to participate in the decision of the Council in respect of the said memorandum ;

3. And whereas it appears to the Government of Madras that in disposing of the memorandum in the manner aforesaid, the Madras Medical Council neglected to exercise and abused the power conferred, and neglected to perform the duties imposed upon it by the Madras Medical Registration Act, 1914 and the rules made thereunder and in particular rule 19 of the rules published with Public Department Notification No. 673, dated the 15th November, 1914, at pages 1719 to 1725 of Part I of the *Fort St. George Gazette*, dated the 22nd December, 1914, as subsequently amended ;

4. Now, therefore, in exercise of the powers conferred by section 22 of the said Act His Excellency the Governor of Madras hereby notifies to the Madras Medical Council the aofresaid neglect to exercise and abuse of the power conferred upon it and neglect to perform the duties imposed upon it, and fixes the 28th day of March, 1948, as the date before which the Council shall remedy the said neglect and abuse.

5. The orders passed in G. O. Ms. No. 2313-P. H., dated 4th July, 1947, are hereby cancelled."

This Order of the Government was considered by the Council at a meeting held on 22nd March, 1948, and a letter was addressed by the President to the Joint Secretary to Government on the same day protesting against the action of the Government and intimating that the Government had no power to re-open the proceedings passed by the Council on the memorandum of the objectors and regretting the inability of the Council to comply with the requisition of the Government. On 20th April, 1949, nearly a year after their previous order, the Government passed another order (No. 1448 -P.H.), purporting to be in exercise of the powers conferred upon them by section 22 of the Act, appointing a Special Officer of the status of a District and Sessions Judge for period of one month to enquire into the representations made by Dr. D. V. Venkappa and others in a memorandum, dated 6th November, 1946, to the Madras Medical Council and to report his findings to the Government. On 23rd May, 1949, the Council passed a resolution to the effect that the action taken by the Government in appointing a Special Officer to hold an enquiry was wholly *ultra vires* of the Government and not justified in the circumstances. The Council also decided to ignore the so-called enquiry to be conducted by the Special Officer. A retired Judge was appointed Special Officer and he called upon the President of the Council to appear before him in connection with the enquiry, but the President refused to be a party to what he considered to be a wholly illegal and unconstitutional enquiry. On 8th September, 1949, after perusing the report from the Special Officer who had evidently forwarded his report, the Government passed an order (No. 3192-P.H.) appointing the Surgeon-General with the Government of Madras to exercise for a period of four months the powers of the Council under rule 19 of the Rules for the conduct of subsequent elections to the Council. This order purported to be in the exercise of the powers conferred by section 22 of the Act. The grounds on which the order was passed were set out at some length. It was pointed out that as the Council had failed to observe the principles of natural justice in disposing of the memorandum of objections filed by the defeated candidates and thus neglected to exercise and abused the powers conferred and neglected to perform the duties imposed upon it by the Act and the rules made thereunder, and in particular, rule 19 of the rules for subsequent elections, the Government had notified to the Council the particulars of the neglect and abuse and had fixed the 28th March, 1948, as the date before which the Council should remedy the neglect and abuse, but the Council had failed to do so. In a long letter addressed to the Additional Secretary to Government, Education and Public Health, the President of the Council protested against the order and intimated that the action of the Government was clearly without jurisdiction and reiterated his previous contention that the decision of the Council on the objection petition had become final and could not be re-opened. In pursuance of the order, dated 20th April, 1949, the Surgeon-General notified to the President of the Council a list of the alleged irregularities and illegalities in the conduct of the elections and informed him that he may make any representation as regards them so as to reach the office on or before 15th October, 1949.

If, however, no representation was received before that date, it would be presumed that there was no explanation or remarks to offer. The President replied refusing to take any part in the enquiry, as, according to him, the proceedings were all *ultra vires* and without jurisdiction. Eventually on 28th November, 1949, the Surgeon-General passed the following order :

"I find that all the allegations notified have been proved. In exercise of the powers conferred on me by G. O. No. 3192 Public Health dated 8th September, 1949, I hereby declare the elections of the seven members noted in paragraph 1 of these proceedings to be *void* and call upon the electorate to make fresh elections."

It is this order that the petitioners seek to quash.

The only material statutory provisions which have a bearing on the contentions raised at the hearing are rule 19 of the rules for subsequent elections made under section 24, sub-section (1) of the Act and section 22 of the Act. Rule 19 is as follows :

"The Council may, of its own motion, or on objection made, declare any election that has been held to be void on account of corrupt practice or any other sufficient cause and may call on the electorate to make a fresh election. The decision of the Council under this rule shall be final."

Section 22 runs thus :

"If at any time it shall appear to the Governor-in-Council that the Council has neglected to exercise or has exceeded or abused any power conferred upon it under this Act or has neglected to perform any duty imposed upon it by this Act, the Governor-in-Council may notify the particulars of such neglect, excess or abuse to the Council; and, if the Council fails to remedy such neglect, excess or abuse within such time as may be fixed by the Governor-in-Council in this behalf, the Governor-in-Council may for the purpose of remedying such neglect, excess or abuse, cause any of the powers and duties of the Council to be exercised and performed by such agency and for such period as the Governor-in-Council may think fit."

Mr. V. Ramaswami Aiyar who argued on behalf of the applicants with great ability first contended that the decision of the Council under rule 19 was final and the Government had no power to interfere with its finality. Though he faintly suggested that section 22 of the Act does not apply to elections and to proceedings of the Council as regards them, the learned advocate was compelled to admit that the language of section 22 would certainly cover any action or omission of the Council relating to any matter provided in the Act. His contention was that even if there was neglect in performance of duty or excess or abuse on the part of the Council, once the Council had made its decision it was final. This contention is obviously unsound. The learned counsel conceded that in spite of the provision of rule 19 that the decision of the Council shall be final, it would be open to this Court to quash such a decision by a writ of *certiorari* if there was any excess of jurisdiction or other ground justifying the issue of a writ. In the same way, the statute confers on the Governor-in-Council power to take up appropriate action in circumstances which would justify the issue of a writ to quash the decision of the Council. It therefore follows that there is no substance in Mr. Ramaswami Aiyar's further development of his argument that even assuming the Surgeon-General had been appointed validly under section 22, he cannot reopen the prior decision of the Council. The real question is whether the action of the Governor-in-Council purported to have been taken under section 22 of the Act was *intra vires*.

The section provides that the authority to decide whether there has been a neglect to exercise or an excess or abuse of the powers conferred on the Council or a neglect in the performance of duties imposed upon it is the Governor-in-Council and not the Court. The language is "if at any time it shall appear to the Governor-in-Council." It would however be open to the Court to ascertain if there has been a *bona fide* exercise of the power conferred on the Governor-in-Council by the section. On the facts and circumstances as regards which there is practically no dispute, it appears to be abundantly demonstrated that there has been an abuse of the power in one respect at least, namely, in the participation by the persons whose elections were being challenged in the meeting of the Council, which dismissed the memorandum of objections by the defeated candidates. It was admitted by Mr. Ramaswami Aiyar that all the seven persons whose elections were being

challenged did attend the meeting at which this resolution was passed embodying the decision of the Council under rule 19.

It is an elementary principle of natural justice that no man can be a Judge in his own cause. Therefore, where persons who have a direct interest in the subject-matter of an enquiry before an inferior Court, take part in adjudicating upon it, the Court is improperly constituted and is without jurisdiction (*Vide* Halsbury's Laws of England, 2nd Edition, Vol. 9, section 1487 and Vol. 26, section 606). Mr. Ramaswami Aiyar relied on the fact that there is no evidence that such members took an active part. This, however, does not make any difference. In *The Queen* v. *London County Council*[1], the facts were these. The London County Council delegated to a Committee of their body the hearing of applications for music and dance licences. The Committee by a majority recommended that a licence which had been applied for should not be granted. The applicant thereupon applied to the County Council for a licence. At the hearing before the County Council certain members of that body who were also members of the Committee and had voted in the majority against granting a licence at the hearing before the Committee, instructed counsel to represent them before the County Council and oppose the application for a licence. The Councillors so instructing counsel were present at the hearing, but did not vote. The Council by a majority refused the application for a licence. It was held that the presence at the hearing of those members of the County Council who had instructed counsel to oppose the application vitiated the proceedings. It was argued that they had taken no part in the deliberations of the Council. A. L. Smith, J., repelled the argument and said :

> " This, however, will not avail. even if it were the fact : for Lord Denman in the case above cited, *Reg.* v. *Justices of Hertfordshire*[2] held that a decision was vitiated by any one interested person taking part, it being enough for the purpose that one single interested person has formed part of the Court and Patteson, J , who followed Lord Denman said ' the question is, has an interested person taken any part at all ? '
>
> " The case of *The Queen* v. *Meyer*[3] is also an authority as to this : Blackburn, J , in delivering judgment said : ' we cannot go into the question whether the interested justice took no part in the matter (*i.e* , in the discussion of the case). The question is, was he so interested in the matter as that he ought not to have sat ? ' In this we agree."

The extreme limits of the application of this great and salutary principle can be found in *The Queen* v. *Justices of Great Yarmouth*[4] and *Cooper* v. *Wilson*[5]. In the latter case the Chief Constable and his assistant were allowed to sit in Court in a position which gave them the appearance at least of being members of the Court which had to try the accused. They sat next and next but one to the Chairman. They continued to remain when the Committee was considering its decision. It was held that the proceedings were vitiated by their presence. Scott, L.J., observed:

> " It makes no difference whether he then discussed the case with them or not ; the risk that a respondent may influence the Court is so abhorrent to English notions of Justice that the possibility of it, or even the appearance of such a possibility is sufficient to deprive the decision of all judicial force and to render it a nullity."

We do not think that a different rule applies in India. Mr. Ramaswami Aiyar who could not seriously contest the legal position attempted to escape its consequences by relying on an exception to the general rule, for which he cited the following passage from Halsbury (2nd Edn.), Vol. 9, at page 884 :

> " Any pecuniary interest, however small, in the matter in dispute, disqualifies a person from acting as Judge, unless the disability is removed by statute."

He argued that as rule 19 did not exclude from participation the members whose election was challenged it must be implied that their disability was removed. But a reference to the authorities cited in the note in Halsbury makes it clear that what is contemplated is an express removal by statute of a disability which

1. (1892) 1 Q.B.D. 190.
2. (1845) 6 Q.B. 753 : 115 E.R. 284.
3. (1875) 1 Q.B.D. 173.
4. (1882) 8 Q.B.D. 525.
5. (1937) 2 All Eng. Rep. 726.

is recognised as such. Both in *The Queen* v. *Bolingbroke*[1] and in Ex parte *Workington Overseers*[2], the material enactment was section 1 of 16 Geo. 2 Ch. 18 which ran thus :

> " It shall be lawful for every Justice of the Peace for any county, riding, city, liberty franchise borough, or town corporate to do within his jurisdiction any act appertaining to his office as Justice of the Peace so far as the same relates to the laws concerning parochial taxes, levies, or rates, notwithstanding such Justice of the Peace is rated to or chargeable with the taxes, levies, or rates within any parish, township or place affected by any such act."

In the absence of any such express removal of disqualification in rule 19 we cannot accept the contention of Mr. Ramaswami Aiyar. The Governor-in-Council was therefore perfectly justified in considering that the Council had abused the power conferred upon it by the Act. It was competent for the Governor-in-Council to notify to the Council the particulars of the abuse and to give an opportunity to the Council to remedy such abuse. In this case the Council took up a very strong attitude that the Government had no right to take any action under section 22 of the Act and therefore would not remedy the abuse. The Council could have disposed of the memorandum of objections after excluding from it the members whose election was being challenged, but they did not do so. There was nothing left for the Governor-in-Council except to appoint some one to exercise and perform the powers and duties of the Council in this matter.

The next contention of Mr. Ramaswami Aiyar was that the order of the Surgeon-General setting aside the elections of the petitioners and others was contrary to the natural justice. This contention was founded on the allegation that the order was based almost entirely on the material placed before the retired District Judge who had been directed at an earlier stage to conduct an enquiry. It was urged that this was not evidence placed before the Surgeon-General and besides, this report which was confidential was not made available to the petitioners. On a perusal of the order, it does not appear that the Surgeon-General merely acted on the findings arrived at by the Special Officer who had conducted a prior enquiry. What he did was to carefully consider the *records* of the enquiry. He relied upon the oral evidence tendered before the Special Officer and also on documentary evidence available to him. Now, it must be conceded that according to the procedure prevalent in Civil and Criminal Courts of the land, the Surgeon-General was not entitled to rely upon the evidence which was given before the Special Officer. But it is now well established that the strict rules of procedure applicable to courts of law need not be followed by domestic and *quasi* judicial tribunals. All that such a tribunal should do is to give an opportunity to the parties to state their case and to act judicially and not arbitrarily. In the leading case on this branch of law, *Local Government Board* v. *Arlidge*[3], Lord Shaw made the following trenchant observations :

> " The words ' natural justice ' occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a Central administrative board deals with an appeal from a local authority it must do its best to act justly and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance, it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated ; and lawyer-like methods may find especial favour from lawyers. But that the Judiciary should presume to impose its own methods on administrative or executive officers is an usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded." (Vide also *Errington* v. *Minister of Health*[4]).

It cannot be denied that the petitioners were given ample opportunities by the Surgeon-General to place their case before him, but they would not take part in the enquiry, because in their view, the enquiry was without jurisdiction. The objectors stated that they had nothing more to add to the materials already available which had been placed before the Special Judge appointed by the Government. In these circumstances, we do not see how the Surgeon-General failed to observe any rule of natural justice in disposing

1. (1893) 2 Q.B. 347.
2. (1894) 1 Q.B. 416.
3. (1915) A.C. 120.
4. (1935) 1 K.B. 249 at 265.

of the enquiry. No doubt the report of the Special Judge was confidential, but it is clear that the order of the Surgeon-General was not based on that report, but only on the material placed before the Judge. Apart from this circumstance it is clear from *Local Government Board* v. *Arlidge*[1], that the non-disclosure of the report which had been referred to by the tribunal would not render the decision of the tribunal void and liable to be quashed by *certiorari*. It is common ground that there is nothing in the statute or the rules prescribing the procedure. In the case of an enquiry under section 13 the Council or any Committee thereof shall be deemed to be a Court within the meaning of the Indian Evidence Act, but there is no such provision regarding elections. The utmost that could be said for the petitioners is that the respondent acted on evidence which would be inadmissible in a Court of law, but surely that is not a ground on which the order could be quashed. Having taken up an attitude of non-co-operation and non-participation in the proceedings, it would not be open to the petitioners to now turn round and accuse the respondent of not giving them an opportunity to meet the charges against them.

The petition fails and is dismissed, but we make no order as to costs.

It is most regrettable that elections held in October, 1946, have been held to be void in November, 1949. Section 22 of the Act contemplates immediate action on the part of the Government but this case reveals long delay. The Government in their Order of March 2, 1948, gave the Council time till March 28 to remedy their neglect and abuse of power but the Council refused to do so. Nevertheless it is only on April 20, 1949, a year later that the Government take the next step, a step not strictly falling within section 22.

We may also point out that rule 19 needs to be amended, as the learned Advocate-General himself conceded.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

A. L. VR. ST. Veerappa Chettiar .. *Appellant**

v.

Chinnasami *alias* Samba Goundan and others .. *Respondents.*

Government of India Act (1935), *section* 107 (2) *and Madras Agriculturists Relief Act* (*IV of* 1938)—*Whether Act IV of* 1938 *is intra vires of the Provincial Legislature.*

The Madras Agriculturists Relief Act even in so far as it affected negotiable instruments is within the legislative competence of the Provincial Legislature. It deals with creditors and debtors and their mutual obligations and the fact that it confines its provisions to a part of the public, namely, agriculturists does not cease to make it none-the-less a legislation affecting money-lenders and money-lending.

Appeal against the decree of the District Court, Coimbatore, in Appeal No. 347 of 1945, preferred against the decree of the Court of the Subordinate Judge, Coimbatore, in O. S. No. 42 of 1944.

R. Kesava Ayyangar for Appellant.

D. Ramaswami Ayyangar and *P. S. Srinivasa Desikan* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—Whether the Madras Agriculturists Relief Act (IV of 1938), in so far as it affected the negotiable instruments is within the legislative competence of the Provincial Legislature is the main question that is raised in this second appeal. The material facts that gave rise to this appeal may be stated.

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1. (1915) A.C. 120.

* S. A. No. 2195 of 1946. 5th April, 1950.

On 15th June, 1925, one Ponnuswami Goundan executed a promissory note for a sum of Rs. 2,500 in favour of the plaintiff. The defendants are the sons of Ponnuswami Goundan. The plaintiff filed the suit, O. S. No. 42 of 1944 on the file of the Subordinate Judge of Coimbatore for the recovery of the amount due on the promissory note. The defendants *inter alia* contended that their father was having a long course of borrowing transactions with the plaintiff, that the suit promissory note was the last of a series of renewed promissory notes and that if the suit debt was scaled down by tracing it back to the original loan the whole debt would be wiped out under Madras Act IV of 1938. In support of their contention they produced two promissory notes, Exhibit D-2 of the year 1921 for a sum of Rs. 2,000 and Exhibit D-3 of the year 1922 for a sum of Rs. 500 and claimed them to be two of the promissory notes in renewal whereof the suit promissory note was executed. The Subordinate Judge held that it was not proved that the suit promissory note was a renewal of Exhibits D-2 and D-3 and therefore gave a decree on the basis of the suit promissory note with interest at $6\frac{1}{4}$ per cent. per annum from 1st October, 1937. The appellate Court held on the evidence that the plaintiff suppressed deliberately all the account books with a view to prevent the disclosure that more than double the original principal had been repaid by Ponnuswami. He held that the suit promissory note was a renewal of successive pronotes in renewal of prior debts and as twice the original principal must have been paid towards the debt the entire debt should be deemed to be discharged. The plaintiff preferred the above appeal. The Courts below also considered the other arguments advanced by the appellants before them but it is unnecessary to notice them as they are not pressed before us.

Mr. Kesava Aiyangar, the learned counsel for the appellant, questioned the validity of the Madras Agriculturists Relief Act in so far as it affected the negotiable instruments. The validity of this particular Act has been questioned before and this Court as well as the Federal Court had an occasion to deal with that question. To appreciate the argument of the learned counsel it would be necessary to trace the previous state of law. The Full Bench of this Court held in *Nagaratnam* v. *Seshayya*[1], that the provisions of the Madras Agriculturists Relief Act, 1938, relating to scaling down of debts and interest were within the powers of the Provincial Legislature. Applying the well-settled principles of construction they came to the conclusion that the Act related to subjects which were reserved for the Provincial Legislature. In their view it dealt with agriculture and money-lending and both the subjects were in the Provincial list. Alternatively they were also inclined to attribute the source to contracts, a subject in the concurrent legislative list. As the Madras Agriculturists Relief Act was reserved for consideration of the Governor-General under the provisions of section 107 (2) of the Government of India Act, 1935, and received his assent, they were of the opinion that the provisions of the Madras Agriculturists Relief Act should prevail over that of the existing law, under section 107 of the Government of India Act, unless and until the Federal Legislature though fit to legislate in respect of the same matter. The authority of this decision was shaken by the judgment of the Federal Court reported in *Subramania Chettiar* v. *Muthuswami Goundan*[2]. Though there are certain observations which may run counter to those made in the Full Bench decision that judgment really turned upon the crucial fact that in that suit before the Act came into force the promissory note had merged in the decree. They confined their decision to the facts before the Court and held that the Act in so far as the decree was concerned could not be challenged as invading the forbidden field of List I No. 28. Another judgment of the Federal Court in the *Bank of Commerce, Ltd., Khulna* v. *Kunja Behari Kar*[3], arising out of the Bengal Money-Lenders Act shook the very foundations of the Full Bench decision. In that case the question was whether the Bengal Money-Lenders Act of 1940 was within the legislative competence of the Provincial Legislature. Sections 30

1. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.).
2. (1941) 1 M.L.J. Supp. 1 : (1940) F.C.R. 188 (F.C.).
3. (1945) 1 M.L.J. 24 : (1944) F.L.J. 269.

to 36 of the Act contained provisions limiting the amount of interest and discharge of the debtors in specified instances. Section 38 prescribed the procedure. It was held that the rules indicated in sections 32, 79 and 80 of the Negotiable Instrument Act were among the essentials of law relating to promissory notes and that the provisions of sections 30, 36 and 38 of the impugned Act affected them so substantially that it would be impossible to regard them as merely amounting to an incidental encroachment on the law relating to promissory notes. Consequential on this decision, this High Court reconsidered its previous view and held in *Somayajulu* v. *Subbarayudu*[1], that the Madras Agriculturists Relief Act was *ultra vires* of the Provincial Legislature to the extent to which sections 7, 8, 9 and 13 of the Act offended against sections 32, 79 and 80 of the Negotiable Instruments Act. A perusal of the judgment shows that the changed view was based upon the decision of the Federal Court. Then the Central Legislature stepped in and passed an ordinance, Ordinance XI of 1945 validating the Act even in regard to negotiable instruments and that ordinance was in force till March, 1947. Meanwhile the decision of the Federal Court in the *Bank of Commerce, Ltd., Khulna* v. *Kunja Behari Kar*[2] was taken in appeal to the Privy Council in *Prafulla Kumar Mukherjee* v. *The Bank of Commerce, Ltd., Khulna*[3], and the Judicial Committee on 11th February, 1947, reversed the judgment of the Federal Court and held that the Bengal Money-Lenders Act of 1940 was not *ultra vires* of the Provincial Legislature. After a minute scrutiny of the provisions of the Act they held that the pith and substance of the Act was money-lending and therefore was a subject within the Provincial List. The following passage from page 13 may usefully be extracted :

> "Subjects must still overlap and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficient legislation would be stifled at birth and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with."

Their Lordships expressed the view that the pith and substance was only money-lending transaction and the promissory note was but an instrument for securing the loan. The result of this judgment is that the view expressed in the later Full Bench of this Court in *Somayajulu* v. *Subbarayudu*[1] is wrong, and the correctness of the decision in the earlier Full Bench judgment stands free from obscurity. After this pronouncement the Central Act II of 1948 was passed repealing Ordinance XI of 1945. In 1948 the Judicial Committee had to deal in *A.-G. of Saskatchewan* v. *A.-G. of Canada*[4], with the validity of the Farm Security Act, 1944, enacted by the Legislature of the Province of Saskatchewan. The learned counsel for the appellant strongly relied upon this decision in support of his contention that the view of the Full Bench does not hold the field any longer. The Farm Security Act, 1944, of Saskatchewan was enacted for the protection of certain mortgagors, purchasers and lessees of farm land and the main object of the Act was to lighten the contractual obligation of the mortgagor or purchaser of farm land in the event of the yield of grain grown upon the land falling below the prescribed minimum. The earlier sections of the Act provided for relief of lessees also. Section 6 was concerned only with the modification of the contractual rights of mortgagees or vendors of farm land in respect of the contractual payments due to them in the event of a "crop failure". It was argued *inter alia* that paragraph 3 of sub-section (2) of section 6 was *ultra vires* of the Provincial Legislature of Saskatchewan because it was an enactment in relation to "interest"—a matter which by section 91, Head 9, British North America Act, was within the exclusive legislative power of the Dominion Parliament. It was contended on the other side that the pith and substance of paragraph 3 was "property and civil rights" a matter in relation to which the Provincial Legislature had an exclusive legislative power, and that in so far as paragraph 3 affected "interest" it did so only incidentally. It was

1. (1945) 1 M.L.J. 339 : I.L.R. (1945) Mad. 679 : 8 F.L.J. 105 (F.B.).
2. (1945) 1 M.L.J. 24 : (1944) F.L.J. 269.
3. (1947) 2 M.L.J. 6 : L.R. 74 I.A. 23 (P.C.).
4. (1949) 2 M.L.J. 80 : A.I.R. 1949 P.C. 190 (P.C.).

also mentioned that the subject was covered by the item "agriculture in the Province," within the meaning of section 95, British North America Act, and it was not repugnant to any Act of the Parliament of Canada such as was referred to in that section. The Judicial Committee held on a construction of the relevant provisions that paragraph 3 of section 6 (2) of the Farm Security Act trenched upon the exclusive field occupied by the Dominion by enacting Interest Act and as the trenching was not incidental it was *ultra vires* of the Provincial Legislature. At page 193 the Judicial Committee say,

"There is a distinction between legislation 'in relation to' agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is 'the true nature and character of the legislation'—not its ultimate economic results that matters.......Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist, but the other of which is a lender of money. However broadly the phrase 'agriculture in the province' may be construed and whatever advantages to farmers the reshaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this Legislation can be regarded as valid on the ground that it is enacted in relation to agriculture."

Basing his argument on the aforesaid decision in *A.-G. of Saskatchewan* v. *A.-G. of Canada*[1], the learned counsel argued that the first reason given by the Full Bench in *Nagaratnam* v. *Seshayya*[2], that the impugned Act related to agriculture was displaced. By a comparative study of the provisions of the Bengal Money-Lenders Act (Act X of 1940) and the provisions of the Madras Agriculturists Relief Act he pressed on us that the second ground of the Full Bench, namely, that the pith and substance of the Act was money-lending was wrong. If the Act dealt with contracts, a subject falling in the concurrent list, it is contended that the principle of pith and substance has no application, and as some of the provisions of the Agriculturists Relief Act are repugnant to that of the Negotiable Instruments Act, the former Act to the extent of the repugnancy is void. We are unable to accept the learned counsel's argument that the Full Bench decision in *Nagaratnam* v. *Seshayya*[2] has no longer any binding authority. It may be that the soundness of the first ground is liable to be canvassed in view of the observations of the Judicial Committee in *A.-G. of Saskatchewan* v. *A.-G. of Canada*[1]. But it cannot be said of the other two reasons advanced by the Full Bench in support of their conclusion. Though there are some obvious differences between the provisions of the Bengal Money-Lenders Act and those of the Madras Agriculturists Relief Act we cannot say that the pith and substance of the Act is not money-lending. It deals with the creditors and debtors and their mutual obligations and the fact that it confines its provisions to a part of the public, namely, agriculturists, does not cease to make it nonetheless a legislation affecting money-lenders and money-lending. Anyhow, the reasoning of the above Full Bench was not held to be wrong in any of the subsequent judgments of either the Federal Court or the Judicial Committee. Indeed, if the pith and substance of the Act is money-lenders and money-lending, *Prafulla Kumar Mukherjee* v. *The Bank of Commerce, Ltd., Khulna*[3], is in itself an authority for holding that the mere fact that in regard to certain borrowings promissory notes were executed as security would not have the effect of entrenching upon the Dominion field.

There are also no merits in the third point. The learned counsel relied upon the following observations of Varadachariar, J., in *Megh Raj* v. *Allah Rakhia*[4]:

"In the judgment of the High Court there is some discussion of the question of the 'pith and substance' of the Act ; but that question does not arise when objection is taken not under section 100 of the Constitution Act, but under section 107 (1)."

We are concerned here not with section 107 (1), but with section 107 (2) which lays down that :

1. (1949) 2 M.L.J. 80 (89) : A.I.R. 1949 P.C. 190 (P.C.). 151 (F.B.).
2. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad.
3. (1947) 2 M.L.J. 6 : L.R. 74 I.A. 23 (P.C.).
4. (1942) I.L.R. 23 Lah. 623 at page 629.

"Where Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion Law or an existing law with respect to that matter, then, if the Provincial Law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial Law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

In the present case the Madras Agriculturists Relief Act has been reserved for consideration of the Governor-General and, therefore, the provisions of that law shall prevail over that of the Negotiable Instruments Act which is the Dominion Law. For the foregoing reasons we hold that *Nagaratnam* v. *Seshayya*[1], though its authority was questioned and to some extent shaken in the intervening period, now holds the field and is binding on us.

The next question is essentially one of fact. The suit promissory note, Exhibit P-1, is dated 15th June, 1925. The defendants' contention is that the said promissory note was the last of a series of renewed promissory notes and that if the suit debt was scaled down by tracing it back to the original loan the whole debt would be wiped off under the Madras Agriculturists Relief Act, 1938. Before the learned Judge, Exhibit P-5, a ledger commencing from 15th June, 1925, to 24th September, 1930, and two cash books Exhibit P-6 covering a period from 10th November, 1924, to 14th November, 1927, and Exhibit P-7 relating to the period from 17th August, 1923, to 30th March, 1925, were filed by the plaintiff. The defendants filed Exhibit D-2, dated 9th June, 1921, and Exhibit D-3, dated 27th August, 1922, two earlier promissory notes executed by them. Exhibits P-7, P-6 (*a*) and P-6 (*b*) disclose that the amounts due under the earlier promissory notes were calculated and were paid off and a fresh advance was taken by the defendant. The learned Judge, on a scrutiny of the accounts, rightly held that it was impossible to believe that Ponnuswami repaid the whole of the principal and the whole of the interest and then received a further loan of Rs. 2,500 and the circumstances made it probable that the suit promissory note was for the balance due on the two earlier promissory notes. These inferences the learned Judge was entitled to draw on the accounts and the document placed before him. Further, he also held that all the relevant books had been suppressed deliberately, and that it has been done to prevent the disclosure that more than double the original principal has been repaid by Ponnuswami. On that finding he also drew the presumption against the plaintiff which he was entitled to do. But the learned counsel contended that the presumption drawn by the learned Judge was not legally permissible in view of the decision of the Privy Council in *Ramanathan Chettiar* v. *Viswanathan Chettiar*[2]. In that case the question was whether a mortgage executed by the manager of a trading family was for necessity or whether it was taken by the mortgagee after making reasonable enquiry. In the course of the trial the defendants filed an affidavit to the effect that accounts had been given to the panchayatdars, both of whom were dead, and that he did not know in whose possession the documents were. The Court passed the order "Petition by plaintiff to direct defendants 1 and 2 to discover on oath. Statements filed may be taken to be sufficient. Petition closed." The defendants acquiesced in that order. On these facts the Judicial Committee held that the evidence acquiesced in by the respondent negatived a deliberate withholding on the part of either defendant, that there was no reason that the appellant should have ever had the documents or have known what they contained and therefore there was no ground for any of these inferences. The circumstances in our case are not similar. The defendants gave notice on 21st August, 1944 to the plaintiff to produce their ledger books and day books in their custody, possession or power containing entries of the money dealings which the plaintiff or his father had with Ponnuswami from the beginning of the transactions to the end. Though the plaintiff had taken a month's time to produce the account books, he exceeded the time by several months, and, finally, on 9th January, 1945, filed an application for excusing the delay in producing the account books. Even then he produced

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1. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.).

2. (1940) 54 L.W. 1.

only three books and said that the others were not available and that it was necessary to search for them and get them. The Judge passed an order directing them to file the accounts, if any, after making the necessary search. The defendant did not acquiesce in this order and, cross-examined the plaintiff's clerk, P.W. 1, in regard to these accounts, and, for the first time, he came out with a different case, namely, that the account books were in the High Court. The learned Judge did not accept this evidence. In view of the changed attitude of the plaintiff in regard to the custody of the account books and other circumstances in the case he had drawn the presumption and we cannot say that he exercised his discretion either illegally or without jurisdiction. Even now the appellant did not file any petition for admission of additional documents but contended himself with filing an affidavit stating the fact that the account books were in the High Court and were taken delivery of recently. Two account books were produced, but no opportunity was given to the advocate for the respondents to scrutinise the accounts. In the circumstances we have to accept the finding of fact.

In the result the appeal is dismissed with costs. In our view the judgment just delivered involves a substantial question of law within the meaning of Article 132 of the Constitution of India. Leave granted.

V.P.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

Devanugraham .. *Appellant* *

Penal Code (XLV of 1860), section 161—Sanction to prosecute for an offence under—Requisites.

In order to constitute proper sanction to prosecute an accused for an offence under section 161, Penal Code, there should be evidence either from the order granting sanction or other documentary authority placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought.

Where a sanction merely refers to the particular offences for which sanction is being accorded and the name of the person to be prosecuted and there is nothing to indicate that the facts giving rise to the offence were placed before the sanctioning officer, the sanction cannot be said to be a legal one. The mere heading in the sanction that it was in regard to the "acceptance of illegal gratification" would not be a sufficient compliance with the requirements of the law.

Appeal against the Order of the Court of the Fifth Presidency Magistrate, Egmore, Madras, in C.C. No. 1137 of 1949.

V. Rajagopalachari and *R. Purushotham* for Appellant.

The State Prosecutor for the State.

The Court delivered the following

JUDGMENT.—This is an appeal by G. Devanugraham, Food Inspector of the Corporation of Madras, against his conviction and sentence by the Fifth Presidency Magistrate for an offence under section 161, Indian Penal Code. He has been sentenced to rigorous imprisonment for six months and to a fine of Rs. 300.

Learned counsel for the appellant raised a number of points. Firstly he contended that the evidence did not make out the offence. Secondly he urged that the investigation was by an Inspector who had not the requisite sanction to act under the Prevention of Corruption Act. Thirdly he contended that the evidence had not been recorded *in extenso* by the Presidency Magistrate. Lastly he urged that the sanction granted by the Commissioner of the Madras Corporation evidenced by Exhibit P-6 was not legal.

It is conceded by the State Prosecutor that if the sanction granted is illegal then the conviction cannot stand. The ground of objection urged against the validity of the sanction is that the facts relating to the alleged offence were not placed before the sanctioning authority or rather that there is no evidence on behalf of the prosecution that the facts were so placed. Reliance was placed on the decision

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* Cr. Appeal No. 728 of 1949. 25th July, 1950

of the Judicial Committee reported in *Gokulchand Dwarkdas* v. *The King*[1]. That judgment decides that there should be evidence either from the order granting the sanction or other documentary evidence placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought. In the present case Exhibit P-6 refers to the particular offences for which sanction is being accorded, and also the name of the person; but apart from these two matters, there is nothing to indicate that the facts which are said to have given rise to the offence were placed before the officer. There is no independent evidence on record that such facts were placed before him. No doubt there is a reference in Exhibit P-6 to a letter, dated 28th March, 1949, with reference to which sanction is being accorded. That letter however was not placed before Court; nor is there any request made to me here for allowing additional evidence by way of placing that letter before this Court. What was urged by the State Prosecutor was that the heading in Exhibit P-6 showed that the conduct of Devanugraham under suspension was the subject-matter of the reference in relation to "acceptance of illegal gratification". From this it was sought to be argued that there was sufficient compliance with the requirements of the law as laid down by the Judicial Committee in the case already referred to. I cannot agree with this view. It follows that it is not proved that the sanction accorded is legal. If so, the conviction cannot stand. In this view it is unnecessary to deal with the question as to whether the offence is brought home to the appellant; nor is it necessary to refer to the other contentions raised by the learned advocate for the appellant.

In the result the conviction and sentence are set aside, and the appellant is acquitted. Fine, if paid, will be refunded.

V.S. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAGESA SASTRY.

Ammunje Narayana Naik .. *Petitioner* *

Essential Supplies (Temporary Powers) Act (XXIV of 1946), section 7—Failure to make necessary entries in counterfoils of sale receipts—Mens rea—Proof of—What would amount to—Proof of corrupt motive—Necessity.

A licensee was convicted under section 7 of the Essential Supplies (Temporary Powers) Act, for his failure to note the addresses of the persons to whom he sold rice and the licence number of his shop in the counterfoil of the receipt kept by him. On a contention that there was no proof of *mens rea*

Held: Assuming that proof of *mens rea* is necessary, it cannot be said that there is no such proof. What is meant by saying that *mens rea* should be established is really that it should be proved that the accused had a guilty mind in doing the act. If he knew that the law and the conditions of the licence given to him required that he should comply with certain formalities and with that knowledge he deliberately omitted to make the necessary entries in the receipt which were required for checking purposes, he did it consciously knowing that what he was doing was a violation of what the law required. It is certainly proof of *mens rea*. Proof of some ulterior corrupt motive of profit-making or anything analogous to it is not essential.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the Judgment of the Court of Session, South Kanara division, in C.A. No. 16 of 1949 (C.C. No. 289 of 1948, First Additional First Class Magistrate, South Kanara).

M. K. Nambiar for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

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1. (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30 (P.C.)

* Cr. R. C. No. 1114 of 1949. (Cr. R. P. No. 1047 of 1949). 13th July, 1950.

The Court made the following

ORDER.—The petitioner seeks to revise the conviction under section 7 of the Essential Supplies (Temporary Powers) Act. It has been found that he sold rice to three customers to whom he issued receipts. The complaint against him is based on the fact that the addresses of the persons were not noted, though the the names were given and also that the licence number of his shop was not found in the counterfoil kept by him. These facts are now admitted. The question is whether an offence is made out. Both the lower courts have held that these facts disclosed an offence, and the first court sentenced the petitioner to pay a fine of Rs. 250 on each count. The appellate court however reduced the fine to Rs. 100 in each case.

In revision it is contended that the offences are very technical. I agree, but the more serious contention is that there is no proof of *mens rea* on the part of the petitioner. Reliance is placed upon the decision in *Bholaprosad* v. *The King*[1]. It may be that this is not a case where an absolute liability is created. Assuming without deciding that proof of *mens rea* is necessary, I fail to see why it should be held that there is no such proof in this case. What is meant by saying that *mens rea* should be established is really that it should be proved that the petitioner had a guilty mind in doing the act. If he knew that the law and the conditions of the licence given to him required that he should comply with certain formalities and with that knowledge he deliberately omitted to make in the receipts the necessary entries which were required for checking purposes, he did it consciously knowing that what he was doing was a violation of what the law required. It is certainly proof of *mens rea*.

It is urged by Mr. Nambiar that what is required is proof of some ulterior corrupt motive on the part of the petitioner such as some financial profit for himself or for some persons in whom he was interested, and it is only in such cases that it may be postulated that he had a guilty mind. I cannot agree with this contention. It is clear that the petitioner did the act knowing that it was contrary to law. The profit motive or anything analogous to it is not essential. What the law requires is only a conscious violation of the rule and if a person deliberately did a thing with the knowledge that what he was doing was a crime, then it cannot be said that he has not got a guilty mind. I am therefore unable to uphold this contention urged on behalf of the petitioner.

Next it is argued that the sentence is excessive. I should agree that Rs. 250 for each count would have been excessive. That is why the Appellate Magistrate has reduced it to Rs. 100. I do not see any need to interfere with his discretion.

The petition is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The Tanjore Co-operative Marketing Federation, Ltd., Vijayapuram, by its Secretary .. *Petitioner* *

v.

R. Krithivasan .. *Respondent.*

Madras Co-operative Societies Act (VI of 1932), section 51—Suit against a Co-operative Society for refund of security deposit and for the arrears of salary by an ex-employee—If barred by section 51.

Where an ex-employee sues a Co-operative Society for the refund of his security deposit and for the arrears of his salary it cannot be said that it is a matter touching the business of the society as contemplated by section 51 of the Madras Co-operative Societies Act. The business of the society is not the taking of security deposits, but the carrying on of some kind of co-operative business. Section 51 is no bar to such a suit.

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1. (1949) 53 C.W.N. 300.

* C. R. P. No. 116 of 1949. 27th April, 1950.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the Order of the Court of the District Munsif, Mayuram, dated 29th September, 1948, in S.C.S. No. 414 of 1948.

G. R. Jagadisa Aiyar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The only point raised in this case is whether the suit is barred by reason of section 51 of the Madras Co-operative Societies Act. The defendant, a Co-operative Society, contested the claim of the plaintiff, an ex-employee, who wanted to recover the security deposit made by him at the time he was entertained by the Society. The suit was for recovery of the security deposit along with the arrears of salary. The point of jurisdiction raised by the Co-operative Society was that the claim for the refund of the security deposit was a matter touching the business of the Society as contemplated in section 51 of the Act and therefore the civil court has no jurisdiction. The learned District Munsif has found that this is not a matter touching the business of the Society and has decreed the suit. My attention has been drawn to a decision in *Narayana Nair* v. *The Secretary, Triplicane Urban Co-operative Society, Ltd.*[1], where Satyanarayana Rao, J., has held that where an employee of the Co-operative Society sues the Co-operative Society for damages for wrongful dismissal, it cannot be held that the action was touching the business of the Society and that the civil courts have no jurisdiction. In that case my learned brother has distinguished a judgment of Kuppuswami Aiyar, J., in C.R.P. No. 1134 of 1940. Mr. Jagadisa Aiyar, the learned advocate for the petitioner, contends that the observations of Kuppuswami Aiyar, J., are applicable *ad idem* to the facts of the present case. I am not satisfied that when an employee asks for the refund of his security deposit and for the arrears of salary that is a matter relating to the business of the Society. The business of the Society is not the taking of security deposits, but the carrying on of some kind of co-operative business. In such circumstances I agree with the learned District Munsif that section 51 of the Madras Co-operative Societies Act is no bar to the present suit. The other points raised in the Civil Revision Petition are all questions of fact, which are binding on me. The Civil Revision Petition is therefore dismissed with costs.

V.S. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Marupaudi Kutumba Rao and others .. *Appellants* *

v.

Parvathaneni Venkataramayya .. *Respondent.*

Malicious prosecution—Suit for damages—Power of Civil Court to come to its own conclusion as to existence of reasonable and probable cause.

It is wrong to say that in a suit for damages for malicious prosecution it is not open to a Civil Court to go behind the fact of acquittal by a Criminal Court and come to a finding that there was a reasonable and probable cause for filing a complaint. On the other hand it is the duty of the Civil Court to consider the evidence adduced independently from the Judgment of the Criminal Court and assess its value to find out if there is reasonable and probable cause.

Pedda Venkatapathi v. *Balappa*, (1933) 65 M.L.J. 146 : I.L.R. 56 Mad. 641, relied on.

Appeals against the decree of the Court of the Subordinate Judge, Vijayawada, in A.S. No. 199, etc., of 1945, respectively preferred against the decree of the District Munsif Court, Vijayawada, in O.S. No. 330, etc., of 1944, respectively.

A. Sambasiva Rao for Appellant.

D. Munikanniah for Respondent.

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1. (1948) 1 M.L.J. 331.

* S. A. Nos. 792, 793 and 852 of 1947. 27th April, 1950.

The Court delivered the following

JUDGMENT.—The three second appeals arise out of three suits filed by the appellants to recover damages from the respondent defendant for malicious prosecution. The defendant is the same in all the three suits.

In respect of an occurrence on 21st May, 1942, the defendant filed a complaint against the appellants and others for offences under sections 148, 149, 323, 324, 352 and 504, Indian Penal Code. *A prima facie* case was made out, and so a charge was framed by the Magistrate against appellants and others for offences under sections 323 and 324, Indian Penal Code. The accused then entered upon their defence and examined defence witnesses. The Magistrate, after considering the defence evidence, acquitted the appellants. The appellants thereupon instituted the suits in the Court of the District Munsif, Vijayawada, for damages for malicious prosecution.

It may be mentioned, the appellants in S. A. No. 793 of 1947 filed a complaint against the defendant, alleging that the defendant and others came and beat him on 21st May, 1942, at about 4 P.M. There were thus two complaints, one by the defendant against the appellants in the second appeals, and the other by the appellant in S. A. No. 783 of 1947, against the defendant and others. In both the complaints the date of occurrence was mentioned as 21st May, 1942, and time of occurrence as 4 P.M. The case of the defendant was, that the appellants came and beat him in his field whereas the case against him was that he and others came and beat the appellants on a tank bund. The difference between the two complaints is only as to the scene of occurrence, the date and time of occurrence being the same. The cases were therefore tried as case and counter. The complaint filed by the defendant ended in acquittal, as stated already. It is not clear what happened to the complaint filed by the plaintiff in O. S. No. 328 of 1944.

In the Court of the District Munsiff, both parties examined witnesses and let in evidence to show that the complaint filed by each party was the true one, and that the other was false. Both sides had sustained injuries and the plaintiffs, though they let in evidence to show that the occurrence was only on the tank bund and not on the field of the defendant, as alleged by him, did not let in any evidence to satisfy the Court as to how the injuries on the person of the defendant were caused. They merely suggested that the injuries on his person were self-inflicted.

The learned District Munsiff, after discussing the evidence in detail, held that either, each party beat the other in the field of the defendant, or the defendant was first beaten in his field by the plaintiffs and others, and thereupon the plaintiff in O. S. No. 328 of 1944 was beaten, by the defendant and others on the tank bund, resulting in a complaint being filed by each party against the other. In short he believed the witnesses cited by the defendant and held the complaint was not made without any reasonable or probable cause, and dismissed the suits. The appellate Court came to the same conclusion and held that on the evidence adduced and the probabilities of the case, the defendants' version is highly probable and that there can be no doubt that he had reasonable and probable cause for filing the criminal case against the plaintiffs' appellants, and dismissed the appeals

In second appeal it is contended by Mr. Sambasiva Rao that in case where there are eye-witnesses who have been disbelieved by the Criminal Court and thereby resulting in acquittal, it is not open to civil court to go behind that acquittal and believe the eye-witnesses and find that there was a reasonable and probable cause for filing the complaint. The learned advocate has not been able to cite any authority in support of the proposition contended for by him. On the other hand, there is clear authority to the contrary. In *Pedda Venkatapati* v. *Balappa*[1], Curgenven, J., says :

1. (1933) 65 M.L.J. 146 : I.L.R. 56 Mad. 641.

"It lies upon the Civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause. Indeed I am unable to agree that our Evidence Act justifies an examination of the judgment of the Criminal Court in order to ascertain the grounds upon which the acquittal proceeded and the view taken by the trying Magistrate of the evidence. Under section 43 of the Evidence Act it appears to me that that judgment can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. I know of no provision of the Act which will justify the Civil Court in taking into consideration the ground upon which that acquittal was based. Upon this point I am in entire agreement with *Gulabchand Gopaldas* v. *Chunnilal Jagjivandas*[1], and *Shubrati* v. *Shamsuddin*[2], in the view that there is no such provision."

Therefore, it is the duty of the Civil Court to consider the evidence adduced in support of the defendants' version and assess its value to find out if there is reasonable and probable cause. The lower courts have done this. As already pointed out, the appellate Court has found that the defendants' verion is probable, and that he had reasonable and probable cause for filing the criminal case which was ultimately tried as C. C. No. 5 of 1942, and this finding is a finding of fact. Vide *Balasubramanya Sastri* v. *Ponnusami Iyer*[3]. There is no question of law in these second appeals. They are therefore dismissed with costs.

Leave refused.

V. S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Gutta Radhakristnayya minor by mother and guardian Nagarattamma. *Appellant**

v.

Gutta Sarasamma .. *Respondent.*

Hindu Law—Partition—All terms embedied in document—Creation of interest in immoveable property—Provision for execution and registration of a formal document later on—Admissibility in evidence of the unregistered document—Registration Act (XVI of 1908), sections 17 and 47—Doctrine of part-performance—Applicability to partition arrangements—Transfer of Property Act (IV of 1882), section 53-A—Scope—Partition—If a transfer within the meaning of the section.

Where a partition deed created an interest in immoveable property the mere fact that a provision was inserted enabling the parties to get a proper partition deed written up on stamp paper and get the same registered did not take away the document from the mischief of sections 17 and 49 of the Registration Act. The document is not admissible in evidence unless it is registered.

Md. Ghouse Sahib v. *Jamila Bi*, (1950) 1 M.L.J. 151, relied on.

Partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severality. Each one of the sharers had an antecedent title and therefore no conveyance is involved in the process as a conferment of a new title is not necessary. Accordingly a partition is not a transfer within the meaning of section 53-A of the Transfer of Property Act and the doctrine of part-performance cannot be invoked by a party claiming to be in possession by virtue of a partition under an unregistered deed.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatnam, dated 12th March, 1948, and passed in O. S. No. 24 of 1946.

P. Somasundaram and *P. Suryanarayana* for Appellant.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is a defendant's appeal against the preliminary decree for partition in Original Suit No. 24 of 1946 on the file of the Court of the Subordinate Judge, Masulipatnam. The plaintiff is the paternal grandfather of the defendant. The defendant's father was Satyanarayana who died in the year 1921. They constituted members of a joint Hindu family and possessed of immoveable properties set out in the A and B schedules annexed to the plaint and some moveables. The plaintiff filed the above suit for partition of the family properties and for profits.

1. (1907) I.L.R. 9 Bom.L.R. 1134.
2. (1928) I.L.R. 50 All. 713.
3. (1919) 10 L.W. 305.

* Appeal No. 519 of 1948. 11th April, 1950.

The defendant *inter alia* pleaded that there was a partition of the family properties through the intervention of mediators and he was put in possession of the properties that fell to his share. He relied upon a document embodying the arrangement between the parties. He also resisted the suit on the ground that the plaintiff was precluded from questioning the alleged partition on the doctrine of part-performance.

As many as eleven issues were raised in the suit but it is unnecessary to consider them in detail as the learned advocates confined their arguments before us only on two points.

The learned Subordinate Judge held that the letter dated 15th February, 1944, alleged to have been executed by the plaintiff was not admissible in evidence. He passed a preliminary decree effecting a division into two equal shares of the properties set out in the schedule to the plaint. The defendant preferred the above appeal.

The learned counsel for the appellant raised two contentions before us:

(1) that the document dated 15th February, 1944, is admissible in evidence as it only recorded a completed partition that was entered into between the parties through the intervention of the mediators.

(2) that the defendant having been put in possession of the properties that fell to his share is entitled to defend the suit on the ground of part-performance.

The first point turns upon the construction of Ex. X-1. It may be pointed out that the contention now raised before us, namely, that the document was only a record of a completed oral partition that was entered into between the parties, was neither raised in the pleadings nor the question was argued before the learned Subordinate Judge. The only question that was addressed to him was that the document did not require registration as it contemplated a formal document being executed subsequently. The document gives in detail the nature of the disputes between the parties and also the settlement of the same through the intervention of the mediators. The properties allotted to the respective parties are minutely described. It provides for payment of money for equalization of the shares; the debts payable by the respective parties are detailed; covenants of mutual indemnity are also embodied in the document; it was signed by the plaintiff and the mediators attested the same. In short, all the terms in regard to the partition of the properties between them are embodied in the document. The document contains the following recital:

"In the said settlement the mediators settled to give the hereunder A schedule 1 and 2 items of property to me, the B schedule mentioned property to the minor, and the C schedule mentioned property to your daughter Leelavati on your behalf, towards the income that may be got from the family property for the property given to you for *pasupu kunkuma* (pin money). Therefore, C schedule mentioned property fell to Leelavati. As regards the said properties, we have this day accordingly taken possession of the lands inclusive of the heaps of crops and the standing crops that fell to our respective shares. Hence, we shall not raise disputes with each other."

These recitals clearly show that the document itself creates a right *in presenti* in favour of the parties to the deed. The learned advocate relied upon the recital in the document, namely, that:

"We shall enter into a proper document before 15th March, 1944 and get it registered at the expense of both the parties"

in support of his argument that it does not require registration. The recent judgment reported in *Md. Ghouse Sahib* v. *Jamila Bi*[1], to which one of us was a party discusses the scope of such recitals in a document. It was held therein that as the document in question created an interest in immoveable property the mere fact that a provision was inserted enabling the parties to get a proper partition deed written up on stamp paper and get the same registered did not take away the document from the mischief of sections 17 and 49 of the Registration Act. A perusal of the

1. (1950) 1 M.L.J. 151.

present document leaves no doubt in our minds that it creates an interest *in presenti* in the properties covered by the same and, therefore, it requires registration. It not having been registered, we agree with the learned Subordinate Judge that the document is not admissible in evidence.

The next question raised by the learned advocate raises an interesting point of law, namely, whether the doctrine of part-performance embodied in section 53-A of the Transfer of Property Act applies to partition arrangements. Section 53-A of the Transfer of Property Act reads :

"Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though it requires to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :"

'Transfer of Property' is defined in section 5 of the Act, as :

"'an act by which living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons ; and 'to transfer property' is to perform such act."

The necessary condition for the application of section 53-A is that the transaction must be a contract to transfer for consideration any immoveable property. The question, therefore, is whether a partition is a transfer for consideration within the meaning of the section. There is no direct decision on the interpretation of section 53-A in regard to its applicability to a partition, but the learned counsel relied upon the meaning attributed to the word 'transfer' appearing in section 53 of the Act and also in other Acts. There is a sharp cleavage of judicial opinion on the question, and a long *catena* of cases have been cited before us on either side. We shall consider them in some detail in their chronological order as the reasoning of the learned judges certainly helps us to arrive at our conclusion.

The earliest case on the subject is the decision in *Gyannessa* v. *Mobarakannessa*[1]. In that case, some of the co-owners possessing an undivided share in several properties took by an arrangement a specific property in lieu of their shares in all the properties. It was contended that the said arrangement was not valid as it was not effected by an instrument in writing. The learned Judges held that the transaction was not an exchange within the meaning of section 118 of the Transfer of Property Act but the completed transaction amounted to a partition which was not required by law to be effected by an instrument in writing. Macpherson, J., says at page 213 :

"The completed transaction was the partition by which the parties held in severalty the lands which had been before held in common. The law does not require a partition to be effected by an instrument in writing, and the right of partition being an incident of property held as this property was, the right is not, according to the second section, affected by any of the provisions of the Act."

At page 215, the other learned Judge, Ameer Ali, J., says :

"Section 118, in my opinion, is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their shares in all. Section 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other."

This decision was approved by Mukherjee, J., in *Satya Kumar Banerjee's cases*[2]. In *Indoji Jithaji* v. *Kothapalli Rama Charlu*[3], the question was whether a partition deed was bad because it contravened the provisions of section 53 of the Transfer of Property Act. Abdur Rahim, J., held that the partition was voidable at the instance of the plaintiff upon the principle enunciated in section 53 of the Transfer

1. (1897) I.L.R. 25 Cal. 210.
2. (1909) 10 C.L.J. 503.
3. (1919) 10 L.W. 498.

of Property Act. It may be noted that Sir Abdur Rahim did not hold that section 53 directly applied to a partition document but only invoked the principle underlying that section. The other learned Judge Spencer, J., was definitely of the opinion that a partition is not a transfer within the meaning of section 53 of the Transfer of Property Act. At page 506, he says :

> "A partition is a division or agreement among co-owners to make a division of their joint property in severalty ; it effects a change in the mode of enjoyment of property but it is not an act of conveying property from one living person to another. Exhibit II is not in terms a division of property, nor is it a transfer or release of property, but purports to be a relinquishment of the executant's incorporeal right to have a partition."

At page 508, he adds :

> "I have already given reasons for thinking that partitions of co-parcenary properties do not fall within the scope of Section 53 which deals with transfers of immoveable property seeing that every member of a co-parcenary has, before a partition takes place, a common interest in and possession of every item of ancestral property."

The nature of a partition came again to be considered by the Calcutta High Court in *Atrabannessa Bibi* v. *Safatullah Mia*[1]. This judgment is rather important as the law laid down by the learned Judges has been invoked by different judges to support divergent views. It is also important as one of the learned Judges, Mookherjee, J., was a party to the decision in *Satya Kumar Banerjee's case*[2], which affirmed the principle laid down in *Gyannessa* v. *Mobarakannessa*[3]. It is unnecessary to state the facts. It would be enough if the relevant passage found at page 509 is extracted:

> "The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners ; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons, of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him, the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property."

Oldfield and Venkatasubba Rao, JJ., relying on the aforesaid passages, held in *Rasa Goundan* v. *Arunachala Goundan*[4], that a partition is a transfer within the meaning of section 53 of the Transfer of Property Act. They dissented from the view expressed by Spencer, J., in *Indoji Jithaji* v. *Kothapalli Rama Charlu*[5], but relied upon a part of the definition of 'partition' found in *Atrabannessa Bibi* v. *Safatullah Mia*[1], namely " the surrender of a portion of a joint right in exchange for a similar right from co-sharers " in support of their conclusion. With great respect to the learned Judges, they have ignored the relevant portion of the statement of law contained in *Atrabannessa Bibi* v. *Safatullah Mia*[1], which, as we shall show later on, is relied upon by other judges to come to a contrary conclusion. Devadoss, J., sitting as a single Judge, followed the observations in *Rasa Goundan* v. *Arunachala Goundan*[4] in *Venkataramayya* v. *Raghavalu*[6] and *Ramaswami Chettiar* v. *Kathamuthu Thevar*[7]. Ramesam, J., in *Ahobilachariar* v. *Thulasi Ammal*[8], made some relevant observations in regard to the applicability of the theory of part-performance to a partition. It may be noticed that the decision was given before the enactment of section 53-A of the Transfer of Property Act which embodied the principle of part-performance, limiting it only to a particular class of cases. The question whether a partition was a transfer or not was neither raised before him nor decided by the learned Judge. As it was then thought that the principle of part-performance was of general application even in India, the learned Judge made a general observations to the effect that though the deed of partition is inadmissible for want of registration, if there is later enjoyment of certain items, as separate property, such enjoyment amounts to partial performance of the contract of partition and its terms ; and in such a case the partition can be given effect to by reason of the partial performance even though the terms of the partition cannot be proved. Obviously

1. (1915) I.L.R. 43 Cal. 504.
2. (1909) 10 C.L.J. 503.
3. (1897) I.L.R. 25 Cal. 210.
4. (1923) 44 M.L.J. 513.
5. (1919) 10 L.W. 498.
6. A.I.R. 1925 Mad. 492.
7. 1926 M.W.N. 641.
8. A.I.R. 1927 Mad. 830.

the restricted principle of part-performance now given statutory recognition would not permit of such treatment of unregistered partition deeds though partially performed. In *Raman Singh* v. *Dilla Singh*[1], the construction of the word ' transfer ' in section 5 of the Oudh Rent Act fell to be decided. If a partition was a transfer it would be invalid under the said Act. The learned Judges at page 248 defined the word ' transfer ' with lucidity and they say :

" A ' transfer ' in law must be deemed to imply a transfer by a person entitled to that property in favour of a person having no title otherwise. Such a transaction relating to an occupancy tenure must, therefore, to deemed to be inoperative. Where, however, the holding is claimed by different heirs of a deceased occupancy tenant or where the occupancy tenure forms part of the property of a joint family or of co-tenants and a division takes place among such persons, it cannot be held that the transaction amounts to a transfer from one having a right in favour of one having no right at all. In such a case all the persons must be deemed to have a right in the holding, and when the parties divide it among themselves their action must be considered to refer to the rights possessed by each party to whom the land has been allotted on division or partition."

In *Waman Ramakrishna* v. *Ganpat Mahadeo*[2], a different note was struck. The question was whether a partition was a transfer within the meaning of section 53 of the Transfer of Property Act. The learned Judges preferred the view expressed in *Rasa Goundan* v. *Arunachela Goundan*[3], to that of Spencer, J., in *Indoji Jithaji* v. *Kothapalli Rama Charlu*[4]. They also understood the observations in *Atrabannessa Bibi* v. *Safatullah Mia*[5] in the same manner as the learned Judges in *Rasa Goundan* v. *Arunachela Goundan*[3] understood. The relevant observations made at page 39 may be extracted.

" It seems to us that the line of reasoning on which the view of the Calcutta High Court is based is sound, and that for purposes of section 53 of the Transfer of Property Act, ' partition ' where the immoveable property has been partitioned among co-owners by metes and bounds, must be held to be ' transfer '. This does not appear to be an unreasonable or far-fetched interpretation : Partition can in fact be adequately described as a mixture of the surrender and the conveyance of rights in property."

There is an exhaustive treatment of the question in two Bench decisions reported in *Suhashini Poddar* v. *Sreenath Chakravarti*[6] and *Khirode Sundari* v. *Chuni Lal*[7]. The first of these decisions is a decision of Mitter and Waight, JJ. The question in that case was whether an allottee under a partition decree was a *bona fide* assignee for value within the meaning of sub-clause (*b*) of section 36 (2) of the Bengal Money-Lenders Act. If the allottee was an assignee for value he would be protected and the decree was not liable to be re-opened at the instance of the judgment-debtor. At page 773, a clear and precise statement of the law is found :

" Although partition thus resembles an exchange, it is not an exchange. There is no conveyance but only *transformation* of the property. The estate in common is transformed, that is, it takes only another form, namely, two or more estates to be possessed and enjoyed in severalty. By the partition a co-sharer gets a separate allotment by virtue of his antecedent title as co-sharer. There is thus no acquisition of property in another independent right. It is not a conveyance—it is not an exchange and the separate allotment is not obtained by another independent title."

The other decision at page 779 of the same report also arose under the Bengal Money-Lenders Act. Another Bench of the same High Court accepted the definition of ' Partition ' found in the earlier decision. At page 783 the learned Judges explained the scope of the observations in *Atrabannessa Bibi* v. *Safatulla hMia*[5]. After referring to the decision in *Rasa Goundan* v. *Arunachela Goundan*[3], and *Waman Ram Krishna* v. *Ganpat Mahadeo*[2], they say :

" The two last-mentioned cases, however, proceeded on what was supposed to be the line of reasonong laid down by Mookerjee, J., in *Atrabunnessa Bibi* v. *Safatullah Mia*[5], to which we have referred. We do not, however, read the observations of Mookerjee, J., in that case, as indicating, contrary to the opinion expressed by him in *Satya Kumar Banerjee's case*[8], that a partition involves a transfer of property. The gist of that observation is in the opening sentence, namely,

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1. (1928) I.L.R. 4 Luck, 243.
2. (1935) I.L.R. 60 Bom. 34.
3. (1923) 44 M.L.J. 513.
4. (1919) 10 L.W. 498.
5. (1915) I.L.R. 43 Cal. 504.
6. (1945) 49 C.W.N. 769.
7. (1945) 49 C.W.N. 779.
8. (1909) 10 C.L.J. 503.

'The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners.'

The expression 'joint right' in the following sentences refers to right of joint possession and enjoyment. The substance of partition, as we have said, is the severance of the joint possession and enjoyment. In the ultimate analysis, in our opinion, and we say so with great respect to the learned judges who decided the Madras case of *Rasa Goundan*[1]; and the Bombay case of *Waman Ram Krishna*[2], there is no difference between the observations of Mookerjee, J, and those of Spencer, J., which we have quoted above."

With great respect we entirely agree with the said observations.

The learned counsel strongly relied upon the judgment of Wadsworth and Patanjali Sastri, JJ., in *K. S. RM. Firm* v. *Subbiah*[3]. In that case the learned Judges held that where the partition was fair and in accordance with the proper shares of the parties, it was not liable to be impeached under section 53, although it was entered into with a view to prevent attachment of the son's shares in execution of the decrees obtained against the father after the partition and was in that sense *mala fide*. In the course of the judgment Patanjali Sastri, J., who delivered the judgment on behalf of the Bench, noticed the various cases construing the word 'transfer' in section 53 of the Transfer of Property Act. We do not find any definite view expressed by the learned Judges in regard to the meaning to be attributed to the word 'transfer.' Perhaps, it was not necessary as in that case the learned Judges held that the partition was not a fraudulent transfer under section 53 of the Transfer of Property Act. Indeed, at page 145, the learned Judge specifically states that there are obvious difficulties in dealing with a partition among members of a Hindu joint family as a fraudulent transfer coming within the section. Whatever doubt there may be, the learned Judge's view was made clear by his pronouncement in a later decision reported in *Narasimhalu* v. *Somaswara Rao*[4]. The question was whether the allotment at a partition of *Jyeshtabhagam* to the eldest brother involved a gift by the younger brother or brothers. After considering the case law on the subject, the learned Judges stated as follows:

"The argument proceeds, in our opinion, on a misconception of the true nature of a partition arrangement under which each co-owner gets a specific property in lieu of his rights in all the joint properties; that is to say each co-sharer renounces his rights in the other common properties in consideration of his getting exclusive right to and possession of specific properties in which the other co-owners renounce their rights. It is thus a renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the others. That is why it has been held that a partition can be effected orally and without any registration instrument though it may affect immoveable properties of the value of one hundred rupees or more."

The aforesaid discussion of the case-law on the subject brings out two divergent views:

(1) partition is a conversion of joint enjoyment into enjoyment in severalty. The crucial test of a transfer by a person having a right in favour of a person having no right is not satisfied. There is no conveyance but a transformation of property, an allotment by virtue of his antecedent title as co-sharer.

(2) It is a conveyance of a portion of joint right in exchange for a similar right from his co-sharer.

In our view, the latter view of a partition as a conveyance of a joint right involves an introduction of fiction and is also contrary to the fundamental conception of partition.

In Freeman, on Co-tenancy and Partition, the following passage from Allnatt, extracted at page 396, may usefully be reproduced here:

"Partition between co-parceners neither amounts to, nor requires, an actual conveyance. It is less than a grant. Its operation is not to pass the land by a fresh investure of the seisin, for parceners

1. (1923) 44 M.L.J. 513.
2. (1935) I.L.R. 60 Bom. 34.
3. (1944) 1 M.L.J. 384: I.L.R. (1945) Mad. 138.
4. (1948) 1 M.L.J. 150.

are supposed to be already in possession of the whole lands. Partition, therefore, makes no decree. It only adjusts the different rights of the parties to the *possession*; each does not take her allotment by *purchase*; but is seized of it by descent from the common ancestor, as she was of her undivided share before partition."

Partition, therefore, is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of the sharers had an antecedent title and therefore no conveyance is involved in the process as a conferment of a new title is not necessary. We are glad to be able to arrive at this conclusion as otherwise we would be introducing complications and anomalies in the working of section 53-A of the Transfer of Property Act. One member of the family who was put in possession of his share would be able to resist the suit for partition and another who did not take possession of his share would have to submit to a decree for partition. In a suit for a general partition there would be a decree for partition in regard to some properties and some parties, leaving out those sharers who secured possession of the properties under an invalid partition. It may be that a decree would have to be passed even in their favour in regard to properties not divided. The working out of equities and equalization of sharers would involve insoluble complications. We, therefore, hold that a partition is not a transfer within the meaning of section 53-A of the Transfer of Property Act, and, therefore, the defendant could not invoke the said doctrine to support his case.

In the result the appeal is dismissed with costs.

K.S. — *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT:—S. FAZL ALI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

Sheth Maneklal Mansukhbhai .. *Appellant**

v.

Messrs. Hormusji Jamshedji Ginwalla & Sons .. *Respondents.*

Transfer of Property Act (IV of 1882), Section 53-A—Applicability—Conditions necessary for—Agreement of lease creating a present demise but not registered—Admissibility as evidence of part-performance.

In cases of lease the Legislature has recognised that the equity of part-performance is an active equity as in English law and is sufficient to support an independent action by the plaintiff (*vide* section 27-A of the Specific Relief Act.). Though this section applies to contracts executed after 1st April, 1930 and has no application to the present case, there can be no manner of doubt that the defence under section 53-A of the Transfer of Property Act would be available to a person who has an agreement of lease in his favour though no lease has been executed and registered.

An agreement of lease creating a present demise but not registered is admissible under section 49 of the Indian Registration Act as evidence of part-performance. A formal lease is not necessary to attract the application of section 53-A of the Transfer of Property Act. All that is required is that an agreement in writing signed by the transferor should be capable of being gathered from the evidence. Where there is a document which is reliable secondary evidence of the agreement to lease there can be no hesitation in holding that by an offer and an acceptance made in writing and signed by the respective parties an agreement was completed.

R. J. Thakur, Advocate, Supreme Court, for Appellant.

Nanak Chand Pandit, Senior Advocate, Supreme Court (*Dewan Charanjit Lal*, Advocate, Supreme Court, with him) for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal from the judgment and decree of the High Court of Bombay dated 9th March, 1943, and made in Second Appeal No. 717

*Civil Appeal No. XXXVII of 1949. 21st March, 1950.

of 1940 varying the decree of the Assistant Judge, Ahmedabad, in Appeal No. 173 of 1936 reversing the decree of the Joint Sub-Judge, Ahmedabad, in Suit No. 830 of 1933.

The suit out of which this appeal arises was filed by the respondent firm in ejectment to recover possession of survey Nos. 222, 223, 225 and 226 situate in Rampura in Ahmedabad district and for mesne profits, as early as July, 1933, and during its 17 years' span of life it had a somewhat chequered career. Those responsible for drawing up the pleadings did not take pains to comprehend correctly as to what they were about and the whole litigation was conducted in a slovenly and slipshod manner. Evidence which should have been produced at the beginning was allowed to be produced at a much late stage after the case went back on remand and the suit was determined by the Assistant Judge on fresh issues and fresh materials. It was in this confused state of the record that it was eventually decided by the High Court and its judgment is by no means satisfactory. The long time taken in deciding the suit which involved determination of a few simple issues is such as is calculated to bring into ridicule the administration of justice.

There is a talukdari estate called the Bhankoda estate in Viramgam taluka in Ahmedabad district. It is jointly owned by several talukdars in different shares and comprises twelve villages, one of which is Rampura in which the suit lands are situate. By Government Resolution No. 8179, dated 30th August, 1912, the estate was taken under Government management under section 28 of the Gujarat Talukdars Act (Bombay Act VI of 1888). The firm of Shah Manilal Maganlal and Bros. (predecessors in interest of the appellant) desired to erect a ginning factory on survey Nos. 223, 225 and 226 and with that object approached the Talukdari Settlement Officer for a permanent lease of these survey Nos. The said officer agreed to grant a lease subject to sanction of Government. By Resolution No. 10795 of 1917 dated 5th September, 1917, the Government of Bombay granted the requisite sanction. Exhibit 181 is a certified copy of the letter from the Chief Secretary to Government to the Commissioner and to the Talukdari Settlement officer and in detail it mentions the various steps taken to effect the transaction.

On 9th December, 1916 an application was made by Shah Manilal Maganlal in writing signed by him to the Talukdari Settlement Officer offering to take a permanent lease of the above mentioned survey Nos. on an annual rental of Rs. 290 for the purpose of erecting a ginning factory. On 12th July, 1917 the said officer accepted provisionally this offer after taking into consideration the objections raised by some of the talukdars in respect of the grant of a lease. He submitted the papers to Government with the following recommendations :—

"As the petitioner was in urgent need to start operations during the current ginning season I have in anticipation of Government sanction permitted him to enter upon the land and have the honour to approach you for sanction under section 27 (A) of the Court of Wards Act, the provisions of which have been made applicable to Talukdari Estates by section 29 (G) of the Gujarat Talukdars Act."

The conditions of the lease agreed upon by the parties were annexed with this letter and a copy of the offer was also sent to Government. Exhibit 181 recites the contents of the offer and states the undertaking given by the lessee. There is intrinsic evidence within its contents to show that these writings were signed by the proposer. The Talukdari Settlement Officer in a signed writing accepted the offer and sent it for Government sanction. It further appears that he communicated his acceptance to the lessee and agreed to give a lease if Government gave sanction. The survey numbers in question were in possession of tenants and it was agreed that the lessee would take possession after making private settlements with them. It was also agreed that if no such private arrangement could be made, then the settlement officer would take steps to issue ejectment notice against the tenants. On 20th July, 1917, the Commissioner forwarded the papers to Government with his recommendations and the Government on 5th September, 1917, sanctioned the arrangement agreed to by the Talukdari Settlement Officer with

Shah Manilal Maganlal. The sanction order is signed by the Chief Secretary to the Government and it contains an endorsement of its having been sent to the officers concerned. It is thus clear that a binding agreement to lease the survey numbers in question was effected between the Talukdari Settlement Officer and Shah Manilal Maganlal with the sanction of the Government. Though a draft of a formal deed of lease was prepared, no such document was formally executed or registered for reasons which it is not necessary to state herein.

Soon after the agreement the lessee took possession of the survey numbers in suit and put up thereupon a ginning and a pressing factory, a bungalow, engine rooms and other structures. He tendered the agreed rent to the Talukdari Settlement Officer who received it from him. He continued receiving it for about two years when the estate was released from the management of the Government and came under the management of the talukdars. The manager appointed by the talukdars continued to receive rent from the lessee as had been settled by the Talukdari Settlement Officer.

On 4th May, 1924, a possessory mortgage of the ginning factory along with all its buildings was effected by Shah Manilal Maganlal in the sum of Rs. 1,40,000 in favour of the defendant. The mortgage included in the schedule of the mortgaged property some other property as well. The two contestants in the suit, the defendant and the plaintiffs, acquired their rights in this property during the years 1924-25. The defendant came in as a mortgagee as above stated, while the plaintiffs came in as ijaradar and assignee of certain mortgage rights. The plaintiffs since then have been receiving the rent according to the grant made by the Talukdari Officer. In the year 1933 the appellant purchased the equity of redemption of the suit property at a court auction and became vested with all the rights of Manilal Maganlal in this property, the value of which has now been estimated in the neighbourhood of Rs. 38,000.

In the year 1933 the plaintiffs discovered that the defendant had no registered lease in his favour and therefore in law he was not entitled to the rights of a permanent tenant in respect of the survey numbers in dispute. They therefore instituted the present suit for ejectment of the defendant. In the 2nd and 3rd paragraphs of the plaint it was admitted that in the course of the correspondence with the Government of Bombay a lease was negotiated between the firm of Shah Manilal Maganlal and the Talukdari Settlement Officer in respect of the survey numbers in dispute for a period of fifty years at an annual rental of Rs. 290, but it was stated that because Manilal Maganlal did not execute a formal registered lease they were in possession as trespassers. In the 4th paragraph the authority of the Talukdari Settlement Officer to grant the lease was also challenged. In the 8th paragraph it was said that the plaintiffs received the amount of the lease up to 31st July, 1932 and that no notice was necessary to be given, the position of the defendant being that of a trespasser. It was however alleged that a notice was given on 25th December, 1930.

The suit was defended on a number of grounds, *inter alia*, it was pleaded that the plaintiffs had no right to sue in ejectment, not being the landlord inasmuch as they had not obtained any right in the land itself and had not acquired complete title by an assignment of the whole of the interest of the talukdars in the survey numbers in dispute. It was pleaded that the defendant was a permanent tenant of the survey numbers and that the plaintiffs' own conduct debarred them from claiming ejectment.

The trial Judge decreed the suit on the finding that as no written lease was forthcoming it should be deemed to be non-existent. It was said that no efforts had been made to show that the Settlement Officer had sanctioned with the approval of the Government a permanent lease in respect of survey Nos. 223 and 225 to Shah Manilal Maganlal. In the concluding part of the judgment it was remarked that the doctrine of equitable part-performance could not apply to the present case. Though no specific issue was raised on this point, the matter seems to have

been argued at some stage before the trial Judge on facts found or admitted. There was an unsuccessful effort to obtain a review of this decision on the ground of discovery of fresh materials. Thereafter the matter was taken to the court of appeal and it was alleged in ground No. 3 that the Subordinate Judge had erred in not considering the position created in the case by the equitable rule of law embodied in section 53-A of the Transfer of Property Act. On 30th July, 1938, the appellate court made an order of remand under Order 41, rule 25, and called for a report on the following two issues :—

(1) Whether the plaintiff was a mortgagee in occupation of survey Nos. 222, 223, 225 and 226?

(8) Whether the suit was bad for non-joinder of parties?

The trial Judge reported on the remand issues against the plaintiffs. He also admitted in evidence a number of documents produced after remand and one of these is Exhibit 181. A point was raised that documents produced after remand were not relevant to the issues remanded and should not be admitted. This contention was overruled. The Assistant Judge allowed the appeal on 27th April, 1940. He held that the plaintiffs had failed to establish their right to maintain the suit either as ijaradars or as assignees of mortgage rights. In paragraph 21 of his judgment he observed as follows :—

"Exhibit 181 shows that the terms of the lease have been reduced to writing though no regular lease appears to have been executed. On the question whether the lease is binding on the plaintiff, I think section 53-A of the Transfer of Property Act is a complete answer. Exhibit 181 shows that the Talukdari Settlement Officer, with the sanction of the Government, contracted to lease out these lands. The writing is signed by the Government. The terms of the lease can be ascertained clearly from Exhibit 181. It is not denied that the defendant's predecessor-in-title was put in possession of this property in performance of that contract. Also the acceptance by the Talukdari Settlement Officer as well as by the plaintiff of the rent of the property as fixed by that contract shows that the possession of the defendant and his predecessor-in-title was in part-performance of the contract of lease. Admittedly, there is no registered lease. The conditions of section 53-A of the Transfer of Property Act are fully satisfied and the plaintiff cannot, therefore, eject the defendant on the ground that there is no registered lease."

Further on the learned Judge said that section 53-A of the Transfer of Property Act embodied the doctrine of estoppel and a plea to that effect had been taken inasmuch as the defendant had pleaded that the plaintiffs were estopped by their conduct from asking for possession and that therefore no separate issue was raised on this point.

The unsuccessful plaintiffs went up in second appeal against this decision to the High Court of Bombay. The High Court allowed the appeal and modified the decree of the Assistant Judge. It decreed the plaintiffs' suit in respect of survey Nos. 223 and 225 and dismissed the suit in respect of survey Nos. 222 and 226. On the question of the plaintiffs' title to maintain the suit the High Court reached the following decision :—

"If it were necessary we would hold that the plaintiff has sufficiently proved that it is entitled to maintain this suit in its capacity as ijaradar as well as assignee from the mortgagees. But we think even apart from that, plaintiff is entitled to bring this suit because on the defendant's own admission he has paid rent to the plaintiff for three of the suit fields, viz., survey Nos. 223, 225, and 226, and that too not the interest of 84 Dakdas in them but for all the 100 Dakdas. In fact, ever since the plaintiff came on the scene the defendant has treated the plaintiff as the landlord as regards these three survey numbers, and in the present suit, therefore, the defendant cannot dispute the plaintiff's right to sue."

In a later part of the judgment it was observed that in any case Ginwalla as the manager of the plaintiff firm would be entitled to continue the present suit as receiver. On the second question the learned Judges of the High Court observed as follows :—

"We do not think it necessary to decide whether if there had been a signed contract by the transferor in the present case, it would have fallen under section 53-A, because, in our opinion, the correspondence which is summarized in the Government Resolution cannot be regarded as evidence of the contract, and secondly, the terms of the contract also cannot be deduced from the correspondence with any reasonable certainty. We, therefore, hold that the Government Resolution on which the defendant relies is no evidence of the writing of a contract referred to in section 53-A of the Transfer

of Property Act, and apart from that the defendant has no legal basis on which he can claim to hold the land either as a permanent lessee or for a particular period."

The principal questions canvassed in this appeal are, whether the plaintiff firm has proved its title to maintain the present suit in ejectment against the defendant, and whether the defendant is entitled to the benefit of the provisions of section 53-A of the Transfer of Property Act. The question as to the maintainability of the suit against the defendant without a proper notice was raised before the High Court but permission to argue it was refused because the matter had not been raised in either of the lower Courts.

The appeal was elaborately argued before us by the learned counsel for the parties, but in our view, it is not necessary to consider and decide all the points urged because we consider that the Assistant Judge was right in entertaining and giving effect to the plea under section 53-A of the Transfer of Property Act and we are satisfied that no substantial grounds existed for reversing that section in second appeal. This section introduced in the Transfer of Property Act in 1929 is in these terms :—

"Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof . . . . and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered . . . . . the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract . . . ."

The section is a partial importation in the statute law of India of the English doctrine of part-performance. It furnishes a statutory defence to a person who has no registered title deed in his favour to maintain his possession if he can prove a written and signed contract in his favour and some action on his part in part-performance of that contract. In order to find whether the defendant in the present case has satisfied the conditions of the section, it has to be held proved that the Talukdari Settlement Officer contracted to give a lease of the survey numbers in suit to Manilal Maganlal by a writing signed by him and that from this writing the terms of the tenancy can be ascertained with reasonable certainty. It has further to be held established that the transferee took possession of the property or did any acts in furtherance of the contract. It may be mentioned that in cases of lease the Legislature has recognized that the equity of part-performance is an active equity as in English law and is sufficient to support an independent action by the plaintiff. (*Vide* section 27-A of the Specific Relief Act). This section however applies to contracts executed after 1st April, 1930 and has no application in the present case ; but there can be no manner of doubt that the defence under section 53-A is available to a person who has an agreement of lease in his favour though no lease has been executed and registered. We are satisfied that the defendant has fulfilled both the conditions necessary to attract the application of the section in the present case. The High Court was in error when it held that the correspondence summarised in Exhibit 181 could not be treated as evidence of the contract and that its terms could not be reasonably deduced from this document. It is no doubt true that Exhibit 181 is merely secondary evidence of the agreement of lease but it is equally true that it is a very reliable piece of secondary evidence coming as it does from Government records. It furnishes proof of the fact that there was an acceptance in writing under which the contract to transfer the survey numbers in suit by way of lease was effected by the Talukdari Settlement Officer in favour of Manilal Maganlal. The offer was also in writing signed by the offeror. The Government Resolution which made the agreement binding was also in writing and was signed by competent authority. No objection as to admission of secondary evidence could be taken in this case as the primary evidence was in the possession either

of the plaintiff or of the talukdars, the predecessors in interest and in spite of notice it was not produced. Reference in this connection may be made to the statement of the plaintiff in the witness box which is to the following effect :—

> "I must have read the correspondence with T.S.O. since it is so recited in the paragraph 2 of the plaint. I cannot say whether that correspondence is in my office or with the talukdars. I cannot say without that correspondence as to whether T.S.O. has called survey No. 226 as Lalliti and hence the talukdars are not entitled to any income for it. I also cannot say without that correspondence that the rents of survey Nos. 225 and 223 were fixed at Rs. 135 and Rs. 115 respectively and that Rs. 45 were to be taken by way of *sugar* . . . ."

In another part of the same statement he said that the talukdars had got the records of the time preceding his management. It appears that the original documents were returned to the talukdars after the discharge of the Talukdari Settlement Officer and were in the possession and power of the plaintiff or his predecessors in interest and they were not produced by him in spite of notice. Paragraph 2 of the plaint clearly recites that there was correspondence between the Talukdari Settlement Officer and the defendant's predecessor in interest under which a lease was negotiated. The plaintiff's knowledge of this correspondence and its contents is thus *prima facie* established and leads to the conclusion that it was in his possession or power and he has intentionally withheld it. Without a perusal of this correspondence the facts recited in paragraph 2 of the plaint could not have been mentioned in the plaint. Once it is held that Exhibit 181 is good secondary evidence of the agreement of lease, there can then be no hesitation in holding that by an offer and an acceptance made in writing and signed by the respective parties an agreement was completed between the Talukdari Settlement Officer and the predecessor in interest of the defendant and that necessary sanction of the Government was also in writing signed by the officer concerned. It has further to be held that the terms of the contract can be fairly deduced from the recitals of this document. The only important clause with which we are concerned in the present case is as to the nature of the tenancy. It is clearly recited therein that the lease was to be of a permanent character and the terms as regards rental could be revised after a period of fifty years. The rent payable is recited in unambiguous terms in the document as Rs. 290 per annum.

It was not denied that the lessee took possession after this agreement was arrived at. It was argued that possession was taken before sanction of the Government was obtained in September, 1917. There is however no proof of this except a bare recital in the Talukdari Settlement Officer's letter to Government that he had permitted the defendant to enter on the land in anticipation of Government's sanction. As already pointed out, the possession was with the tenants and had to be taken after entering into an arrangement with them or by issuing notice to them. It is not possible to think that this could have happened in such a short space of time as elapsed between the middle of July and the beginning of September. In any case the factory could not have been built before the sanction of the Government was received. Not only did the lessee take possession in part-performance of the agreement but he offered the rent agreed upon and paid it not only to the Talukdari Settlement Officer but to all those who subsequently managed the interest of the talukdars in the survey numbers in dispute. The original lessee after having entered into possession of the property effected a mortgage of it in favour of the defendant. The defendant advanced a substantial sum on security of the property to the lessee. The equity of redemption was sold at an auction sale. The defendant and his predecessor in interest were willing to perform their part of the contract. As a matter of fact, they have performed the whole of it. All that remains to be done is the execution of a lease deed by the lessor in favour of the lessee and of getting it registered. The plaintiff in paragraph 6 of the plaint in unambiguous terms admitted that he received the amount of the lease up to 31st July, 1932, in respect of the survey numbers in dispute. It is difficult to imagine what lease he was referring to in the absence of a registered deed of lease. It could only mean the agreement of lease given in writing and signed by the Talukdari Settlement Officer. It is in pursuance of this agreement of lease that all the subse-

quent acts above mentioned were done. It may also be observed that an agreement of lease creating a present demise but not registered is admissible under section 49 of the Indian Registration Act as evidence of part-performance and Exhibit 181 is secondary evidence of that agreement. A formal lease is not necessary to attract the application of section 53-A of the Transfer of Property Act. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence. The correspondence mentioned in Exhibit 181 fully establishes that fact.

We are therefore of the opinion that the learned Assistant Judge rightly dismissed the plaintiff's suit and the High Court was in error in interfering with that decision in second appeal. The result therefore is that the appeal is allowed, the decision of the Assistant Judge restored and that of the High Court reversed. The circumstances of the case are such that we would make no order as to costs. The defendant was at fault in not producing all the documentary evidence at the proper stage of the case and he has been enabled to avail himself of the defence furnished to him under section 53-A by reason of the admission in evidence after remand of Exhibit 181, which though not properly admitted at that stage was not rejected by the High Court and could not be rejected at the stage when we dealt with the case. The parties are therefore left to bear their own costs throughout.

Agent for Appellant : *S. P. Varma.*

Agent for Respondent : *Ganpat Rai.*

G.K./V.S. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

[Appellate Jurisdiction (Civil).]

PRESENT :—H. J. KANIA, *Chief Justice*, M. PATANJALI SASTRI AND S. R. DAS, JJ.

Rachpal Mahraj .. *Appellant**

v.

Bhagwandas Daruka and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (f)—Memorandum delivered along with deposit of title deeds as security for loan—If compulsorily registrable under Registration Act (XVI of 1908), section 17—Admissibility in evidence to prove the charge.

The accounts relating to the appellant's dealings with respondents were examined on the 23rd October, 1936, and a large sum was found due to the respondents who demanded payment. The appellant thereupon brought and gave certain documents, being title deeds relating to immoveable properties belonging to his family, for the purpose of being held as security for the amounts then due and to become due on further dealings. A draft of the memorandum was thereafter prepared which the appellant took with him to be shown to his lawyer and he returned in the afternoon, and signed and delivered it to the respondents. All this took place in Calcutta. The memorandum was in the form of a letter addressed to the respondents' firm and was in the following terms :—

"We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business . . . . . with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions . . . ."

On the question whether the above memorandum relied upon by the respondents as evidencing the creation of a mortgage was compulsorily registrable under section 17 of the Registration Act,

Held : The memorandum delivered by the appellant along with the title deeds deposited with the respondents did not require registration as the parties did not intend thereby to create the charge. Accordingly it is admissible in evidence to prove the creation of the charge.

On appeal from the Judgment and Decree of the High Court of Judicature at Patna dated the 11th March, 1947, in F. A. No. 218 of 1944.

* Civil Appeal No. LXVII of 1949. 5th May, 1950

Shiva Prasad Sinha, Senior Advocate, Supreme Court (*Sri Kishan*, Advocate, Supreme Court, with him) for Appellant.

B. K. Saran, Advocate, Supreme Court, for Respondent No. 1.

Respondents 2 to 13 did not enter appearance.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal arises out of a suit brought by the respondents against the appellant and other members of his joint family to enforce a mortgage alleged to have been created by the appellant by deposit of title deeds on the 23rd October, 1936, at Calcutta.

The short point for determination in the appeal is whether the memorandum signed and delivered by the appellant on 23rd October, 1936, and relied upon by the respondents as evidencing the creation of the mortgage was compulsorily registrable under section 17 of the Indian Registration Act, 1908, and, not having been registered, was inadmissible in evidence to prove the mortgage. The Subordinate Judge of Darbhanga who tried the suit, and the High Court at Patna on appeal, held that the document did not require registration and was admissible in evidence, and accordingly decreed the suit.

The question turns on the proper construction of the memorandum and the circumstances under which it was delivered to the respondents. According to the evidence of the respondents' witnesses which has been accepted by the Courts below, the accounts relating to the appellant's dealings were examined on the 23rd October, 1936, and a large sum was found due to the respondents who demanded payment. The appellant thereupon brought and gave certain documents, being title deeds relating to immoveable properties belonging to his family, for the purpose of being held as security for the amounts then due and to become due on further dealings. A draft of the memorandum was thereafter prepared which the appellant took with him to be shown to his lawyer and he returned in the afternoon, and signed and delivered it to the respondents. All this took place in Calcutta. The memorandum is in the form of a letter addressed to the respondents' firm and is in the following terms :

> "We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7, Sambhu Mullick Lane, relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions. . . . ."

A mortgage by deposit of title deeds is a form of mortgage recognised by section 58 (*f*) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) by a person

> "delivering to his creditor or his agent documents of title to immoveable property with intent to create a security thereon."

That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immoveable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable, as in *Obla Sundarachariar*

v. *Narayana Ayyar*[1]. Or it may be delivered at a later date and nevertheless be registrable, as in *Hari Sankar Paul* v. *Kedar Nath Saha*[2]. The crucial question is: Did the parties intend to reduce their bargain regarding the deposit of the title deeds to the form of a document? If so, the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration.

There are numerous decisions, some of them not easy to reconcile, where this question was considered with reference to the document concerned in the particular case. It is unnecessary to review them, as the two latest pronouncements of the Privy Council, to which reference has been made, aptly illustrate cases falling on either side of the line. In *Obla Sundaracharíar* v. *Narayana Ayyar*[1], a signed memorandum was delivered to the mortgagee along with the title deeds of certain properties deposited as security. The memorandum stated "As agreed upon in person, I have delivered to you the under-mentioned documents as security", and listed the title deeds deposited. It was held that the memorandum was no more than a mere record of the particulars of the deeds and did not require registration. The criterion applied was:

"No such memorandum can be within the section (section 17 of the Registration Act) unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties."

In *Hari Sankar Paul* v. *Kedar Nath Saha*[2], the title deeds were deposited accompanied by a memorandum when part of the advance arranged for was made. Some days later when the balance was advanced, another memorandum was delivered superseding the earlier one, and this was a formal document stating the essential terms of the transaction "hereby agreed" and referred to the moneys "hereby secured". It also conferred an express power of sale on the mortgagee. Lord Macmillan, after reviewing the earlier decisions of the Board, held that the document required registration, observing:

"Where, as here, the parties professing to create a mortgage by a deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction, and is itself an operative instrument and not merely evidential, such a document must under the statute, be registered."

Turning now to the memorandum before us, it is clear, on the face of it, that the parties did not intend thereby to create the charge. The document purports only to record a transaction which had been concluded and under which the rights and liabilities had been orally agreed upon. No doubt it was taken by the respondents to show that the title deeds of the appellant's properties were deposited with them as security for the moneys advanced by them, and to obviate a possible plea that the deeds were left with them for other purposes, as indeed was contended by the appellant in his written statement, taking advantage of the non-registration of the memorandum in question. But that is far from intending to reduce the bargain to writing and make the document the basis of the rights and liabilities of the parties. In agreement with the High Court, we are of opinion, that the memorandum delivered by the appellant along with the title deeds deposited with the respondents did not require registration and was properly admitted in evidence to prove the creation of the charge.

The appeal fails and is dismissed with costs.

Agent for Appellant: *Tarachand Brijmohanlal.*

Agent for Respondents: *S. P. Varma.*

G.K./V.S. —— *Appeal dismissed.*

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1. (1931) 60 M.L.J. 506 : L.R. 58 I.A. 68 : I.L.R. 54 Mad. 257 (P.C.).
2. (1939) 2 M.L.J. 522 : L.R. 66 I.A. 184: I.L.R. (1939) 2 Cal. 243 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

M. S. M. M. Meyyappa Chettiar .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 25-A—Scope of—Right of revenue authorities to ignore partitions on the ground of unequal shares being allotted to minors—Conditions necessary for making an order under section 25-A (1)—" Partition in definite portions "—Meaning.

The Revenue authority has no right to constitute itself as the self-appointed guardian of minor coparceners and, in that assumed role avoid a partition arrangement effected by their father in the exercise of his powers under the Hindu law, on the ground of an inequality in the partition and the resultant prejudice to the interests of the minors. Such an arrangement is not void, but only voidable at the instance of the minors and in conceivable circumstances they may stand by it.

Section 25-A of the Income-tax Act provides the machinery for computing and assessing the income of a joint Hindu family which existed during the year of account but has ceased to exist during or prior to the year of assessment. It ignores a mere severance in status, though it would put an end to the joint family under the Hindu law. In spite of the severance, the joint family continues to exist 'as a person' or legal entity for purposes of income-tax and is liable to be assessed as such, until all the properties belonging to the joint family are finally and completely partitioned. An order under section 25-A (1) could be made only where in addition to a severance in status, there has been a partition of all the family properties among the members and until such an order is made, the family is deemed to be an undivided family for purposes of income-tax, notwithstanding a severance in status and a partition of some of the properties. In the case of property that admits of a physical division or division by metes and bounds, such division is necessary to satisfy the requirement of a partition "in definite portions' found in section 25-A. In the case of trades and businesses, there need not be a winding up and division of the goods, outstandings and assets in order to satisfy the section. An allotment of a business exclusively to one member or a division of the capital and outstanding of the business in definite shares among the members in the books, coupled with the crediting of the receipts and debiting of the expenses pertaining to the share of each member, would be a sufficient compliance the with section 25-A.

Where only a portion of the joint family property has been partitioned, the portion so partitioned ceases to belong to the joint family but the joint family still remains and so long as the joint family remains no order under section 25-A (1) could be made. But the income of the joint family would comprise only the income arising from such portion of the family assets, as have not been partitioned among the members or assigned to one of them on partition.

Case-law discussed.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act (XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939) in 66 R. A. No. 31 (Madras) of 1944-45 on its file.

V. K. Thiruvenkatachari for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Court delivered the following

JUDGMENTS : *Satyanarayana Rao, J.*—Under section 66 (1) of the Income-tax Act the Appellate Tribunal referred to this Court the following question :

"Whether in the circumstances of the case the finding of the Appellate Tribunal that there has been no partition within the meaning of section 25-A is right".

The applicant who is the assessee is the *karta* of a Hindu undivided family which consisted of himself and his two minors sons, Chockalingam and Meyyappan. During the assessment year 1940-41, the assessee applied under section 25-A of the Income-tax Act for an order recording a partition which had taken place among the members of the family. The family was assessed till that date as an undivided family. In December, 1941, another son was born; but the partition claimed was long before that date and even before the period of gestation. According to the applicant the partition was on 22nd February, 1940, which was reduced to writing on the 5th April, 1940, as evidenced by the partition deed of that date. The property of the family which was the subject-matter of partition consisted of businesses, houses and other immoveable properties, jewels and shares. There

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* Case Referred No. 43 of 1946. 5th December, 1949.

were four businesses which were exclusively owned by the family and one in partnership with others. The sole businesses were Ipoh M. S. M. M., Sithiawan M. S. M. M., Rangoon M. S. M. M. and Karaikudi M. S. M. M., and the joint business was at Singapore M. S. M. M. On the 22nd February, 1940, the assessee wrote a letter to his agent at Ipoh directing him to make certain entries in the accounts to evidence the partition of the businesses. The sons being minors, the father, it was claimed, exercised his right under Hindu law of bringing about a division between himself and his sons and also between the sons *inter se*. The partition deed of 5th April, 1940, shows that the Rangoon business was allotted exclusivety to the father, and that the other businesses at Ipoh and Sithiawan and the combined business at Singapore were divided equally between the three sharers. The Karaikudi business was also taken entirely by the father. The share allotted to each member was described in three Schedules, Schedule A representing the share of the father, Schedule B representing the property allotted to Chockalingam and Schedule C to Meyyappan. Items 1 to 12 and 16 are houses and house-sites in which each of the members was allotted a third share. Items 13, 14 and 15 of Schedule A were exclusively allotted to the father as well as the shares in Karaikudi Sri Minakshi Sundareswarar Electric Power Corporation, Ltd., and other shares in other companies. The family owned undivided shares in certain villages and they were also distributed between the sharers. The jewels, silver articles and vessels were not physically divided; but each member was declared entitled to a third share.

The partition was not recognised by the Income-tax authorities, including the Appellate Tribunal. The ultimate finding of the Appellate Tribunal was that though the businesses were divided, the division was unequal and that as regards the immoveable properties and moveable properties, there being no physical division as contemplated by section 25-A the partition could not be recognised. The Appellate Tribunal has recorded a finding that the partition of the businesses was altogether null and void, as the father's over-riding power recognised under Hindu law of bringing about a division between himself and his sons could be effected only if the division actually made was fair and equal. As in the present case the division was wholly unequal, it is void and is of no legal effect. The inequality of the division of the businesses is based upon the fact that the father took for himself three rubber estates and houses at Ipoh whose book value was 5,13,000 dollars, at a valuation of 1 lakh dollars which was adjusted in the account books between the various sharers. These assets, it was found, were under-valued, and the father practically obtained for himself the three rubber estates and the houses for one-fifth of their value, and the distribution therefore of the properties made by the father was unequal. In view of the letter of 22nd February, 1940, which contained the directions given to the agent at Ipoh by the father to make these adjustments with regard to the rubber estates and the houses and also to carry out the division of the other businesses in the accounts, it is a proper inference to draw that this arrangement relating to the rubber estates and the houses was part of the partition arrangement and not a sale by the father to himself of the assets of the family at a value of 1 lakh dollars. This is also the view of the Appellate Tribunal, and there is no reason to differ from that conclusion.

The position therefore is that the businesses were divided, though unequally, the jewels were not divided, and so far as the immoveable properties are concerned, regarding 13 items, the division was only into three shares of each item, one share being allotted to each member. In some of these items the family itself owned a fraction of the interest in the property and was not the owner of the properties in their entirety. The question therefore is whether the partition so made satisfies the requirements of section 25-A of the Income-tax Act. The question formulated by the Appellate Tribunal really covers more than one contention raised on behalf of the assessee, and the Appellate Tribunal in the statement of the case has made it clear that the four questions of law raised by the applicant in his application for reference are really covered by the question which has been referred to this Court. It is on that footing thatthe mat ter has to be considered.

The case raises two questions on the facts as stated above. The first is whether the division of the businesses brought about by the father in exercise of his superior power is valid and effective notwithstanding the unequal nature of the division. The second is whether, in the absence of a physical division, that is, in the case of immoveable properties by metes and bounds and in the case of jewels a physical separation of the items, there was such a partition of the properties as could be recognised under section 25-A of the Act.

The first question is entirely one which arises under Hindu law. Under the Mitakshara law the father has the undoubted right and privilege of effecting a partition between himself and his sons, whether they are majors or minors, without their consent. He may divide the properties physically or may only bring about a division in status. This division may be between himself and his sons or even between the sons *inter se*. The partition so made however must be fair and equal. See *Kandaswami* v. *Doraiswami Ayyar*[1] and *Venkatapathi Raju* v. *Venkatanarasimha Raju*[2] [Mayne's Hindu Law, Eleventh Edition (1950), pages 547 and 548]. This power of the father is exercisable also by the grandfather but with the qualification that he can only separate himself from his grandsons and not make a division between the grandsons *inter se*. (See *Subbarami Reddi* v. *Chenchu Raghava Reddi*[3] and Mayne, Eleventh Edition, page 548.) If the partition is unequal and unfair it is open to the sons if they are majors, to repudiate the partition; but if they are minors, it is open to them to avoid that partition by appropriate proceedings after they attain majority. The partition therefore will be good until it is set aside. It is not void and is not without effect. This right of avoidance based on the inequality of the shares is a personal right of the minors and cannot be exercised by others. The power is not a conditional power in the sense that, if the condition of the partition being fair and equal is not satisfied, the power ceases to have operative force. The partition will be valid in such circumstances until it is avoided by the minors, and until it is repudiated by the major sons. These principles have been well-recognised in the two decisions already referred to. It has never been held and no decision has been brought to our notice taking the view that in such circumstances the partition is wholly void and is of no legal effect. Whether it is an alienation under the Hindu law by a guardian on behalf of the minor or a partition effected by the father in the exercise of his peculiar power the transaction will be good until it is set aside; it is voidable and not void. The view therefore of the Appellate Tribunal that the partition is void and is of no legal effect so far as the businesses are concerned on the ground that it is an unequal division cannot be accepted as applying the law correctly. The ground therefore on which the Tribunal held that the partition of the businesses was void cannot be sustained. There is therefore an effective division of the businesses.

The next question is whether there is a partition of the immoveable properties and the jewels which can be recognised under section 25-A. The interpretation of this section is the subject-matter of several decisions which are by no means reconcilable. The doubts and difficulties have been to a large extent resolved by the decision of the Privy Council in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[4]. Under section 3 of the Act an undivided family is recognised as a unit for taxation. Section 25-A is not a charging section but only provides a machinery for purposes of assessment. In order to avoid double taxation section 14 (1) provides that an assessee is not liable to pay any tax in respect of any sum which he receives as a member of a Hindu undivided family, where such a sum has been paid out of the income of the family. Section 25-A is intended to meet the difficulty which arises when an undivided family receives income in the year of account as an undivided family but ceases to exist as such at the time of assessment. If section 25-A is not on the statute book, the individual member who became separated during the year of assessment will not be liable to pay tax in respect of income which he received

1. (1880) I.L.R. 2 Mad. 317.
2. (1937) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. 1937 Mad. 1 (P.C.).
3. (1945) 1 M.L.J. 151 : I.L.R. 1945 Mad. 714.
4. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 : I.L.R. 1943 All. 69 (P.C.).

as a member of the joint family, and the family which has ceased to be joint cannot be assessed to income-tax in respect of any sum which was received in the previous year, as an undivided family. In other words, if the family status was disrupted and there was no partition of the property, if section 25-A did not exist, the members of the family would have escaped the assessment. So long as the family continues joint, section 25-A does not come into operation. If the family while continuing joint parts with some of its property either to a member or members or even to a stranger, the income from such property would not form part of the income of the undivided family and has to be excluded from the assessment of the undivided family. Even if there is a partial partition of the properties, if the status of the family is not affected by such partition, the properties as partitioned cease to be joint family properties, and their income cannot enter into the computation of the income of the undivided family. The income of the family fluctuates. The income of the undivided family gets reduced by parting with the property ; but so long as the status of the family continues undivided, the income of the remaining properties owned and possessed by the family forms the basis for the assessment for purposes of income-tax. If there is merely a division in status during the assessment year by reason of section 25-A, if the condition of partition of the property among the various members and groups of members in definite portions is not satisfied, the family will be deemed to be undivided for the purpose of the Act and will continue to be a Hindu undivided family. The important condition for the separation of the assessment in the manner provided by sub-clause (2) of section 25-A is proof of the fact that the joint family property has been partitioned among the various members or groups of members in definite portions. If this is satisfied under sub-clause (2) in respect of the income which was received by the family as an undivided family during the accounting year, each member will be liable to pay a share of the tax on the income in proportion to the joint family property allotted to him. Of course under the proviso to that clause the liability of the members who have partitioned the property continues to be joint and several in respect of the tax. If the crucial fact is not established, however, under sub-clause (3), the family is assessed as undivided, as it is deemed for the purpose of the Act to continue to be an undivided Hindu family. The distinction therefore under the section is between what under Hindu law is known as a division of a right, *i.e.*, division of the joint status, and the division of the property. If it merely stops at the division of the right it seems to be clear from the decision of the Privy Council itself that such a division of interest would not satisfy the requirement of the section. Before 1939 when the section was amended, the section required that the Income-tax Officer

> "should be satisfied that a separation of the members of the family has taken place, and that the joint family property has been partitioned among the various members or groups of members in definite portions before recording an order to that effect."

By the Amending Act of 1939 the words

> "if he is satisfied that a separation of the members of the family has taken place"

were omitted. From this omission, in some of the decisions an inference was drawn that if there was merely a division in status, the section would not come into operation. But it seems to me that if the second part of the clause that the joint family property has been partitioned among the various members in definite portions is satisfied, it follows from it that not only the property was divided but that the status also was disrupted. When once there is a complete partition of the properties the separation in status of the family automatically follows. The omission of the first part of the clause in 1939 may be due to the fact that it was thought redundant to retain it. In my judgment, the decision of the Privy Council definitely establishes that if there is merely a division in status without the property being partitioned in definite portions, then the family is deemed to continue undivided, notwithstanding the division in status by virtue of section 25-A. The gist of the decision of the Privy Council is contained in the following passage which appears at page 465 in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[1] :—

1. (1942) 2 M.L.J. 761 : I.L.R. 1943 All. 69 : 10 I.T.R. 457 at p. 465 (P.C.).

"Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family—in effect as tenants-in-common. Section 25-A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax. If, however, though the joint Hindu family has come to an end it be found that its property has not been partitioned in definite portions, then the family is to be deemed to continue—that is to be an existent Hindu family upon which the assessment can be made on its gains of the previous year."

This last sentence, in my opinion, is conclusive on the point that mere division of interest and the disruption of the joint family status without a partition in definite portions is ineffective under sub-section (2) of section 25-A to justify an assessment in the manner provided under that clause. Under sub-section (3) the family is deemed in such circumstances to be an undivided Hindu family. This decision of the Privy Council is also authority for the position that even if there was a partial partition or an item of property was alienated to a stranger or an asset of the family was divided and a partnership was constituted, as the family continued joint and continued to own other properties, the assessment on the basis of undivided Hindu family would be confined to the income of the property so remaining undivided, and the income of the property partitioned or alienated would be excluded from computation of the income for assessment. It follows from the foregoing discussion that so long as the family remains undivided the section has no application. If, however, the family is merely divided in status, that would not affect the legality of the assessment of the income received in the previous year as the income of the undivided family, as by the operation of sub-clause (3) of section 25-A the family is deemed to continue undivided, and is assessed accordingly. If, however, there is a partition of the properties in definite portions the result envisaged in sub-clause (2) would follow.

This leads me to the consideration of the question as to the meaning to be attached to "partition in definite portions" occurring in the section. One thing is clear that the partition should be a complete partition of the properties. If by mistake or oversight or having regard to the fact that an item in the nature of things could not be divided, as for example an idol belonging to the family and worshipped by it, the partition does not on that ground become incomplete. (For a discussion of property indivisible in its nature see Mayne, Eleventh Edition, 1950, pages 512 and 513). If the partition is partial in the sense that it does not relate to all the members, that will not matter, as the partition would be recognised only as between the members separated, and the others would continue as joint. That is implicit also in the expression "among the various members or groups of members" occurring in section 25-A (1). Regarding the meaning of the expression, one view is that mere division of interest without more which results in converting what was joint family property into a property held by tenants-in-common would be sufficient "partition" within the meaning of the section. In view of the decision of the Privy Council already referred to, in my judgment this contention cannot be now seriously maintained. Further, the section refers to partition of the property and not to the status of the members, which is also an indication that mere division of status or disruption of the family is not enough to constitute a partition. It no doubt creates a division in the right, not a division of the property. In this connection what was said by the Privy Council in the well-known case of *Appoovier* v. *Rama Subba Aiyar*[1] may be borne in mind. Partition under Hindu law comprises both a division of a right and a division of property. A division of the right is concerned only with the division of the status while something more is required to constitute a division of the property.

1. (1867) 11 M.I.A. 75.

What is it then that constitutes partition into definite portions? The other extreme view is that it requires a physical division, that is, division by metes and bounds in the case of immoveable property, and separation of the properties themselves in the case of moveables and other kinds of property. It is however conceded by those who take such an extreme view that in the case of a business such a physical division is impossible. In the case of business the only kind of division possible is to make entries in the accounts and to indicate by other modes that there is a separation of the shares of the members of the family owning the business. It is therefore conceded that in the case of a business at least a physical division is impossible, but it is said that the meaning to be attached to the expression "partition in definite portions" must vary according to the nature of the property. In my opinion the language of a statute should not be so construed as to give a different meaning in different circumstances and varying with the nature of the property. It must bear a uniform construction whether it is applied to one kind of property or another. To construe therefore the expression "definite portions" as equivalent to physical partition in the case of immoveable property and moveables and a notional or a paper partition in the case of a business is to vary the meaning of the statute according as it is applied to one kind of property or the other. It must have the same meaning, whatever be the nature of the property. Physical division even in the case of immoveable property is not the only mode by which definite portions may be ascertained. The word "portions" has the meaning of "part" as well as a "share". It is therefore ambiguous; but the word "definite" prefixed to it makes it clear that it is not a mere share in the sense in which tenants-in-common own the property in shares. It must mean something more than a definite fractional interest in the property. Even in the case of immoveable property the definite portion or part may be indicated by specifying the boundaries of the property allotted without actual division by metes and bounds or specifying even, as for instance, in the case of a house, the northern one-third or the northern half or the southern half or the northern one-third and the southern one-third, and so on. In all these cases, even though there is no physical division, it is possible to infer that the property allotted is definite and is a definite portion. In my opinion, therefore, whether in a given case there is or is not a partition in definite portions must be ascertained from the facts and circumstances of each case. In some cases physical division may be proved; in others other circumstances of making definite the part allotted may exist.

In the present case the division of the houses, items 1 to 12 and 16, consisted in allotting to each member a third share in the houses which the family owned exclusively and a third share in the fractional share which the family owned in houses jointly along with others. In respect of houses in which the family owned only a fractional interest it is not possible for the members without the concurrence and consent of the other sharers to divide them physically. As the nature of the property admits only a division in the manner adopted in the deed of partition, it may be taken that in respect of those properties the division was in definite portions. In the case of houses owned by the family exclusively the position is somewhat different. No doubt the division in respect of those properties is carried a step further. It is not merely the ownership of an undivided one-third share in all the items by the members but in each item a member was allotted a third share. If a suit for partition by metes and bounds were to be instituted, this division of each item into three shares will be binding on the parties. It will not be open to them to go behind that division and claim that instead of one house another house in its entirety should be allotted to his share. Further it will be open to a member to alienate his share in each of the houses, and the alienee has the right to get each house separated into three shares and take a share by virtue of his rights under the sale deed. Though the houses are not physically divided, in my opinion, they may be treated as definite portions for the purpose of section 25-A. Under sub-clause (3) of section 9 relating to property tax such portions of houses have to be assessed separately and all the members cannot be assessed as an association of persons. If, therefore, for purpose of assessment under section 9 of property tax

of the houses, each sharer can be treated as an individual and assessed in proportion to his share, there is no reason for not treating the partition in that manner as a partition in definite portions. Reference was made in the course of arguments on behalf of the applicant to the word "portion" occurring in various parts of section 9 as indicating a fraction; but that would not help the applicant, as the word "portion" is preceded by the word "definite" in section 25-A. It must be a definite portion and not merely a portion.

The jewels however in this case have not been divided and are merely held in common. The jewels, vessels, etc., are valued at Rs. 1,50,000 and do not constitute an insignificant portion of the properties. There is no acceptable explanation for not dividing them, and even though the businesses were divided and in my view there was also a partition of the immoveable property in definite portions, there being no division of the jewels, etc., the partition cannot be said to be complete and therefore cannot be recorded under section 25-A.

It remains to refer to the decisions which have been cited at the Bar. In *Biradhmal Lodha* v. *Commissioner of Income-tax*[1], Niamatullah, J., was of opinion that a division by metes and bounds was not necessary, and the case was concerned more, like the decision of the Privy Council in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[2], with the effect of partial partition. At page 177 the learned Judge states:

> "Partition of the joint family property by metes and bounds is not a necessary requirement of the disruption of the family. If the properties remain intact, but the separating member's share in them is defined, they are nevertheless considered to have been 'partitioned'. Partition contemplated by section 25-A is not necessarily a partition by metes and bounds. This view finds further support from the proviso to sub-section (2)."

He also observes at page 178:

> "In spite of a partial partition of the kind assumed, they continue to remain members of the same joint family possessed of joint family property left after the disposition of a part. For these reasons I am of opinion that Section 25-A was not applicable to the circumstances disclosed by the assessees' objection taken before the Assistant Commissioner, and I answer the first question in the negative."

It is this aspect of the matter that was referred to by the Privy Council in the judgment in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[2]. The view of the learned Judge regarding the interpretation of section 25-A that no partition by metes and bounds is necessary and that a division in status would be sufficient is opposed to the decision of the Privy Council. In the same volume (at page 448) there is a decision of the Lahore High Court in *Saligram Ramlal* v. *Commissioner of Income-tax*[3], which takes the view that actual partition by metes and bounds of the property is necessary. The property in dispute was a business which was divided and which was subsequently constituted into a partnership. There is a third decision in the same volume at page 479 of a Special Bench of the Lahore High Court in *Sher Singh Nathu Ram* v. *Commissioner of Income-tax*[4], in which Dalip Singh, J., delivered the judgment of the Court. In this case it was held that a disruption of the family and a definite ascertainment of the shares of the different members composing the family would be sufficient to constitute a definite portion within the meaning of the section, and that there need not be a physical division by metes and bounds. This again related to a business, and so far as the actual decision that there was a definite ascertainment of the shares of the different members composing the family and that there was therefore a sufficient partition of the business, seems to be correct. The three stages of partition of a Hindu family which the learned Judge adverts to at page 483 may not be quite accurate, as there are really two stages, disruption of the joint status and division of the property. He also refers to the difficulty of partition by metes and bounds of a business and that the only thing possible in such a case is the ascertainment of the shares. Some of the observations of the learned Judge may be wide off the mark; but the actual decision in the case, if I may say so with respect, is correct.

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1. (1934) 2 I.T.R. 164: I.L.R. 56 All. 504.
2. (1942) 2 M.L.J. 761: 10 I.T.R. 457: I.L.R. 1943 All. 69 (P.C.).
3. (1934) 2 I.T.R. 448.
4. (1934) 2 I.T.R. 479.

The Nagpur High Court considered the question in *Sir Bisesardas Daga, In re*[1] and expressed the opinion that physical division was not required under the section and followed the decision of Niamatullah, J., in *Biradhmal Lodha* v. *Commissioner of Income-tax*[2]. In *Lachiram Baldeodas* v. *Commissioner of Income-tax, Bihar*[3], the Patna High Court took the view that there should be a physical division and not merely a notional separation or division of interest; but the opinion seems to be *obiter*, as the main question considered was whether or not there was a genuine partnership. In the Bombay High Court Beaumont, C.J., and Kania, J., had to deal with the question in *Gordhandas T. Mangaldas* v. *Commissioner of Income-tax, Bombay*[4]. Both the learned Judges construed the section as requiring a physical division of the property and not a mere division in status. The expression "partition in definite portions" according to Beaumont, C.J., has to be construed with regard to the nature of the property concerned, and the learned Judge concedes that a business cannot be divided into parts as in the case of land, and the only mode of division possible in the case of a business is division in the books. Kania, J., expressed his view at page 199 that the word "portion" when read in conjunction with partition of joint family property would ordinarily mean a physical division and not a definition or ascertainment of shares only. I respectfully agree with the observations of the learned Judge that *ordinarily* it would be so; but as conceded in that very decision, in the case of a business, a physical division is impossible, and the nature of the division required must therefore vary with the nature of the property. The learned Judge also construes the Privy Council decision in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[5] as authority for the view that mere division in status which brings about a disruption of the family is ineffective to constitute a partition under section 25-A. I respectfully agree with this view of the learned Judge regarding the decision of the Privy Council.

There is another decision in the Bombay High Court of Kania, O.C.J., and Chagla, J., *Waman Satwappa Kalghatgi* v. *Commissioner of Income-tax*[6], which was a case of division of the properties at various stages. The members of the joint family decided in July, 1941, to divide the properties, and, in fact divided the cash, jewellery and businesses by 30th July, 1941. There were, however, differences between them regarding the division of the immoveable properties which were referred to an arbitration, and an award was made on 16th October, 1941. The question that had to be considered was whether the income of the businesses separated and allotted to individual members and earned by them between 30th July, 1941, the date of division of the business, and the end of the accounting year, 20th October, 1941, should be treated as part of the income of the undivided family or the income of the individuals owning the business. The objection raised was that the partition was not completed till a later date and that therefore there was no completed partition within the meaning of section 25-A of the Act. The case really is governed by the decision of the Privy Council in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[5]. The status of the family was disrupted and the business ceased to belong to the joint family during the relevant period. This asset therefore went out of the family and the income therefore ceased to belong to the joint family. Under sub-section (3) of section 25-A no doubt until a complete partition is effected the family is treated as an undivided Hindu family but the family ceased to own property, that is, business which was carried on during the period. The income therefore earned by them during that period was rightly excluded from the income of the undivided family. The extreme contention urged was that when once a joint family became disrupted, all the properties must be treated as properties of the family until the final partition took place. This contention was not accepted by the Bench as, on the authority of the Privy Council case in *Sundar Singh Majithia* v. *Commissioner of Income-tax*[5], it was open, as pointed out by Sir George Rankin, to a Hindu family

1. (1936) 4 I.T.R. 66.
2. (1934) 2 I.T.R. 164 : I.L.R. 56 All. 504.
3. (1936) 4 I.T.R. 279.
4. (1943) 11 I.T.R. 183.
5. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 : I.L.R. 43 All. 69 (P.C.).
6. (1946) 14 I.T.R. 116.

to part with the assets either to a stranger or to one of themselves, and if they so part, they cease to belong to the undivided family. The family will, therefore, be treated as joint for the purpose of the income-tax to the extent of the assets which have not been partitioned. It will still continue to be joint for the purpose of the income-tax in respect of properties still retained by the family. In respect of the properties parted under the partial partition, however, those assets can no longer be considered as assets of the family. From this point of view in the present case as there is an undoubted partition of the businesses which I have held to be valid, the income attributable to those businesses must be excluded from the total income of the family from 3rd March, 1940, till 13th April, 1940, the end of the accounting year and in the subsequent assessment.

Lastly there is a decision of our Court in *Medam Gurumurthi Setty* v. *Commissioner of Income-tax, Madras*[1], by Leach, C.J., and Patanjali Sastri, J. The only point decided was that "the partition" in the section means "completed partition". If any assets remain undivided or are left for future division, it will not be a completed partition and therefore would be ineffective under the section. No doubt there is an observation in the judgment that section 25-A refers only to partition of the property and not to separation of status. What constitutes partition of the property was not considered by the learned Judges, and they were not called upon to deal with that question. The decision therefore is not of much assistance in deciding the question what constitutes partition into "definite portions" under the section.

There is one other contention urged on behalf of the applicant based upon the language of section 25-A and that is, that the partition of the properties required under the section must be confined to properties which are the source of assessable income and not to other properties such as lands whose income is exempt from tax, being agricultural income. I do not however think that this contention can be sustained. Under section 25-A (2) the proportion has to be worked out according to the portion of the joint family property allotted to the applicant, and this can only mean in the context the entire family property in which a share is allotted and not restricted to property which is the source of the assessable income.

It is said that the division is bad, as the motive was to evade income-tax. A coparcener governed by the Mitakshara Hindu law has the undoubted right to get his share separated. If the separation entails the consequence of reducing the tax in any manner the partition cannot be impeached on the ground that the motive was not laudable. There is authority in support of the view that

> "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax". See *Inland Revenue Commissioners* v. *Westminster (Duke)*[2].

Viscount Simon, L.C., in a later case considered that the exercise of such ingenuity was not commendable and was inconsistent with the discharge of the duties of good citizenship, though it is within legal rights. See *Latilla* v. *Inland Revenue Commissioners*[3]. So long as a transaction is legal, however reprehensible the object may be, it must be given its effect in law, unless there is a statutory provision invalidating it on the ground that the main purpose is to evade or get a tax reduced as under section 10-A of the Excess Profits Tax Act.

The result is that the question referred to us by the Appellate Tribunal must be answered in the affirmative and against the assessee, and the assessee will pay the costs of the Income-tax Commissioner which is fixed at Rs. 250.

Viswanatha Sastri, J.—The question that has been referred to us is in these terms :—

> "Whether in the circumstances of the case the finding of the Appellate Tribunal that there has been no partition within the meaning of section 25-A of the Income-tax Act is right ?"

1. (1944) 1 M.L.J. 197 : 12 I.T.R. 176.
2. (1936) A. C. 1, at 19 and 20.
3. (1943) A.C. 377 at 381 : 11 I.T.R. Suppl. 78.

This comprises and compresses the following four questions :—(1) Whether by the deed of partition, dated 5th April, 1940, a partition has taken place among the members of the family of M. S. M. M.? (2) Whether the Income-tax Officer has power under section 25-A to ignore a partition on the ground that there has been an unequal distribution of the family properties among minor coparceners? (3) Whether the members of the M. S. M. M. family are divided in status, and (4) Whether the joint family properties have been partitioned among the various members in "definite portions" within the meaning of section 25-A. We have tried to dissect the order cf the Tribunal and unfold the points of law that are involved in the one rolled-up question referred to us by the Tribunal. This Court might well have been spared the task of dissecting the case and probing into every stage of the proceedings for ascertaining the facts and the real questions of law that arise in the case. An answer merely in the affirmative or negative to the question propounded would be easy but unfair to the assessee and productive of much uncertainty and mischief in the course of the assessment proceedings. We have therefore heard arguments on all the points involved and shall deal with them in this judgment.

The facts have been stated in the judgment of my learned brother, and it is unnecessary to repeat them. The substantial question relates to the effect of the partition arrangement effected by Meyyappa Chettiar dividing himself and his sons *inter se*. The finding of the Appellate Tribunal is that the Income-tax Officer was not bound to recognise the deed of partition dated 5th April, 1940, under section 25-A of the Act for the following reasons :—(1) The partition between the father and his minor sons was so unequal that the father's power under Hindu law to effect a partition between himself and his sons could not be said to have been validly exercised. (2) The revenue authority could ignore the partition for the reason that the division was unequal and prejudicial to the minor sons. (3) The partition was incomplete, many of the family properties not having been divided into definite portions as required by section 25-A, the mere definition of the shares of the members being insufficient.

I may clear the ground by stating that the reference to the partition deed, dated 5th April, 1940, and the arrangements effected thereby as being "not genuine" or "unreal" in the orders of the Income-tax Officer and the Appellate Assistant Commissioner is misleading. There is no doubt that the document was duly executed and registered. It is not the contention of the department here nor is it the finding of the Tribunal that the document was a sham, colourable or fictitious transaction intended by the parties to have no effect. The contention is that the transaction has failed to achieve the desired result of reducing the liability to income-tax by reason of its invalidity under the Hindu law and non-compliance with section 25-A of the Act.

Under the Hindu law, a physical division of the properties of a joint family is not necessary to constitute a partition. Once the sharers of the members are defined and fixed, there is a severance of the joint status. The shares may then make a physical division of the property, or they may decide to enjoy it in common. But the property ceases to be joint immediately the shares are defined and thenceforward the sharers hold it as tenants-in-common. A partition whether by means of a physical division of property or by a definition of shares therein, may be either total or partial. The partition of a portion of the joint family properties does not necessarily imply a division in status among the members and whether there has been a severance in status in the case of a partial division must be gathered from the terms of the instrument effecting the partition or the conduct of the parties. In a joint Hindu family consisting of a father and his sons, the father has power, irrespective of the consent of his sons, to effect a division not only between them and himself but also between the sons *inter se* (vide *Kandaswami* v. *Doraiswami*[1]; *Aiyavier*

1. (1880) I.L.R. 2 Mad. 317, 321.

v. *Subramanier*[1]; *Venkatapathi* v. *Venkatanarasimha*[2]). The power of the father extends not only to effecting a division by metes and bounds but also a division in status between him and his sons *inter se* (*Venkateswara* v. *Mankayammal*[3]; *Subbarami Reddi* v. *Chenchu Raghava Reddi*[4]). A partition by metes and bounds, if effected by the father in the exercise of the power conferred on him by Hindu law, must be fair and the allotments substantially equal. In *Kandaswami* v. *Doraiswami*[5], the texts of Hindu law were examined and the father's power to effect a partition as well as the limitations on the exercise of that power were clearly formulated. This decision has been uniformly followed in this and the other High Courts.

Where a partition is effected by a Hindu father between himself and his sons in the exercise of his power and the sons are allotted a smaller share of the joint property than would justly be due to them so as to defraud them of their equal and legitimate rights, it would be open to the sons to have the partition set aside on the ground of gross inequality or fraud. If the sons happen to be minors at the time of the partition, they can have the partition set aside on their attaining majority (vide *Balakishen Das* v. *Ram Narain Sahu*[6]). But it is equally open to the sons to acquiesce in and accept the transaction (vide *Brijraj Singh* v. *Sheodan Singh*[7]; *Awadh* v. *Sitaram*[8]). In other words, the transaction is not void but only voidable at the option of the sons and if the latter seek to stand by it or enforce its terms, it will not be open to the father to plead the invalidity of the arrangement on the ground of the inequality of the allotments. Mr. Rama Rao Sahib argues that it is a condition of a valid exercise of the father's power that the division should be fair and equal and, unless this condition is satisfied, the partition purporting to be effected by him would be of no effect whatever, and it is open to the revenue authority to ignore the partition on this ground. This contention cannot be accepted. Where there is an execution of a power with something added which is improper, the execution is good and the excess is bad. The execution is not void *ab initio*. The inequality in the partition could be redressed by an allotment of the excess property retained by the father without disturbing the other terms of the partition arrangement. Even if the division of properties effected by the father were prejudicial to his minor sons and therefore liable to be set aside at their instance, a division in status between the father and his sons would have resulted from the transaction (*Venkateswara* v. *Mankayammal*[3]; *Veerappa Chettiar* v. *Annamalai Chettiar*[9]; *Kuppan Chettiar* v. *Masa Goundan*[10]; *Thirumalai* v. *Subramania*[11]; *Ramanathan Chetty* v. *Shanmugham*[12]).

For these reasons, I hold that the revenue authority has no right to constitute itself as the self-appointed guardian of minor coparceners and, in that assumed role, avoid a partition arrangement effected by their father in the exercise of his powers under the Hindu law, on the ground of an inequality in the partition and the resultant prejudice to the interests of the minors. The inequality in the allotments is no doubt a circumstance relevant to the determination of the question whether the partition is real or fictitious. An unequal partition can nevertheless be a real partition and there may be reasons of sentiment, gratitude, or affection for the inequality of the allotments. Here, the finding of the Tribunal is that the partition was real but the inequality of the allotments vitiated it completely and rendered it void. The finding of the Tribunal that there was an inequality in the actual allotments is supported by some evidence notably the allotment of family assets of the value of 3 lakhs of rupees to the father at a valuation of one lakh, as a part of the partition arrangement, in spite of the cloak put on the transaction as a conveyance. But that circumstance does not entitle the revenue authority to exercise

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1. (1912) 32 M.L.J. 439, 441.
2. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1, 6 (P.C.).
3. (1934) 69 M.L.J. 410 at 424.
4. (1944) 2 M.L.J. 89 : I.L.R. (1945) Mad. 714.
5. (1880) I.L.R. 2 Mad. 317, 321.
6. (1903) I.L.R. 30 Cal. 738, 752.
7. (1913) 25 M.L.J. 188 : L.R. 40 I.A. 161 ; I.L.R. 35 All. 337 (P.C.).
8. (1907) I.L.R. 29 All. 37.
9. (1934) 68 M.L.J. 157.
10. (1937) 1 M.L.J. 249 : I.L.R. (1937) Mad. 1004.
11. (1937) 1 M.L.J. 243.
12. (1944) 1 M.L.J. 384 : I.L.R. (1945) Mad. 198.

the right of avoiding the partition, a right which belongs only to the minor coparceners and which they may not find it prudent, proper or profitable to exercise on attaining majority. The propriety of the partition, whether it should be effected at all, whether it should be effected at a particular time, what properties should be allotted to the different members, and how the family properties should be divided, are all matters for the coparceners to decide, if they are adults, or for their guardians, if they are minors, or for the father, if the family consists of himself and his minor sons. Once a real and *de facto* partition is found to have been effected, it is not for the revenue authority to redress alleged inequalities in the partition by professing to ignore it in the interests of the minor coparceners. On the other hand, section 25-A (2) recognises unequal partitions and provides for an apportionment of the tax accordingly. The decision in *Harveys, Ltd.*[1], cited by Mr. Rama Rao Saheb was a case where it was held that the revenue authority was entitled to find out the real original cost of a business asset to the assessee ignoring an inflated valuation put upon it under an arrangement between the assessee and another company, for the purpose of obtaining a much larger depreciation allowance than would be allowable on the real cost. This decision lends no countenance to the overriding power claimed by the revenue authority to ignore family partitions merely on the ground of inequality of the allotments. This ground of decision of the Tribunal therefore fails.

I now proceed to consider the remaining ground of the Tribunal's decision. In the present case, there has been a division in status. The family business at Ipoh and Sithiawan in Burma has been divided into three shares as between the father and his two sons by appropriate entries in the accounts showing a division of capital and *menpanam* (further contributions). In the Singapore firm the family had only a share along with other partners, but the business of the firm had been closed. No entries relating to the partition of the assets pertaining to the share of the family in the Singapore firm have been made in the Singapore accounts or in the Ipoh accounts where the receipts from the Singapore firm are credited. In respect of thirteen items of the family immoveable properties situated here, as well as in respect of silverware and jewels valued at Rs. 1,50,000, there has been no physical division but each of the three sharers is allotted an one-third share. The Tribunal has held that there has not been a partition of the family properties into definite portions as required by section 25-A of the Act.

This section has been the victim of conflicting interpretation not only by the different High Courts but by the Judges of the same Court. It is agreed on all hands that section 25-A has no application to a Hindu family which is an undivided family in the year of assessment. The mere fact that a portion of the joint family property is partitioned or parted with in favour of strangers or individual members of the family does not effect a disruption of the joint Hindu family, though the property so dealt with and its income ceases to be joint family property or joint family income. Section 25-A cannot be invoked unless there has been a complete disruption and the joint family has ceased to exist as such at the time of assessment (see *Sundar Singh Majithia's case*[2]). What is the meaning to be attached to the words

> "the joint family property has been partitioned among the various members or groups of members in definite portions" in section 25-A?

There may be family properties like lands and houses capable of physical division. There may be properties like a trade or business not capable of physical division. In the case of a family trade or business, "a division into definite portions" cannot mean a winding up of the business and a division of the assets realised on such winding up. Section 25-A contemplates a division, not a destruction or extinction of the family property. There may be family properties which are not partible and which require to be kept in common. Even in respect of properties capable of a physical division, the members may agree that notwithstanding

1. (1940) 2 M.L.J. 95 : I.L.R. (1940) Mad. 985 : 8 I.T.R. 307 (F.B.).
2. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 : I.L.R. (1943) All. 69 (P.C.).

a division of right or interest, they should hold the properties in common in defined shares without a physical division or division by metes and bounds. The section has to be applied to these varying situations in a reasonable way with due regard to its language and object. In some of the decisions cited, the expression "partitioned in definite portions" in section 25-A has been held to include a mere division of right or interest, *i.e.*, a holding of property in defined shares without a physical division (see *Biradhmal Lodha's case*[1]; *Sher Singh Nathu Ram's case*[2]; *Sir Bisesardas Daga's case*[3]). In other decisions, the contrary view has been taken that section 25-A requires a physical division or partition by metes and bounds at least in cases where the nature of the property admits of such a division and that a mere division in status or a mere change of coparcenary into a tenancy-in-common by a severance of the joint status is not within the section (see *Saligram Ram Lal's case*[4]; *Lachiram Baldeo Das's case*[5]; *Gordandas Mangaldas's case*[6]; *Bansidhar Dhandhania's case*[7] and *Medam Gurumurthi Setty's case*[8]). The contention of Mr. V. K. Thiruvenkatachari, the learned Advocate for the assessee, is that the reference to partition in defined portions in section 25-A is wide enough to include an agreement to hold the family property in defined shares, which is a well-recognised form of partition under the Hindu law. He states that section 25-A is a mere machinery section and does not in any way abrogate the rule of Hindu law that the holding of family property in definite shares without a physical division amounts to a partition. Mr. Rama Rao Saheb for the Department maintains that section 25-A does not recognise a mere division in status as effecting a partition and to this extent it is a deliberate departure from the rule of Hindu law. The further contention of Mr. V. K. Thiruvenkatachari is that there has been something more than a mere division in status in the present case, because the three members of the family have been given each an one-third share in the items of immoveable and moveable property kept in common. This is stated to be a partition in defined portions, the word "portion" being construed as a synonym for "share". He also referred to section 9 of the Act which recognises the holding of house property in definite shares by different persons with a separate liability to assessment.

Section 25-A purports to modify the ordinary Hindu law of partition of joint family property to some extent. This is clear from section 25-A (3). It is not as if every partition that is recognised by Hindu law is accepted as good for income-tax purposes. Section 25-A ignores a mere division of right or interests, *i.e.*, a division in status, and requires a partition of family property into definite portions before a partition could be recognised. Section 25-A must be read as applicable both to Mitakshara and Dayabhaga families (see *Kalyanji Vithaldas's case*[9]). In a Dayabhaga family, the members hold the property as tenants-in-common and their shares are always ascertained, whether the family be joint or separate. If mere ascertainment of shares and division of the income of the undivided property according to ascertained shares were to be held sufficient to constitute partition into definite portions, section 25 A would have no effect on Dayabhaga families. When therefore the section speaks of a partition of the family properties in definite portions, it means something more than a definition of shares, for shares are already defined in a Dayabhaga family. It is legitimate to construe section 25-A (1) as referring to a physical division where the property by its nature is capable of such division and in the case of a trade or business which does not admit of such division, by suitable entries in the books. Section 25-A is evidently intended to avoid prolonged and complicated enquiries into the state of the family by requiring proof of an easily demonstrable fact, namely, a physical division or division by metes and bounds, wherever the property admits of such division. I am not unalive to the argument that the words "definite portions" in section 25-A should not be read

1. (1934) 2 I.T.R. 164 : I.L.R. 56 All. 504.
2. (1934) 2 I.T.R. 479.
3. (1936) 4 I.T.R. 66.
4. (1934) 2 I.T.R. 448.
5. (1936) 4 I.T.R. 279.
6. (1943) 11 I.T.R. 183 : I.L.R. (1943) Bom. 245.
7. (1944) 12 I.T.R. 126 : I.L.R. 23 Pat. 68.
8. (1944) 12 I.T.R. 176 : (1944) 1 M.L.J. 197.
9. (1937) 5 I.T.R. 90 : I.L.R. (1937) 1 Cal. 653.

in different senses according to the nature of the property to which they are applied. In the case of a trade or business, the nature of the property is such that a partition in definite portions is effected and can be effected only by suitable entries in the books apportioning the capital and profits to the different sharers. Any other mode of division will result in an extinction of the business as an asset of the family which is not required by section 25-A. The balance of authority is also in support of this view.

In *Sundar Singh Majithia's case*[1], the Judicial Committee, after referring both to Mitakshara and Dayabhaga families, observed :

> " If, however, though the joint Hindu family has come to an end, it is found that its property has not been partitioned in definite portions, then the family is to be deemed to continue that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year."

In the context the reference to " definite portions " is not to a mere definition of shares but to a physical division. In *Gordhandas T. Mangaldas's case*[2], Beaumont, C.J. and Kania, J., came to the conclusion that the expression " definite portions " in section 25-A referred to a physical division of the property and not to a mere definition or ascertainment of shares in the property. The word " portion " was construed as a separate part of the property and not a share therein. Beaumount, C.J., observed :—

> " The expression ' definite portion ' is not appropriate to describe an undivided share in property where all a particular member can claim is a proportion of the income and a division of the corpus but where he cannot claim any definite portion of the property. ' Portion ' seems to me the apt word for division of property and ' share ' for division of interest and it is significant that ' portion ' is used in section 25-A."

With reference to a family trade or business, the same learned Judge said :—

> " No doubt, the expression ' division in definite portions ' will have to be construed with regard to the nature of the property concerned. A business cannot be divided into parts in the same manner as a piece of land ; division may only be possible in the books."

In a later case of the Bombay High Court, it was held that for purposes of the Income-tax Act, a joint family in spite of a severance of status, continues to exist as a unit or entity till all the properties belonging to the family are completely and finally partitioned. It is only when that condition is satisfied that an order under section 25-A (1) could be made and till such an order is made, the joint family continues to exist as a unit for assessment to income-tax (see *Waman Satwappa's case*[3]). To the same effect was a decision of the Lahore High Court in *Saligram Ram Lal's case*[4], though a somewhat different view was taken in a later Full Bench decision, *Sher Singh Nathu Ram's case*[5], without reference to the earlier case. The Full Bench case related to a family business and Dalip Singh, J., who delivered the leading judgment stated (pages 482 and 483) :

> " One of the properties owned by a joint Hindu family, as is well-known, may be a trading business as in this case. It is difficult to see how this business could be partitioned by metes and bounds or that anything more could be done to it except to ascertain the shares. No particular object could be served by demanding partition by metes and bounds in a business, for all that would be necessary would be to make a book entry separating the capital and separating the outstandings of the firm and then make another entry re-uniting the capital and re-uniting the outstandings of the firm. I do not see what object would be served by this and it seems to me clear that in the case of a business at any rate, the only reasonable meaning of the words ' partitioned in definite portions ' must be ' partitioned in definite shares '. The dictionary gives the word ' share ' as a synonym for the word ' portion ' and similarly it gives ' portion ' as a synonym for the word ' share '. I am not able to see why the word should not take its natural meaning rather than the somewhat forced meaning that partition in definite portions means a partition by metes and bounds."

Where the family property consists only of a business, the above observations would hold good ; but if they go further and were meant to apply even to properties capable of a physical division, I must respectfully express my dissent.

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1. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 : I.L.R. (1943) All. 69 (P.C.).
2. (1943) 11 I.T.R. 183 : I.L.R. (1943) Bom.
3. (1946) 14 I.T.R. 116 : 48 Bom. L.R. 56.
4. (1934) 2 I.T.R. 448.
5. (1934) 2 I.T.R. 479.

In *Biradhmal Lodha's case*[1], the point now under consideration did not directly arise for decision but Niamatullah, J., in the course of his judgment expressed the opinion that a division by metes and bounds was not an indispensable requirement of section 25-A and that a disruption of the joint family by a division in status was enough. The words "a separation of the members of the family has taken place" which existed in section 25-A, as it then stood, were relied upon by the learned Judge in support of his conclusion. But section 25-A as it then stood also required a partition into definite portions in addition to "a separation" of the members. In any case, the Legislature omitted the words above quoted from section 25-A by the amending Act of 1939 evidently with a view to overrule the view of Niamatullah, J. Otherwise, those words would have been retained and the requirement of a partition "in definite portions" would have been omitted. In a brief judgment of this Court in *Medam Gurumurthi's case*[2], it was held that the fact that the members are divided in status and have agreed to hold the property in defined shares would not attract section 25-A unless all the assets have also been divided. The learned Chief Justice observed :—

> "There is a distinction to be drawn between separation of status and partition of family property. As pointed out by the Privy Council in *Sundar Singh Majithia's case*[3], section 25-A refers only to a partition of the property . . . . Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section."

The view of the Patna High Court is the same as that of this Court and the Bombay High Court. In *Bansidar's case*[4], that Court held that section 25-A (1) required a physical division of the entire family properties among the members of the family or groups of members and that a mere division in status or definition of shares was not enough. Where, however, a physical division is not feasible, as in the case of a business, partition in definite shares by book entries would be enough.

As a result of the foregoing discussion, I have arrived at the following conclusions:—Section 25-A of the Income-tax Act provides the machinery for computing and assessing the income of a joint Hindu family which existed during the year of account but has ceased to exist during or prior to the year of assessment. It ignores a mere severance in status, though it would put an end to the joint family under the Hindu law. In spite of the severance, the joint family continues to exist as a "person" or legal entity for purposes of income-tax and is liable to be assessed as such, until all the properties belonging to the joint family are finally and completely partitioned. An order under section 25-A (1) could be made only when, in addition to a severance in status, there has been a partition of all the family properties among the members and until such an order is made, the family is deemed to be an undivided Hindu family for purposes of income-tax, notwithstanding the severance in status and a partition of some of the properties. In the case of property that admits of a physical division or division by metes and bounds, such division is necessary to satisfy the requirement of a partition "in definite portions" found in section 25-A. In the case of trades and businesses, there need not be a winding up and division of the goods, outstandings and assets in order to satisfy the section. An allotment of a business exclusively to one member or a division of the capital and outstandings of the business in definite shares among the members in the books, coupled with the crediting of the receipts and debiting of the expenses pertaining to the share of each member would be a sufficient compliance with section 25-A. The divided members would then be in the position of partners of a firm. If, having regard to the nature of the property, what has been done amounts to a division of the entire family properties in definite portions, an order under section 25-A (1) could be passed.

In order to prevent possible misconception and hardship, it is necessary to emphasise that under section 25-A (2) it is only the total income of the joint family in the previous year that is assessed. If by reason of a partial partition effected

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1. (1934) 2 I.T.R. 164 : I.L.R. 56 All. 504.
2. (1944) 1 M.L.J. 197 : 12 I.T.R. 176.
3. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 : I.L.R. (1943) All. 69 (P.C.).
4. (1944) 12 I.T.R. 126 ; I.L.R. 23 Pat. 68.

in a particular year the family businesses alone are divided and each of the members is exclusively allotted a separate business for his share, the income from the businesses subsequent to the division would not be part of the income of the joint family, because the businesses have ceased to be joint family property. Again, if the members of a joint Hindu family enter into a partnership in respect of a portion of the joint family property which they have divided among themselves, then the property so held in partnership is taken out of the joint family and the income derived by the partnership is not the income of the joint family. If the family moveables, stocks, shares, securities and cash alone are divided among the members, each getting particular moveables or a number of shares and securities or a sum of money exclusively for himself, the lands and houses being left undivided, the income from stocks, shares and securities allotted to the different members would not be the income of the joint family after such division and allotment. In all these cases, where only a portion of the joint family property has been partitioned, the portion so partitioned ceases to belong to the joint family but the joint family still remains and so long as the joint family remains, no order under section 25-A (1) could be made. But the income of the joint family would comprise only the income arising from such portion of the family assets as have not been partitioned among the members or assigned to one of them on partition. Even though there has been a disruption of the joint family by a division in status, still for purposes of income-tax the joint family is deemed to continue till all the properties have been partitioned. But it is only the income received from the properties not partitioned that would be considered to be the income of the fictional joint family and liable to tax as such. This is the result of section 25-A (1) and (3) of the Act. It is fallacious to argue that if a joint family becomes divided in status, all its assets must be deemed to be the assets of the joint family and all the income derived therefrom must be deemed to be the total income of the joint family till the final or physical partition of every item of the family property is completed. It may be that between the division in status and the partition of the last item of the family properties, as a result of intermediate arrangements among the members of the family, some part of the assets has been parted with to a stranger or even to one of the members of the family as his own separate and exclusive property. It may be that the divided members enter into a partnership with reference to a family business after dividing it by book entries. In such cases, though the family which is divided in status is deemed to be an undivided family under section 25-A (3) by reason of the fact that the actual division of the properties has been partial and not total, as required by section 25-A (1), still the family is deemed to be joint for purposes of income-tax only to the extent of those assets that have not been partitioned. To the extent the family assets have been actually partitioned or taken away from the family and allotted exclusively to the individual members, those assets cannot be considered to be the assets of the artificial joint family created by section 25-A (3). Nor could that joint family be assessed to income-tax under section 25-A (2) on the income derived from such assets. Authority in support of the above conclusions will be found in the decisions of the Privy Council in *Sundar Singh Majithia's case*[1] and of the High Courts in *Bansidhar Dhandhania's case*[2] and *Waman Satu appa's case*[3].

Though there has been a division of the business there has not been a partition of moveables nor a partition of immoveable properties into definite portions in the present case. Therefore my answer to the question referred to us is that there has been no partition within the meaning of section 25-A of the Income-tax Act. I agree with my learned brother in the direction for costs.

V. P. S. *Reference answered accordingly.*

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1. (1942) 2 M.L.J. 761 : 10 I.T.R. 457 : I.L.R. (1943) All. 69 (P.C.).
2. (1944) 12 I.T.R. 126 : I.L.R. 23 Pat. 68.
3. (1946) 11 I.T.R. 116 : 48 Bom.L.R. 56.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kannukkakath Ahmad Koya Mollah .. *Appellant**

v.

The Calicut Municipal Council and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 23, rule 1—Scope of the power to allow withdrawal—Allowing withdrawal of second appeal to enable appellant to file a review application in the lower appellate Court—If justified.

The power to allow withdrawal of a suit is specifically dealt with by the Code and unless the conditions prescribed by the Code do exist, the High Court has no jurisdiction to allow the withdrawal merely because unless that is done no review of the judgment and decree of the lower appellate court can be sought by a party and he will be put to considerable hardship.

In second appeal before the High Court the appellant wished to withdraw the appeal in order that he might file a fresh suit for a declaration that there had been no encroachment of land as contended by the Government, or file an application for review before the lower appellate Court, and he relied upon the report of a certain commissioner appointed by the High Court in an interlocutory application which would go to show that there was no such encroachment.

Held : The requirements of Order 23, rule 1 which have to be borne in mind in considering such a request for withdrawal are not fulfilled in the present case. The Court cannot in order to enable the appellant to file a review application override the provisions of Order 23, rule 1. Considerations of hardship have no place in the applications of the provisions of the Code, where they are perfectly clear and on considerations of hardship it is not open to any Court to exercise inherent powers on matter specifically dealt with by the Civil Procedure Code itself.

Appeal against the decree of the Subordinate Judge's Court, South Malabar, at Kozhikode in A.S. No. 223 of 1946 preferred against the decree of the District Munsif Court, Kozhikode, in O.S. No. 1144 of 1942.

K. P. Ramakrishna Aiyar and *S. R. Subramania Aiyar* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—The question raised in this case is as to an encroachment alleged against the plaintiff, the Molla of a certain mosque in Calicut by the defendants, the Calicut Municipal Council and the Collector of Malabar, representing the Provincial Government, Madras. The encroachment alleged against the plaintiff has been concurrently found by the courts below and in spite of a fairly long and strenuous argument on the part of Mr. Ramakrishna Aiyar, I am not inclined to disturb the finding of the Courts below. Mr. Ramakrishna Aiyar's main point is that Exhibit D-3 a certain letter written by his client to the Municipal Council in September, 1940, has been misread by the lower appellate Court as containing a certain admission by his client that the suit shop buildings were reconstructed some years back. I am not quite so sure however as the lower appellate Court that there is any such admission as is supposed by the lower appellate Court to exist in Exhibit D-3. At the same time I must say there is certainly other evidence on record on which it was competent to the lower appellate Court to arrive at its conclusion concurrently with the trial Court that there was, in fact, an encroachment as alleged by the defendants. There is D.W. 1, the Commissioner who prepared the plan Exhibit P-29 and submitted his reports Exhibits P-29 (*a*) and P-29 (*b*) and there is also the evidence of D.W. 2 the Town Surveyor, who made a report about the encroachment before suit. On these facts the learned Subordinate Judge has principally relied, besides dealing with the other oral evidence on record. I am not therefore prepared to disturb the finding of the courts below.

Then Mr. Ramakrishna Aiyar urges that I might grant him permission to withdraw this second appeal in order that he might file a fresh suit for a declaration that there has been no encroachment ; that is because he says, since the institution of this second appeal a certain commissioner who has been appointed by this Court has discovered certain survey stones and reported upon their existence in the suit locality, which would go to show that there has been no encroachment at all on the part of the plaintiff. I am not satisfied that the report that has been submitted

* S.A. No. 1398 of 1947. 25th April, 1950.

to this Court by the Commissioner appointed by it is really matter on which I am entitled to act by way of additional evidence in this second appeal or by way of an inducement to me to allow a withdrawal of this suit by the plaintiff. The provisions of Order 41, rule 27, Civil Procedure Code, are not in my opinion satisfied in the present case and notwithstanding the order which a learned Judge of this Court made on a petition by the appellant, appointing a Commissioner who has since made a report of his own. I cannot say that conditions have been made out which would justify my reception of the report of that Commissioner as evidence for consideration in second appeal. Nor can I say that the mere fact that the suit is bound to fail on the merits of this second appeal is itself a good ground to enable me to allow the plaintiff to withdraw the present suit. What the learned counsel for the appellant says is that if the second appeal is allowed to be withdrawn his client will be in a position to apply for review of the judgment and decree of the lower appellate Court by bringing to its notice the additional material in the shape of the report by the Commissioner appointed by this Court in second appeal as disclosing the existence of survey stones which would disprove the case of encroachment alleged against him by the defendants in the present suit. I am not satisfied that the requirements of Order 23, rule 1 of the Code which have to be borne in mind in considering a request of this description do at all stand fulfilled in the present case; and it seems to me that I cannot, in order to enable the appellant to file a review petition, override the provisions of Order 23, rule 1 of the Code. The power to allow withdrawal of suits is specifically dealt with by the Code and unless the conditions prescribed by the Code do exist I have no jurisdiction to allow the withdrawal merely because unless that is done no review of the judgment and decree of the lower appellate Court can be sought by the plaintiff and the plaintiff will be put to considerable hardship. Considerations of hardship have no place in my opinion in the application of the provisions of the Code where they are perfectly clear and on considerations of hardship it is not open to any Court to exercise inherent powers on matters specifically dealt with by the Code itself.

In these circumstances the second appeal fails and is dismissed with costs.

No leave.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Ariangavu Pillai .. *Petitioner* *

v.

Nallamangai Ammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 23—Remand when justified—No material before appellate Court for concluding that decree was wrong—Remand to make the trial Court to think over a matter once again—If justified.

In a suit certain allegations were made against the present appellant that he had fabricated some secondary evidence. The trial Court dismissed the contention. There was an appeal which was dismissed and a second appeal against it to the High Court was pending. Meanwhile the respondent filed an application requesting the Court under section 476, Criminal Procedure Code, to file a complaint against appellant. The Court refused the request. On appeal under section 476-B of the Criminal Procedure Code the District Judge finding the lower court's enquiry somewhat inadequate remanded the matter with a direction that the then presiding Subordinate Judge (the successor to the Judge who had passed the prior order) should make such enquiry as he deemed fit and hear and decide whether a prosecution was necessary in the interests of justice.

Held, the remand under the circumstances was improper. Under Order 41, rule 23, Civil Procedure Code, a remand can be ordered only where the appellate Court finds it necessary to set aside a decree and that can be done only if the Court has material for concluding that the decree was wrong. An appellate Court cannot direct the trial Court to think over a matter once again and give fresh findings on the same issue giving some vague and general directions to make further inquiry The District Judge could have himself *suo motu* enquired into the matter if he wished but he could not direct the Subordinate Court under the circumstances to make another inquiry.

* C.R.P. No. 270 of 1949. 17th March, 1950.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Tirunelveli, dated 17th December, 1948, in C. M. A. No. 13 of 1948, preferred against the order of the Court of the Subordinate Judge, Tirunelveli, in O. P. No. 48 of 1947.

V. Ramaswami Aiyar and *V. Meenakshisundaram* for Petitioner.

S. Ramachandra Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The respondent made an allegation against the appellant that he had caused the disappearance of a ledger from the precincts of the Court and fabricated some secondary evidence. The same allegation was put forward during the course of the suit in which the ledgers had been filed. The trial Court found against the respondent. The respondent appealed and the appeal was dismissed. The second appeal to this Court is still pending. During the course of the appeal and second appeal, the respondent filed this application, requesting the Court under section 476, Criminal Procedure Code, to file a complaint against the appellant. The Court, acting on very much the same evidence as it had in the course of the suit, concluded that the disappearance of the evidence was due to somebody acting on the part of the respondent and not of the appellant and that the secondary evidence was true. He therefore refused to file a complaint. On appeal under section 476-B, the learned District Judge thought that the enquiry of the learned Subordinate Judge had been rather perfunctory ; so he allowed the appeal and remanded the suit, with a direction that the present Subordinate Judge (the successor to the Judge who had passed " the order " refusing to complain) should make such enquiry as he deemed fit and hear and decide whether any prosecution or prosecutions were necessary in the interests of justice.

Whatever the powers of remand may be, the learned Judge was not justified in ordering a remand under the circumstances. He did not feel himself in a position to give any definite finding on the questions before him ; but he thought that a further enquiry carried out by the Subordinate Judge *suo motu* might produce something more definite on which he could act. The provisions of Order 41, rule 23 were not therefore complied with, as a remand can be ordered only where the appellate Court finds it necessary to set aside a decree. That he can do only if he has material for concluding that the decree was wrong. Apart from this, however, clearly an appellate Court cannot direct the trial Court to think over a matter once again and give fresh findings on the same issues, giving some vague and general direction to make some further enquiry. The learned advocate for the respondents argues that the learned District Judge was justified in ordering what he did; because the wording of rule 25 of the same order gives support for that argument. The learned Judge directed the trial Court to make such enquiry as it deemed fit and hear and decide whether any offences were *prima facie* established and whether any prosecution or prosecutions were necessary in the interests of justice. Those were the very matters which the trial Court had already considered.

It may be open to the learned District Judge, in view of the fact that a complaint may be made *suo motu* as well as on applications from parties, to delve into the matter himself if he so wishes and decide on any fresh material that may be forthcoming as a result of his researches to complain or not to complain ; but he must do that himself and not direct the Subordinate Judge to do so.

The petition is allowed and the appeal (C.M.A. No. 13 of 1948) remanded to the District Judge for fresh disposal in the light of the observations contained in this judgment. The costs of this civil revision petition will abide the result of the appeal.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRY.

Palaniyandi Chetty and others .. *Appellants**

v.

Kandappa Goundan .. *Respondent.*

Suit—Reference to arbitration pending suit without knowledge of Court—Award whether binding—Arbitration Act (X of 1940), section 47, Proviso and Civil Procedure Code (V of 1908), Order 23, rule 3.

In a suit for a declaration of right of pathway as a cart track the lower court held on the evidence that the plaintiff should be held to have established his claim. But on the contention that pending the suit there was a private reference to arbitration and an award which would operate as an adjustment or compromise of a suit under Order 23, rule 3,

Held : That reference to arbitration pending a suit at the instance of the Court or without its knowledge, still constituted an agreement between the parties to abide by the decision of the arbitrators and the award of the arbitrators operates as an adjustment or compromise within the meaning of Order 23, rule 3, Civil Procedure Code.

Arumuga v. *Balasubramania*, (1945) 1 M.L.J. 463 : I.L.R. 1946 Mad. 39, followed.

But the award in question was not a complete decision of all the matters in controversy between the parties and was vague and indefinite with respect to the manner in which those rights have to be exercised and hence the decree of the Court is correct.

Obiter : Chapter IV of the Arbitration Act is comprehensive and complete and covers all references to arbitration in pending suits and Chapter II does not apply to such references by its own force.

Appeal against the decree of the Court of the Subordinate Judge, Salem, in A.S. No. 145 of 1945 preferred against the decree of the Court of the District Munsif, Sankaridrug at Salem, in O.S. No. 303 of 1942.

A. V. Narayanaswami Aiyar for Appellants.

C. A. Vaidyalingam and *T. Venkatadri* for Respondent.

The Court delivered the following

JUDGMENT :—Defendants 1 to 11 are the appellants in this second appeal. The plaintiff sued for a declaration of his right of way along the pathway indicated as ABCDEFGHJKL in the plaint plan for his cattle, carts and men to go to his land and for an injunction restraining the defendants from interfering with his user of the pathway and for the restoration of the pathway at HJ to its original condition. The suit has been decreed by the Courts below on the finding that the plaintiff was entitled to the right of way claimed by him and that the obstructions and alterations caused by the defendants in the pathway so as to interfere with the plaintiff's exercise of his right of way were unjustified. There was a decree for a prohibitive and a mandatory injunction in favour of the plaintiff. There is ample evidence in the case to support the finding of the lower appellate Court that the pathway in question was a pathway over which the plaintiff had the right claimed by him in his plaint. The mere fact that the way is shown as a pathway in respect of a considerable portion of the track is not conclusive of the matter and the evidence of the Tahsildar and the Revenue Inspector and the other witnesses is to the effect that there was a good cart track with rows of trees standing on each side of it and therefore the plaintiff must be held to have established his claim to use the pathway as a cart track.

Mr. Narayanaswami Aiyar argues that this issue is open to consideration by me in this second appeal for the reason that there was a reference to arbitration of the disputes between the parties during the pendency of the suit in the trial Court and an award passed by the arbitrators which is marked as Exhibit P-16. His contention is that the reference pending the suit though not made at the instance of the Court or with its knowledge, still, constituted an agreement between the parties to abide by the decision of the arbitrators and the award of the arbitrators operates as an adjustment or compromise of the suit within the meaning of Order 23,

* S.A. No. 958 of 1947. 15th March, 1950.

rule 3, Civil Procedure Code. Before the enactment of the Arbitration Act of 1940 it was held by a Full Bench of this Court in *Subbaraju* v. *Venkataramaraju*[1], that where the parties to a pending suit have referred their difference to arbitration without an order of the Court and an award is made, a decree in terms of the award could be passed by the Court under Order 23, rule 3, Civil Procedure Code, even though the parties do not accept the award as binding upon them. This decision has been followed and applied to a similar case even after the enactment of the Arbitration Act of 1940 by a Division Bench of this Court in *Arumuga* v. *Balasubramania*[2]. The learned Judges construed the language of the proviso to section 47 of the Arbitration Act, so as to make it applicable to a case where there has been a mere agreement to be bound by a future award and an award is given on such a reference. They held that Order 23, rule 3, was not confined to a case where after the award is made, the parties consent to its being filed as a compromise or adjustment of the pending suit and that the proviso to section 47 also did not bear that interpretation. Sitting singly I am bound by this decision though I consider that it is probable that the Legislature intended that a private reference to arbitration in a pending suit without the knowledge of the Court and without its direction which results in an award should not be made a rule of Court unless all the parties interested in the suit consent to the award being filed into Court as a compromise or adjustment of the suit. Indeed the Calcutta High Court had consistently taken that view before the Arbitration Act of 1940 and the proviso to section 47 appears to confirm that view. The further question argued in the case whether a reference to arbitration in a pending suit is governed exclusively by Chapter IV of the Arbitration Act or whether Chapter II of the Act which deals with arbitrations without the intervention of a Court would also apply to references to arbitration in a pending suit does not fall for decision in this case. But my view is that Chapter IV is comprehensive and complete and covers all references to arbitrations in pending suits and Chapter II does not apply to such references by its own force. The provision in section 25 of Chapter IV of the Act, applying the other provisions of the Act to arbitrations in pending suits, would be unnecessary if Chapter IV were not a self-contained provision regulating references to arbitration in pending suits.

The point for consideration now is whether there has been an adjustment or compromise of the suit as a result of the award passed by the arbitrators. The award is not a complete decision of all the matters in controversy between the parties and is further vague and indefinite with respect to the rights claimed by the plaintiff and with reference to the manner in which those rights should be exercised. Having considered its provisions, I am of the opinion it has not decided all the matters in controversy between the parties. I do not, of course, rely upon the statement of the arbitrators themselves in Exhibits P-15 and P-15 (*a*) as to what was in their mind when they passed their award but I arrive at this conclusion on an interpretation of the pleadings in the case and the award passed by the arbitrators.

I therefore consider that the decree of the lower appellate Court is correct and that this second appeal should be dismissed with costs. (Leave refused.)

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Raman Ambalam and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 238—Charge of a graver offence—Conviction for a lesser offence which is a constituent part of the graver offence.

A court or jury is entitled when the charge is for the graver offence to find the accused guilty of the constituent part of that offence. In a trial for an offence under section 392 read with section 397

1. (1928) 55 M.L.J. 429 : I.L.R. 51 Mad. 800 (F.B.).
2. (1945) 1 M.L.J. 463 : I.L.R. 1946 Mad. 39.

*Cr.R.C. No. 91 of 1950. (Cr.R.P. No. 84 of 1950). 25th July, 1950.

of the Penal Code it is open to the jury to find the accused guilty of an offence under section 326 of the Penal Code.

An offence under section 379 of the Penal Code, however, cannot be said to be one of the component parts constituting the major offence under section 394. Nor is it a minor offence in relation to section 326. A conviction, therefore, of the accused under section 379, where there is no separate charge for that offence is illegal and the conviction must be set aside.

Pattikadan Ummaru v. *Emperor*, (1902) I.L.R. 26 Mad. 243, followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sessions Judge, Mathurai dated 3rd December, 1949, in C.A. No. 255 of 1949, preferred against the order of the Court of the Second Assistant Sessions Judge, Mathurai division, dated 28th October, 1949, in S.C. No. 115 of 1949.

C. K. Venkatanarasimham for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—The petitioners were sentenced to various terms of imprisonment by the learned Second Assistant Sessions Judge of Mathurai which sentences were confirmed on appeal by the learned Sessions Judge of the same division and in revision the question has been raised regarding the correctness of the convictions and sentences.

The charges framed against them were that the first petitioner on or about the 27th January, 1949, at Sirumarudakanmoi of Ucharichanpatti village committed robbery of the property of one Sundararajan Ambalam along with the other two petitioners and that at the time of committing the said robbery, the first petitioner used a deadly weapon to wit an aruval and voluntarily caused grievous hurt to the said Sundararajan Ambalam thereby committing an offence under section 392 read with section 397, Indian Penal Code. As against the other two petitioners, the charge was that they were conjointly concerned with the first petitioner in committing the robbery of the property of Sundararajan Ambalam and during the course of that concerted action, voluntarily caused hurt to Sundararajan Ambalam in committing the robbery and thereby committed an offence under section 394, Indian Penal Code. They were tried by the learned Assistant Sessions Judge with a jury as the offences were triable exclusively by jury. The unanimous verdict of the jury was that the first petitioner was not guilty of an "offence" under section 392, Indian Penal Code, read with section 397, Indian Penal Code, but that he was guilty of voluntarily causing grievous hurt with a dangerous weapon to the said Sundararajan, an offence under section 326, Indian Penal Code. As against the second and third petitioners, the unanimous verdict of the jury was that they were not guilty of the offence under section 394, Indian Penal Code ; but were guilty of an offence under section 379, Indian Penal Code, theft of the articles belonging to the said Sundararajan Ambalam. The trial Court accepted this unanimous verdict and sentenced the first petitioner to rigorous imprisonment for four years and the second and third petitioners to rigorous imprisonment for one year. These convictions and sentences were confirmed by the learned Sessions Judge of Mathurai and hence this revision.

As the learned Assistant Sessions Judge has accepted the unanimous verdict of the jury which view has been endorsed by the learned Sessions Judge, it is not open to us to go into the correctness or otherwise of this verdict. The question is purely one of law, *viz.*, whether as regards the first petitioner it is open to the jury in a trial for an offence under section 392 read with section 397, Indian Penal Code to return a verdict regarding an offence under section 326, Indian Penal Code, likewise as regards the second and third petitioners, whether it is open to the jury to return a verdict under section 379, Indian Penal Code, when the indictment related to an offence under section 394, Indian Penal Code.

At the very outset it has to be mentioned that under section 536, Criminal Procedure Code, if an offence triable with the aid of assessors is tried by a jury the

trial shall not on that ground only be invalid ; so that if there had been separate charges under sections 326 and 379, Indian Penal Code, the trial in the Sessions Court would have been with the aid of assessors but as it has happened the trial was with the aid of a jury then this section lays down that the trial shall not be invalid on that ground only. Such being the case, it is open to the jury to try a case which would ordinarily be triable with the aid of assessors and there is no illegality or irregularity committed by such a trial *alone.* We have then to find out whether the jury were justified in returning a verdict on two sections of the Code of which the respective accused not been charged. In other words, can there be a conviction for the offences mentioned above without there being a charge and can a conviction on such a verdict be justified on legal grounds. Among that fasciculus of sections dealing with the forms of charges and joinder of charges, we have sections 237 and 238, Criminal Procedure Code, which deal with the state of circumstances when a person is charged with one offence, whether he can be convicted of another (section 237) and when a minor offence which is included in the offence charged is proved whether it can be made the subject of a conviction. Section 237 lays down that in the case mentioned in the previous section (section 236) where an accused is charged with an offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it. Section 238 (1) says that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. In the light of these statutory provisions, we have to find out whether the sections with which the petitioners were respectively charged constituted combinations of minor offences or whether they without such integration, were each by itself offences which cannot be analysed into component minor misdemeanours. Taking first section 397, Indian Penal Code, it has to be observed that it is a mixture as it were of two different offences, *viz.*, the offence of robbery and the offence of voluntarily causing grievous hurt with a dangerous weapon. An admixture of the various elements constituting each of these offences would by such mixture make out section 397 and so far as section 394 is concerned, it is likewise a mixture of two different offences, *viz.*, robbery and voluntarily causing hurt. Whereas section 397 contemplates a combination of robbery and grievous hurt, section 394 is an amalgam of robbery with simple hurt. It may be said that section 397 is a more aggravated form of section 394. If we analyse these sections into their component parts and if the provisions of section 238 (1), Criminal Procedure Code, are applied, then there is no difficulty whatever that a Court or a jury is entitled when the charge is for the graver offence to find the delinquent guilty of one of the constituent parts of that offence. Therefore apart from any decisions or other judicial authority, the statute itself makes the point clear and but for certain decisions of this Court, no doubt could have been entertained on this point. It is therefore necessary to refer to and consider the cases cited at the bar on this topic.

In *Pattikadan Ummaru* v. *Emperor*[1], Benson and Bhashyam Aiyangar, JJ., considered a similar point arising in a reference to this Court from a Sessions Judge under section 307, Criminal Procedure Code. What happened there was that two persons were charged before the Sessions Judge one of them alone with robbery, section 392 read with section 397, Indian Penal Code and both of them were charged under section 392. The jury returned a verdict that one of them was guilty of having voluntarily caused grievous hurt under section 325, Indian Penal Code, and there was a reference to the High Court under section 307, Criminal Procedure Code as well. On the question as to whether in such circumstances it is open to the High Court to go into the question of fact and find out whether the evidence justified the conclusion arrived at by the jury, the learned Judges differed. Benson, J., was of opinion that it was open to the Court to appreciate the facts and

1. (1902) I.L.R. 26 Mad. 243.

come to a conclusion whereas Bhashyam Aiyangar, J., took the contrary view. But both the learned Judges agreed on the next question that in a matter like this where the offence charged was a major one which itself was a mixture of two minor offences, it is open to the jury to return a verdict that the accused was guilty of one of the minor offences alone. It is stated that an offence under section 397, Indian Penal Code, is a compound offence and is constituted by the combination of two offences committed in one transaction, that is, the offence of voluntarily causing grievous hurt (section 325) and the offence of robbery (section 392) and Benson, J., held that he could see no reason for regarding the conviction under section 325, Indian Penal Code, to be incorrect. Bhashyam Aiyangar, J., was of opinion that if the Sessions Judge had also framed an additional charge under section 325, the accused could have been tried by the Sessions Judge on that charge alone under sub-section (3) of section 269, Criminal Procedure Code, with the aid of jurors or assessors. But applying sub-section (1) of section 238, Criminal Procedure Code, the learned Judge held that the accused was liable to be convicted of the minor offence under section 325 without there being a separate charge under that section. The effect of section 238, according to the learned Judge, was to invest a jury trying an offence triable by a jury with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constituted a minor offence and return a verdict of guilty of such offence though such minor offence be not triable by a jury. Therefore it was open to the Sessions Judge to record judgment convicting the accused of such minor offence although he was not charged with it and tried on such a charge by the Sessions Judge with the aid of jurors or assessors. Whatever difference arose as regards the powers of this Court in hearing the appeal with regard to the right to appreciate questions of fact both the learned Judges were agreed on this point, *viz.*, that it was open in a trial for an offence under section 397, Indian Penal Code, to find the accused guilty of a minor offence, say, section 325, Indian Penal Code. 11 years later the same point arose before Ayling and Napier, JJ., in In re *A. Mutyalu*[1], and in a short judgment the learned Judges held that it was open to a jury to convict the accused of an offence under section 326, Indian Penal Code, when the charge was under a major section. The learned Judges sought support for this conclusion not only from *Pattikadan Ummaru* v. *Emperor*[2], but also from two earlier decisions *Queen-Empress* v. *Anga Valayan*[3] and *King-Emperor* v. *Krishna Iyer*[4]. It is not necessary for us to analyse and find out whether the decision in *Queen-Empress* v. *Anga Valayan*[3], and *King Emperor* v. *Krishna Iyer*[4], really afford substantial support to the view taken by the learned Judges. But certainly *Pattikadan Ummaru* v. *Emperor*[2], afforded justification for the view taken by the learned Judges; though we find in the judgment a statement to the effect that Benson, J., in *Pattikadan Ummaru* v. *Emperor*[2], on this aspect of the case took a different view from that of Bhashyam Aiyangar, J., our understanding of the above decision does not enable us to agree with this statement of the learned Judges. But whatever that might be these learned Judges were also of opinion that where the accused was tried by a jury for an offence under section 397, Indian Penal Code, which was a combination of robbery and voluntarily causing grievous hurt, it was open to the jury to find him guilty of an offence under section 326 alone and therefore the Sessions Judge can accept that verdict and convict the accused of that offence. A single Judge, Srinivasa Aiyangar, J., in *Arumuga Kone* v. *Emperor*[5], followed *Pattikadan Ummaru* v. *Emperor*[2], and held that on a charge under sections 434, 392 and 397, Indian Penal Code while the jury returned a verdict of not guilty with regard to the counts under the said sections, they at the same time found the accused guilty of voluntarily causing hurt by a dangerous weapon, an offence triable by a Judge only with assessors, that the conviction or sentence in such a case should not be set aside or interfered with unless it is clear that the irregularity has led to some miscarriage of justice. The learned

1. (1912) I.L.R. 37 Mad. 236.
2. (1902) I.L.R. 26 Mad. 243.
3. (1899) 8 M.L.J. 183 : I.L.R. 22 Mad. 15.
4. (1901) I.L.R. 24 Mad. 641.
5. A.I.R. 1928 Mad. 275.

Judge followed *Pattikadan Ummaru* v. *Emperor*[1], and he refers to section 536 (1), Criminal Procedure Code.

As against this trend of authority, we find a somewhat divergent view taken in In re *Ponniah Rowther*[2] and *Alli* alias *Venkatachala Mudaly* v. *Emperor*[3]. In the earlier of these case Coutts-Trotter, C.J. and Mackay, J., laid down that on a charge of dacoity a conviction for hurt could not properly be the result because the essence of a charge of dacoity or robbery is the *animus furandi*. This case arose on a reference under section 307, Criminal Procedure Code, by the learned Sessions Judge of Trichinopoly, Mr. K. P. Lakshmana Rao (as he then was) where the accused were charged under section 395, Indian Penal Code, and the jury unanimously found the third accused guilty of causing grievous hurt with a dangerous weapon and the other accused guilty of voluntarily causing hurt. On this reference this Court held as mentioned above. It will be seen that section 395, Indian Penal Code, cannot be said to be a combination of offences as section 397 is whereas as we have already stated section 397 is an amalgam of two different legal conceptions enacted in sections 396 and 325 or 326, Indian Penal Code, as the case may be. Section 395 is a single offence, *viz.*, robbery committed by five or more persons conjointly and thus becomes the offence of dacoity. There is no element of voluntarily causing hurt or grievous hurt in the composition of section 395. It is only an aggravated form of theft or robbery and offences of a similar nature. Therefore it cannot be said that the decision in In re *Ponniah Rowther*[2] when properly understood and when the facts are clearly analysed, runs counter to the decision in *Pattikadan Ummaru* v. *Emperor*.[1] On perusing the Sessions Judge's order of reference we find that he has adverted to *Pattikadan Ummaru* v. *Emperor*[1], but as the charge against the accused in that case related only to offences under section 395 and not section 397, Indian Penal Code, we cannot say that this decision has in any way whittled down the authority of *Pattikadam Ummaru* v. *Emperor*[1], followed as it is by another Bench in In re *A. Mutyalu.*[4] Therefore we cannot accept the contention put forward by learned counsel for the petitioners that Coutts-Trotter, C.J. and Mackay, J., have followed a different line of action and thought from what the learned Judges in *Pattikadan Ummaru* v. *Emperor*[1] adopted. The other case on which the learned counsel places reliance and which according to him is against the trend of authority mentioned by us is the decision of Burn, J., in *Alli* alias *Venkatachala Mudali* v. *Emperor.*[3] The learned Judge held there that where the accused were charged with dacoity and the jury found them not guilty but returned a verdict of guilty for assault, they had no power to give a verdict of guilty for assault under section 352, Indian Penal Code, and the Sessions Judge had no power to accept such verdict. The judgment is a very short one and does not refer to any earlier cases on the point but in our opinion on the facts of the particular case, it cannot be held that the learned Judge came to a conclusion different from the trend of authority previously followed in this Court. It is sufficient for us to state that section 395, Indian Penal Code, cannot be said to be a combination of any offence with section 352 and therefore under section 238 (1), Criminal Procedure Code, it will not be open to the Court to find the accused guilty of a minor offence. These are the only cases of our Court referred to at the bar before us. But a decision of the Calcutta High Court in *Meher Sheikh* v. *Emperor*[5], was brought to our notice by Mr. C. K. Venkatanarasimham. What was held there was that with regard to an offence under section 395, Indian Penal Code, it cannot be said that offences under sections 448 and 323, Indian Penal Code, are minor ones so as to be necessarily involved in a charge under section 395. We have already stated that it is difficult to say that section 395 is a combination of any other offence with section 323 or 448. The Calcutta decision can be said to be in the same line as the two Madras cases referred to by us—In re *Ponniah Rowther*[2] and *Alli* alias *Venkatachala Mudali* v. *Emperor*[3]. It seems to us therefore that what the lower Court has done can be supported by the

1. (1902) I.L.R. 26 Mad. 243.
2. (1929) M.W.N. 185 (1).
3. (1935) M.W.N. 653.
4. (1912) I.L.R. 37 Mad. 236.
5. (1931) I.L.R. 59 Cal. 8.

authority of the earlier decisions of this Court and our reading and understanding of the later decisions cited at the Bar does not enable us to come to the conclusion that the reasoning in the earlier cases have either been dissented from or deviated in the subsequent cases. Even if it is to be held that the later decisions have taken a different view, we would with all due respect prefer the line of reasoning followed in *Pattikadan Ummaru* v. *Emperor*[1]. Such being the case and since the Courts below have followed the proper procedure we cannot say that the conviction of the first petitioner for an offence under section 325 is not justified.

We have next to consider the convictions of petitioners 2 and 3 for an offence under section 379, Indian Penal Code. As remarked by us already the charge was under section 394, Indian Penal Code, in that these petitioners assisted the first petitioner in the act of robbery. The lower Courts agreeing with the jury have found that there was no robbery committed at all. If the first petitioner has not committed robbery then it cannot be said that the second and third petitioners have abetted or assisted the commission of that offence. It is also clear that an offence under section 379, Indian Penal Code, cannot be said to be one of the component parts constituting the major offence under section 394; nor can it be said that section 379 is a minor offence in relation to section 326, Indian Penal Code. In those circumstances it seems to us that the second and third petitioners were prejudiced by being found guilty of an offence under section 379, Indian Penal Code, when there was no separate charge framed for that offence. As we are of opinion that there has been an illegality committed in finding the petitioners 2 and 3 guilty of an offence under section 379, Indian Penal Code, we set aside their convictions and sentences and direct that they be acquitted and set at liberty.

We have next to see whether the sentence imposed on the first petitioner for causing grievous hurt is excessive as contended for by learned counsel. Had it not been for the circumstance that the first petitioner was tried before the Assistant Sessions Judge with a jury for a major offence for which he has been found not guilty, the ordinary course would have been to have him tried before a First Class Magistrate for an offence under section 326, Indian Penal Code and if that were the case, the maximum sentence which that Magistrate could have inflicted would only be rigorous imprisonment for two years. We therefore reduce the sentence on the first petitioner to rigorous imprisonment for two years. In other respects we confirm his conviction.

V.P.S. ——— *Sentence on 1st accused reduced, convictions and sentences of accused 2 and 3 set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Rajarathna Vaduganatha Pillai .. *Petitioner**

v.

Srinivasa Raghava Aiyangar and others .. *Respondents.*

Court-fees—Minor—Party to a decree through guardian—Suit to set aside.

A *quondam* minor who impeaches a decree to which he was a party through a guardian and chooses the institution of a suit as the only mode of avoidance, he is bound to include in the plaint a prayer for setting aside the decree and he can be directed to pay court-fee under section 7 (iv-A) of the Court-fees Act. *Hussain Sahib* v. *Ayesha Bibi*, (1941) 1 M.L.J. 800 : I.L.R. 1941 Mad. 775 (F.B.), applied.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Subordinate Judge Court, Kumbakonam, dated 14th April, 1948, in O. S. No. 16 of 1946.

N. Rajagopala Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*), *K. V. Ramachandra Aiyar*, *T. S. Venkatarama Aiyar* and *S. V. Venugopalachari* for Respondents.

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1. (1902) I.L.R. 26 Mad. 243.

* C.R.P. No. 845 of 1948. 27th April, 1950.

The Court delivered the following

JUDGMENT.—The decision of the lower Court is correct. The Full Bench in *Hussain Sahib* v. *Ayesha Bibi*[1], decided that a *quondam* minor impeaching an alienation made by a certificated guardian without sanction of the Court is bound to sue to set aside the sale. This is not a case where the minor avoided the transaction by anything done before suit. He chose the institution of the suit as the only mode of avoidance and he is bound to include in the plaint a prayer for setting aside the transaction. The fact that the sanction is impeached on the ground of fraud and collusion would not make any difference. It would utmost be in the event of fraud being established a case where no sanction was obtained for the transfer. The view taken by the lower Court regarding the transaction is correct. The minor was a party to the decree through a guardian. He is therefore bound to sue to set aside the decree, and the Court-fee directed to be paid under section 7 (IV-A) of the Court-Fees Act. The civil revision petition is dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRY.

Kota Kanakayya and another .. *Appellants**

v.

Kamepalli Lakshmayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 23 (Madras) and Order 43, rule 1, clause (u)—Order of remand for taking further evidence in a case—Final decision in the suit itself after remand—Subsequent appeal against order of remand, whether permissible.

A litigant has a right of appeal against an order of remand ; he has a right also to contest the proceedings taken in a trial court pursuant to the order of remand ; these are independent legal rights and the exercise of one such right is no bar to the exercise of the other. The aggrieved party is not faced with alternative rights ; it is the same right that he wishes to agitate both in the appeal against the order of remand and at the further stages of the trial after the remand. He has not lost the right to have an appeal against an order of remand merely because he has contested the litigation in the lower court after the remand.

Where in a suit an order of remand was passed and it was carried out and the suit decided the remedy can be also by appeal against the order of remand and not merely by way of appeal against the final decision in the suit. The wide language of Order 41, rule 23, Civil Procedure Code as amended in Madras gives ample rights to the aggrieved party to file an appeal against an order of remand even after the final decision in the suit has been given.

Venkatarama Aiyar v. *Unnamalai Ammal*, (1948) 2 M.L.J. 404 dissented from.

Case-law reviewed.

Appeal against the order of the Court of the Subordinate Judge of Guntur dated 10th July, 1947, in A. S. No. 343 of 1946, preferred against the decree of the Court of the Additional District Munsiff, Guntur, dated 24th June, 1946, in O. S. No. 364 of 1944.

M. S. Ramachandra Rao for Appellants.

V. Suryanarayana for Respondents.

The Court delivered the following

JUDGMENT.—Encouraged by a recent decision of Mack, J., in *Venkatarama Aiyar* v. *Unnamalai Ammal*[2], Mr. V. Suryanarayana, the learned counsel for the respondents, raised a preliminary objection to the hearing of this appeal against an order of remand passed by the lower appellate Court under Order 41, rule 23, Civil Procedure Code. The argument is that the order of remand has been carried out and the suit decided and the remedy of the defendants, here appellants, is only by way of an appeal from the final decree. It is urged that this appeal against the order of remand has to be dismissed on that ground as was done by Mack, J.,

1. (1941) 1 M.L.J. 800 : I.L.R. (1941) Mad. 775 (F.B.).
2. (1948) 2 M.L.J. 404.

* A.A.O. No. 63 of 1948. 13th December, 1949.

in the case above cited and for the same reasons. While I appreciate the vigour of the judgment of my learned brother, I venture, with respect, to think that, as an expression of legal principle, it is far from convincing. As I differ from his judgment, it is my duty and I shall endeavour to state as clearly as I can, the reasons which have compelled me to come to a different conclusion.

Under the Civil Procedure Code of 1882 there was no provision for the passing of a preliminary decree and no adjudication came within the definition of a decree unless it decided the suit. Section 2 (2), Civil Procedure Code of 1908, provided for the passing of a preliminary decree which determined the rights of parties with regard to all or any of the matters in controversy in the suit though it did not completely dispose of the suit. Section 97 of the Code of 1908, provided that if a party aggrieved by a preliminary decree did not appeal from it, he would be precluded from disputing its correctness in any appeal which might be preferred from the final decree. Section 562 of the Civil Procedure Code of 1882 empowered an appellate Court to remand a suit which had been disposed of on a preliminary point by the trial Court, if the appellate Court found the decision of the trial Court to be erroneous. Section 588, clause (28), Civil Procedure Code of 1882 gave a a right of appeal against an order of remand. Under the Code of 1882 it had been held by Courts that a party aggrieved by an order of remand could object to its validity in an appeal against the final decree though he might have appealed against the order of remand under section 588, clause (28) but had not done so. *Subba Sastri* v. *Balachandra Sastri*[1]. There was also a dissent from this view in *Subbalakshmamma* v. *Venkatrayudu*[2]. When the Civil Procedure Code of 1908 was enacted, the Legislature reproduced with slight variations the old sections 562 and 588, clause (28), Civil Procedure Code of 1882 in Order 41, rule 23 and Order 43, rule 1, clause (*u*) respectively, of the new Code, and also added a new provision in section 105 (2) precluding an appellant from taking on an appeal from the final decree any objection that might have been urged by way an appeal from an order of remand. The Madras High Court in the exercise of its rule-making powers amended Order 41, rule 23, Civil Procedure Code, so as to empower an appellate Court to remand a suit even in a case where the trial Court had not disposed of it on a preliminary point. By the amendment, this Court put an end to the interminable controversy that raged round orders of remand, whether they were passed under Order 41, rule 23, Civil Procedure Code, or under the inherent powers of the Court, on the decision of which point depended the appealability of such orders. Suffice it to say that in Madras all orders of remand are now appealable under Order 43, rule 1, clause (*u*), Civil Procedure Code in all cases where an appeal would lie against the decree of the appellate Court. This resume of the history of legislation has been rendered necessary by the reliance placed by Mack, J., on certain decisions of the Calcutta High Court given before the coming into force of the Civil Procedure Code of 1908.

The Civil Procedure Code of 1908 not only gives an aggrieved party a right of appeal against a preliminary decree or an order of remand in a case where the decree of the appellate Court would have been open to appeal but also imposes this serious disability on a litigant that if he does not prefer an appeal against the preliminary decree or an order of remand, he is thereafter precluded from disputing its correctness in an appeal from the final decree. There is no provision anywhere in the Code that takes away the right of a party to appeal from a preliminary decree or an order of remand, if a final decree happens to be passed in the suit before the appeal against the preliminary decree or the order of remand is presented. Nor is there any provision in the Code, that an appeal against a preliminary decree or an order of remand properly presented becomes defunct by the passing of a final decree pending the appeal. I am unable to accept the dictum of Mack, J., that

1. (1894) I.L.R. 18 Mad. 421.
2. (1908) I.L.R. 32 Mad. 318.

"it is necessary that these wide privileges of appeal should be exercised within the limits of reason and practicality",

the limits being evidently, those prescribed by learned Judges, according to their own notions of what is reasonable or practical. In my opinion, it is not legitimate for a Court to read into the statutory provisions granting a right of appeal, limitations and disabilities which the Legislature has not thought fit to insert. Abrogation of a right of appeal given by statute cannot be imported by Courts for reasons founded on practical convenience. A right of appeal which is a substantial right conferred by statute, is not to be put in peril merely because the purpose of granting a right of appeal does not appeal to the predilection of the Court. Mack, J., observes that

"the cycle of appeals, the law permits in India, have (*sic*) no parallel in the juristic history of any other country".

I am not so sure about this but in any case, it is a problem for the Legislature and is not to be solved by judicial abrogation of rights conferred by statutory enactments.

I proceed to consider the other reasons given in support of his conclusion by Mack, J. The learned Judge observed that he would have entertained the appeal against the order of remand though it was filed after the final decree had been passed,

"had the appellant signified his intention of appealing against the order of remand by applying for stay and had stay been refused—a most unlikely contingency".

I am unable, with respect, to see the point of this observation. The learned Judge evidently meant—indeed it is so stated in his judgment—that the appellant should have signified to the lower appellate Court his intention of appealing against the order of remand or applied to it for a stay of further proceedings. The lower appellate Court was *functus officio* when it passed the order of remand. There is no provision in the Civil Procedure Code similar to Order 41, rule 6, empowering the lower appellate Court to stay the trial of a suit remanded by it. Even in appeals against orders of remand preferred to the High Court, stay of further trial cannot be had as of right. Onerous conditions may be imposed which an appellant might not find it possible to comply with. The maintainability of an appeal against an order of remand should not in my opinion, be made to depend on the grant or refusal of stay of further trial in the exercise of a Court's discretion.

Mack, J., further holds that if a person wants to avail himself of the privilege of appealing against an order of remand he must do so before the final decree is passed. If he does not prefer an appeal betimes and obtain an order for stay of trial but submits, without protest, to the trial which ends in a decree,

"he must be deemed to have accepted the new basis and submitted to a fresh trial on that footing."

Thereafter, it is not open to him to "undermine" the basis of the order of remand by an appeal from that order or from the final decree in the suit. His only remedy is to file an appeal from the final decree if he has any grievance against that decree. So runs the argument. Order 43, rule 1, clause (*u*), does not say that an order of remand shall be appealable only if the case had not been finally determined by the trial Court before the date of the filing of the appeal. Nor does it say that an appeal filed against an order of remand becomes infructuous if a final decree happens to be passed during its pendency. It is not permissible for a Court to import into the provisions of Order 43, rule 1, clause (*u*), a limitation which is not there found either in express terms or by necessary implication. It is all the more objectionable to import such a limitation in the face of the stringent provision in section 105, clause (2), Civil Procedure Code, which precludes a party from questioning the propriety of an order of remand except on an appeal preferred against that order. The result of the Calcutta decisions relied upon by Mack, J., as being good law, even under the Civil Procedure Code of 1908, would be that if a party, without any fault of his own, is unable to appeal against the order of remand before the final decree on remand is passed, he would lose

all opportunity of ever objecting to that order and at the same time be deprived of the right of appeal expressly conferred by Order 43, rule 1, clause (u), Civil Procedure Code. There might be delay in the grant of certified copies for filing an appeal against an order of remand. The trial Court or the appellate Court might refuse a stay of trial and the final decree in the suit might happen to be passed before the appeal from the order of remand is filed or is heard. In my opinion, it is erroneous to hold that the right of appeal given by Order 43, rule 1, clause (u), against an order of remand is taken away or nullified by the passing of a final decree in the suit. An order of remand has an independent existence and is not submerged or dissolved in the final decree. A separate right of appeal is provided against such an order. Not only is a right of appeal provided by Order 43, rule 1 clause (u) but an obligation is cast by section 105 (2), Civil Procedure Code, upon a person dissatisfied with an order of remand to appeal against it on pain of losing his right to object to the propriety or the correctness of the order or the findings on which it is based in the later stages of the litigation.

It might happen that a person has no objection to the final decree provided the order of remand was right and his only objection may be to the order of remand itself. In so far as the final decree is consequential upon or merely carries out the directions contained in the order of remand, there is no reason why a litigant should put himself to the expense and trouble of appealing against the final decree when Order 43, rule 1, clause (u), gives him a right of appeal against the order of remand, especially when in the appeal against the final decree he could not be heard to impugn the correctness of the order of remand by reason of the bar imposed by section 105 (2), Civil Procedure Code. An appeal against an order of remand or against a preliminary decree, would, if allowed, make an appeal against the final decree on the same grounds quite unnecessary. The further trial after remand depends on the validity of the order of remand and if that order is set aside on appeal the final decree and indeed, all the proceedings taken under the remand order, would fall with it. I am aware that the doctrine, that subordinate and dependent decrees come to nothing when the decree on which they are dependent is set aside, should not be extended so as to operate beyond the different stages of the same suit or proceedings in view of the decision of the Judicial Committee in *Naganna Naidu* v. *Venkatappayya*[1]. But the final decree passed in pursuance of a preliminary decree or order of remand in the same suit is subordinate to and dependent on the preliminary decree or the order of remand as the case may be. The appellate Court, if it has seisin of the appeal against a preliminary decree or an order of remand, has power to reverse or modify it and in this manner and to this extent, has also the power to affect the operation of the final decree passed in pursuance thereof.

There is only one other aspect of the matter that has to be mentioned. Mack, J., following the Calcutta decisions referred to in his judgment holds that the party affected by an order of remand must make his election as to the remedy he desires to pursue and if instead of appealing forthwith against the order of remand and applying for stay of trial, he chooses to allow the trial to go on and end in a final decree, he cannot thereafter turn round and "undermine" the order of remand by presenting an appeal against it. I regret my inability to follow this reasoning. There is no question here of choosing one of two inconsistent remedies. As already stated, the further proceedings under the order of remand might go on in the trial Court either because a party has not had sufficient time to file an appeal and obtain an order for a stay or because a stay of trial has been refused. Is it to be said in such a case that the party who attends the further trial of the suit without allowing the case to go for default against him takes his stand on it and precludes himself from appealing against the order of remand if the final decree happens to be passed? The trial after remand takes place pursuant to the direction of the appellate Court remanding the case without any reference to the inclinations of the parties. It is news to me that a person who pays the amount or surrenders

1. (1923) 45 M.L.J. 657 : L.R. 50 I.A. 301 : I.L.R. 46 Mad. 895 (P.C.).

possession of the property decreed precludes himself from appealing against the decree and yet this is what the argument for the respondents comes to. There is no question here of a choice between alternative and inconsistent or mutually exclusive remedies ; the litigant has a right of appeal against an order of remand ; he has a right also to contest the proceedings taken in the trial Court pursuant to the order of remand ; these are independent legal rights and the exercise of one such right is no bar to the exercise of the other. The aggrieved party is not even faced with alternative rights ; it is the same right that he wishes to agitate both in the appeal against the order of remand and at the further stages of the trial after the remand. He has not lost his right to have an appeal against an order of remand merely because he has contested the litigation in the lower Court after the remand.

I have so far discussed the matter with reference to the language of section 105, clause (2) and Order 43, rule 1, clause (u), Civil Procedure Code, and the general principles of law applicable to the case. I now turn to the authorities. In *Lakshmi* v. *Manidevi*[1], it was held by Sundara Aiyar and Phillips, JJ., that an appeal against an order of remand could be filed and heard even though a final decree consequential on the remand order had been passed. The learned Judges pointed out that a right or jurisdiction conferred by Statute could not be taken away or cut down except by express words or by necessary implication. They also held that if the order of remand was reversed on the appeal preferred against it, the subsequent decree or order which depended for its validity on the earlier order of remand would *ipso facto* cease to have any force. The previous decisions of this Court as well as three of the four decisions of the Calcutta High Court relied upon by Mack, J., were all considered by the learned Judges before they arrived at a conclusion contrary to that reached by Mack, J. The decision in *Lakshmi* v. *Manidevi*[1] was followed by another Bench of this Court in *Ramien* v. *Veerappudian*[2], where again the learned Judges declined to adopt the view of the Calcutta High Court and held that the right of a party to prefer an appeal against a preliminary decree was not lost by reason of the passing of a final decree before the appeal was presented. I do not see any difference between a preliminary decree and an order of remand so far as this question of appealability is concerned. In *Manicka Pillai* v. *Mahudam Bathummal*[3], Wallace, J., held in revision under section 115, Civil Procedure Code, that it was competent to this Court to set aside an order of the lower Court setting aside the dismissal of a suit for default of appearnce of the plaintiff, even though the suit had been tried and decreed by the trial Court after the date of the order setting aside the dismissal for default . Perhaps I would not have exercised my discretion in the same way as the learned Judge in the circumstances of that case. The decision, however, is an authority on the point that where an order is brought before this Court in revision or appeal, the mere fact that further proceedings have gone on in the Court below and have resulted in a final decree or order would not stand in the way of this Court interfering in revision or on appeal with the order brought up before it. If the High Court reverses the order of the lower Court the subsequent proceedings conducted in the trial Court which depend for their validity on the order which is set aside by this Court would also cease to have operation or legal effect. In *Arunachala Iyer* v. *Louis Dreyfus and Co*[4]., Ramesam and Cornish, JJ., followed *Ramien* v. *Veerappudian*[2], and observed that

> "it has always been held in this Court that an appeal against a preliminary order if allowed makes an appeal against a final order on the same grounds unnecessary though another appeal may have to be filed if it has reference to what happened after the preliminary order was passed."

In *Sundaram Chettiar* v. *Valliammal*[5], Beasley, C.J., and King, J., followed the principle of the decisions in *Lakshmi* v. *Manidevi*[1], and *Ramien* v. *Veerapudian*[2] and held that it was competent to a Division Bench of this Court hearing an appeal under clause 15 of the Letters Patent from an order of a

1. (1911) 21 M.L.J. 1063 : I.L.R. 37 Mad. 29.
2. (1912) 22 M.L.J. 217 ; I.L.R. 37 Mad. 455.
3. (1924) 48 M.L.J. 152.
4. (1927) 27 L.W. 267, 281.
5. (1934) 68 M.L.J. 16 : I.L.R. 58 Mad. 116.

single Judge declining to grant unconditional leave to defend a suit filed under the summary chapter of the Original Side Rules, to grant a stay of execution of the decree passed pursuant to the order declining to grant unconditional leave to defend. The learned Judges acted on the view that if the order refusing to grant unconditional leave to defend was found to be erroneous and was set aside on appeal, the result would be to render the decree passed as a consequence of the refusal of leave to defend ineffective, even though the decree itself had not been appealed against. The decisions of this Court cited above are binding upon me as they were binding on Mack, J. I would have directed the papers in this case to be placed before His Lordship the Chief Justice for directions as to the case being posted before a Division Bench if I entertained any doubt about the correctness of the previous decisions of this Court or the legal principles applicable to the case. I follow the previous decisions of this Court cited above and I regretfully differ from the ruling of Mack, J., in *Venkatarama Aiyar* v. *Unnamalai Ammal*[1].

The decisions of the Calcutta High Court on some of which Mack, J., purported to rely are by no means unanimous in their statement of the principle underlying their conclusion. In *Jatinga Valley Tea Co.* v. *Chera Tea Co.*,[2] which was an appeal against an order of remand, the High Court set aside an order of remand even though the suit had been tried and dismissed after the date of the order of remand. The Court held that the proceedings taken by the Court of first instance after the remand and pending the hearing of the appeal fell with the reversal of the order of remand by the High Court. Twenty years later came the decision in *Madhusudhan Sen* v. *Kaminikanta Sen*[3], relied upon by Mack, J. The Court held that if a party decided to avail himself of the privilege conferred by section 588 (28) [(corresponding to Order 43, rule (1), clause (*u*)] in relation to an order of remand, he ought to do so before the final disposal of the suit. It was further held that if the suit was disposed of, his only remedy was to appeal from the final decreee in the suit. The decision in *Madhusudan Sen* v. *Kaminikanta Sen*[3] was also applied by the Calcutta High Court to appeals from preliminary decrees preferred after the passing of final decree. It is unnecessary to examine the later Calcutta decisions relied upon by Mack, J., in view of the Full Bench decision of five Judges in *Taleb Ali* v. *Abdul Aziz*[4], holding that an appeal from a preliminary decree was competent even if a final decree had been made before the appeal was presented. It was further held that it was unnecessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree subsequently passed in order to maintain his appeal against the preliminary decree. This decision was perhaps not brought to the notice of my learned brother. I consider that the same rule should apply to an appeal against an order of remand.

A Full Bench of the Allahabad High Court dissented from the decisions of the Calcutta High Court relied upon by Mack, J., and held in *Uman Kunwari* v. *Jarbandhan*[5], that the fact the suit had been decided by the Court of first instance in compliance with an order of remand made under section 562, Civil Procedure Code, (Order 41, rule 23) was no bar to the filing of an appeal from an order of remand or to the hearing of such an appeal. In so doing, the learned Judges of the Full Bench followed the opinion of Edge, C.J., in *Rameshar Singh* v. *Sheodin Singh*[6]. Yet another Full Bench of the Allahabad High Court took the same view in *Kanhaiyalal* v. *Tribeni Sahai*[7]. The principle of these decisions is that where an order of remand is appealed against and that order set aside on appeal, the subsequent proceedings conducted in pursuance of the order of remand are considered to be subordinate and dependent proceedings liable to be superseded by the reversal of the order of remand which was the subject-matter of appeal before the superior tribunal. In *Gurmukh Singh* v. *Shiv Ram*[8], in *Wahidunnissa* v.

1. (1948) 2 M.L.J. 404.
2. (1885) I.L.R. 12 Cal. 45.
3. (1905) I.L.R. 32 Cal. 1023.
4. (1929) I.L.R. 57 Cal. 1013 (F.B.).
5. (1908) I.L.R. 30 All. 479.
6. (1889) I.L.R. 12 All. 510.
7. (1914) I.L.R. 36 All. 532 (F.B.).
8. (1935) I.L.R. 17 Lah. 53.

Dip Narain Pershad[1], in *Basawant Mallappa Raja* v. *Kallappa Virbhadrappa Motiwale*[2], and in *Madhaorao* v. *Eknathrao*[3], the other High Courts have taken the same view as this Court in *Lakshmi* v. *Manidevi*[4]. I am not prepared to disturb this settled rule.

On the merits I am of the opinion that the order of the lower appellate Court is perfectly justified in view of the wide language of Order 41, rule 23, Civil Procedure Code, as amended in Madras. Section 123 of the Transfer of Property Act requires that a gift of immoveable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 68 of the Indian Evidence Act requires that a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. There was an issue raised after the remand as to whether the deed of gift was properly and validly executed. The learned District Munsiff was of the opinion that the deed of gift did not require to be proved by the evidence of any attestor and that the evidence of the donee herself was sufficient to prove the deed of gift. Evidently this erroneous view of the learned District Munsiff influenced the course of the trial and the necessary evidence required by law was not placed before the Court. It must here be observed that no plea as regards the invalidity of the execution of the gift deed was raised when the suit was originally tried or on appeal when the order of remand was made. It is only among the issues raised in the suit after the order of remand that an issue as regards the validity of the gift was framed. In these circumstances it seems to me that the plaintiffs were misled by the absence of any specific plea in the written statement filed by the defendants, though having regard to the frame of the issue, the burden was cast upon them of proving the due execution of the gift deed. I hold that the appellate Court was justified in remanding the case for trial on issue (3) as regards the validity of the execution of the gift deed.

I therefore confirm the decision of the lower appellate Court and dismiss this Civil Miscellaneous Appeal with costs.

No leave.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Mohammad Ismail Maracair .. *Petitioner**

v.

Wazir Bi Bi Saheba .. *Respondent.*

Civil Procedure Code (V of 1908), Section 132 (1)—Scope—"Customs and manners of the country"—Meaning—Application by woman entitled to exemption from personal appearance for examination on commission—Considerations for grant of—Personal "appearance" and "personal attendance"—Distinction, if any.

"The customs and manners of the country" in section 132 (1) Civil Procedure Code, mean the customs and manners of the different communities and classes and sections of the people in the country. It may also be that according to the customs and manners of a particular locality, certain families, say of a noble rank, observe Gosha. But it is difficult to speak of the customs and manners of a particular lady. The question whether any woman falls within the category of women mentioned in section 132 (1) is really one of fact. Once that question of fact is decided and it is found that a particular woman falls within the class mentioned in section 132 (1), she is entitled to exemption from "personal appearance" in Court. The Code does not make any distinction between "appearance" and "attendance".

Salma Bi v. *Mahomed Ebrahim Sahib*, (1949) 2 M.L.J. 517, dissented from.

A commission to examine a person who falls within the class of women described in section 132 (1) should issue as a matter of course, almost as of right both when such a person is a party to a suit or petition as well as when she is a witness summoned by any of the parties to a suit, except when the application for her examination is made *mala fide* and would amount to an abuse of the

1. (1916) 1 Pat. L.J. 406.
2. A.I.R. 1938. Bom. 222.
3. I.L.R. 1947 Nag. 412.
4. (1911) 21 M.L.J. 1063 : I.L.R. 37 Mad. 29.

* C.R.P. No. 1205 of 1949. 21st April, 1950.

process of the Court. The court can refuse to grant the application of a woman who though she may belong to a community which observes gosha has herself abandoned the custom, to be examined on commission, when she is herself a party to the suit. In such a case there is no question of the court compelling her to give evidence. If she wants to support her case with her own evidence there is no reason why she should be given the indulgence which she does not deserve.

Though the custom of gosha is not being observed as strictly as before by the members of the Muslim community in the State of Madras it would be rash to hold that the custom has become obsolete and has been entirely abandoned by the Muslim community in the State of Madras.

Quære.—Whether a woman who belongs to a community which still observes gosha generally but who herself completely abandoned that custom is entitled to claim exemption from personal appearance ? A change in the mode of life of a particular lady can be taken into consideration in exercising discretion in the grant of a prayer from her for being examined on commission.

There could be no conceivable objection on the ground of an encroachment on the right conferred by section 132 (1), to the trial Judge himself, taking evidence, say, in the residence of such a woman. Where such a person submits to an examination on commission outside her residence, there is no reason why she should object to her being examined by the trial Judge himself in his chambers or in the Court room after excluding the general public from it altogether.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the Order of the Court of the District Munsiff of Vellore, in I. A. No. 909 of 1949, in O. S. No. 406 of 1948.

G. R. Jagadisa Aiyar for Petitioner.

A. Viswanatha Aiyar and D. C. Krishnamurthi for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is a petition for revising the Order of the District Munsiff of Vellore directing that the plaintiff in O. S. No. 406 of 1948 on his file be examined on commission in the house of the counsel for the defendant. An advocate was appointed commissioner to examine her. The suit was for the recovery of a jewel or its value, and the amount alleged to be due on a hand loan from the defendant. In the affidavit filed by the plaintiff in support of the application for the issue of a commission to examine her, she stated that she was a Muslim gosha lady and according to the law and custom among her people, she did not attend Court. She prayed that she may be examined at her residence. The defendant filed a counter-affidavit in which he did not deny the statement of the plaintiff that she was a purdanashin lady. The appliction was, however, opposed on the ground that its purpose was to substitute some one else in place of the plaintiff behind the purdah. It was suggested that the plaintiff should be made to appear in Court and depose before the Court after the work of the day was over, if necessary, in camera. The District Munsiff made the following cryptic order :

"It is alleged that the plaintiff might be examined on commission in the house of P. K. Chandrasekhara Aiyar, counsel for defendant. Therefore, Mr. N. Subramania Sastri, Advocate, is appointed as commissioner to examine plaintiff on commission".

The defendant seeks to have this order revised.

It is difficult to understand what the Munsiff meant in saying that it was alleged that the plaintiff might be examined in the house of the counsel for the defendant. Possibly he meant that it was agreed by both sides. If that be so, the defendant is not now entitled to complain and the petition must be dismissed. But the petition before us was argued on the assumption that there was no such agreement. When the revision petition came on for hearing before Krishnaswami Nayudu, J., the learned Judge considered that the revision petition raised a question which it was desirable should be decided by a Division Bench, because of the conflicting views taken by single Judges of this Court as to the scope and extent of the applicability of section 132 (1) of the Civil Procedure Code (hereinafter referred to as the Code).

Section 132 (1) of the Code runs thus :—

"Women who, according to the custom and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in Court".

The question whether any woman falls within the category of women mentioned in this provision is really a question of fact. Ordinarily Courts have not found

any difficulty in determining this question. But there are some observations in the recent decision of Mack, J., in *Salma Bi* v. *Mohammed Ebrahim Saheb*[1], to which I am constrained to refer, because they do not accord with the interpretation placed on the section by the Courts in India so far. The learned Judge said :

> "As I read section 132 (1) it is not the custom and manners or habits of a particular individual lady which has to be taken into consideration or the customs and manners of a family or a small community but the customs and manners of the country as a whole".

While I entirely agree that the habits of a particular lady cannot be taken into consideration, I fail to see how one can speak of the 'customs and manners' of a particular lady. I must dissent from the statement that the customs and manners of a family or a small community should never be taken into consideration. In a country like India the customs and manners prevailing in one part of the country differ largely from those prevailing in other parts. Even among persons of the same religious persuasion, such differences can be perceived. Taking the very case of gosha, this custom is very much prevalent even among Hindu women in Northern India, while it is practically absent in Southern India. In my opinion, the customs and manners of the country mean the customs and manners of the different communities and classes and sections of the people in the country. It may also be that according to the customs and manners of a particular locality, certain families, say of a noble rank, observe gosha. Actually we find that several of the decided cases relate to Hindu women of whom it cannot certainly be said that there is a universal custom of gosha obtaining throughout the country.

The learned Judge went on to say that customs and manners of a country go on changing. I agree. And I also agree that in order to decide whether a particular woman is or is not entitled to the benefit of section 132 (1), the customs and manners of the country prevailing at the time the Courts are called upon to apply it should be the criterion and not the customs and manners which might have prevailed years ago, but which had become completely obsolete. This construction of the section is not really a fresh judicial interpretation, but the only reasonable interpretation. The learned Judge found it difficult to be bound in the year 1949 by decisions dating from the year 1899 as regards the interpretation of section 132 of the Code. If he meant that a decision holding that a woman of a particular community ought not to be compelled to appear in pubilic according to the customs and manners of the country then prevailing cannot be binding for all time as regards women of that community, I agree. But once the question of fact is decided and it is found that a particular woman falls within the class mentioned in section 132 (1), I fail to see why we should disregard the interpretation of the scope of the provisions by the learned Judges in 1899.

I am also unable to agree with the learned Judge in taking judicial notice of a complete change in the cutstoms and manners of the Muslim community in the State of Madras as regards the custom of gosha. Though it is true that there are instances of Muslim ladies taking part in public life and following professions like law and medicine and though it is also true that the custom is not being observed as strictly as before, I think it would be rash to hold that the custom of gosha has become obsolete and has been entirely abandoned by the Muslim community in the State of Madras. Exceptions only emphasise the general rule and do not abrogate it. A difficult question might arise in the case of a woman who belongs to a community which still observes gosha generally, but who has herself completely abandoned that custom. Is such a woman entitled to the exemption under section 132 (1)? In *Solomon* v. *Jyotsna Ghosal*[2], Greaves, J., held that section 132 (1) would cover the case of a woman who belongs to a class and community observing purdah, but who has abandoned it. In the case before him there was evidence that the lady had entirely abandoned the protection of the purdah and was accustomed to freely appear in public and go about in society. Nevertheless, the learned Judge thought that she ought not to be compelled to appear in the witness-box, because

1. (1949) 2 M.L.J. 517.
2. (1918) I.L.R. 45 Cal. 492.

regard should be had to the feelings of her class. In *Kissen Lal Kankoria* v. *Purshottam Das Halwasiya*[1], a lady who was found as a fact to be a purdanashin lady was held to be entitled to the exemption under section 132 (1), though she did not observe strict purdah and often went out in public and even attended Court. But in *Balakeshwari Debi* v. *Jnanananda Banerjee*[2], a Division Bench was inclined to make an exception in the case of a lady who though she belonged to a community which observed gosha had herself completely abandoned that custom. They said :

> "No doubt a *purdanashin* lady may completely alter her mode of life and cease to be included in the statutory description of 'women, who, according to the customs and manners of the country, ought not to be compelled to appear in public.' When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132 ".

In the particular case before them, the learned Judge thought that mere previous appearance in public would not amount to such a transformation as to deprive her of the statutory protection. I refrain from expressing my final opinion on this point, because it does not arise in this case. Mr. Jagadisa Aiyar for the petitioner conceded that the respondent not only belonged to a community observing gosha, but also that she herself was a purdanashin lady. I am, however, inclined to take this circumstance, namely, a change in the mode of life of a particular lady, into consideration in exercising discretion in the grant of a prayer from her for being examined on commission.

There has been some divergence of opinion as to the meaning of the words 'personal appearance'. Lort-Williams, J., in *Bilasroy Serowgee, In re*[3], construed appearance to mean coming forth into view or becoming visible to the public gaze. He therefore understood section 132 (1) as providing that a lady who according to the customs and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in Court, *i.e.*, from being exposed to the public gaze, but such person was not exempt from attendance in court. This distinction of his between 'appearance' and 'attendance' has not found general acceptance, though Balgden, J., in *Mariambai* v. *Abdul Hamid*[4], was inclined to think that there was some difference between 'attendance' and 'appearance'. Personally I think that whatever difference there might be etymologically the Code does not appear to make any distinction between the two. In Order 26, rule (1), there is reference to persons exempted under the Code from 'attending the Court', obviously referring to persons coming within the classes mentioned in sections 132 and 133 who are exempted from appearance in Court (*vide* also *Kissen Lal Kankoria* v. *Purshottam Das Halwasiya*[1], *Sundar Devi* v. *Dattatraya Narhar*[5] and the observations of Mack, J., in *Salma Bi* v. *Mohammed Ebrahim Saheb*[6].)

The next question relates to the issue of a commission to examine a person who falls within the class of women described in section 132 (1). There is preponderance of authority that a commission should issue as a matter of course, almost as of right both when such a person is a party to a suit or petition as well as when she is a witness summoned by any of the parties to a suit. There are three decisions of single Judges of this Court taking this view, namely, *Vellai Nachiar* v. *A. K. R. M. M. Meiappa Chetti*[7] (Srinivasa Ayyangar, J.), C.R.P. No. 1345 of 1948 (Chandra Reddi, J.) and C.R.P. No. 1072 of 1948 (Raghava Rao, J.). In *Sundar Devi* v. *Dattatraya Narhar*[5], Niamat-ullah and Rachhpal Singh, JJ., held that the exemption from personal appearance under this section is a right which no court has power to refuse and applies to parties as well as witnesses and that it was a right of a purdanashin lady to say that if she is to be examined, her statement should be taken on commission. No reported case has been brought to our notice in which it has been held that the court can in the exercise of its discretion refuse to issue a commission to a woman falling within the exempted class, except of course, when the court is convinced that the application for her examination

1. (1941) I.L.R. 2 Cal. 155.
2. (1917) I.L.R. 45 Cal. 697.
3. (1929) I.L.R. 56 Cal. 865.
4. A.I.R. 1946 Bom. 340.
5. (1933) I.L.R. 55 All. 666.
6. (1949) 2 M.L.J. 517.
7. A.I.R. 1925 Mad. 905.

is made *mala fide* and would amount to an abuse of the process of the court. Personally speaking, I am inclined to make another exception. The Court can refuse to grant the application of a woman who though she may belong to a community which observes gosha has herself abandoned the custom, to be examined on commission, when she is herself a party to the suit. In such a case there is no question of the court compelling her to give evidence. If she wants to support her case with her own evidence there is no reason why she should be given the indulgence which she does not deserve and I may add that no decision has gone to the length of holding that the court cannot *permit* such a person to give evidence in court.

The question still remains if there cannot be found some way to enable the trial Judge at least to listen to the evidence of such a person without infringing her right under section 132 (1) of the Code. Obviously, when such a person submits to an examination on commission, she also submits to appearance (though under a purdah) before the commissioner appointed to take her evidence, counsel on either side and the parties, probably others instructing counsel. To this extent it is clear that she is willing to give evidence before strangers. If so, I fail to see why she should refuse to give evidence outside her residence before the same persons as in a commission except that the trial Judge would take the place of the commissioner. She cannot decline to be examined at any place other than of her own choice, *Khitipatiroy* v. *Dharani Mohan Mookerjee*[1]. As indicated in a recent judgment of the Bombay High Court in *Mariambi* v. *Abdul Hamid*[2], there could be no conceivable objection on the ground of an encroachment on the right conferred by section 132 (1) to the trial Judge himself taking evidence, say, in the residence of such a person. In the case before us, the respondent is apparently quite willing to go to the house of the counsel for the petitioner and give evidence before a commissioner. On principle I see no difference between the house of the opponent's counsel and the chambers of the trial Judge. In both cases the lady has to leave her house and go to another place. The general public can be shut out from the Judge's Chambers as effectively as, if not more than from the residence of the opposing counsel. This would be equally so even if the examination takes place in the court room itself, but after excluding the general public from it altogether. During the examination except the trial Judge and officers of Court and the counsel and parties, others would not be present. There is virtually no difference between such an examination and an examination on commission. But such a course would have the great advantage of enabling the trial Judge to listen to the deposition. I venture to think that such a course would not infringe the provision of section 132 (1) of the Code.

Coming to the present case, I am not certain if the order of the lower court was made by consent. If so, it must stand. Otherwise I modify the order of the lower court by directing the respondent to be examined either in the chambers of the Munsif or in the court room after excluding the members of the general public.

Viswanatha Sastri, J.—I entirely agree.

K.S. *Appeal dismissed.*

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1. (1921) I.L.R. 48 Cal. 448.
2. A.I.R. 1946 Bom. 340.

[THE SUPREME COURT OF INDIA].

(Under Article 32 of the Constitution for a Writ of Prohibition and *Certiorari*).

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, AND S. R. DAS, JJ.

Romesh Thappar .. *Petitioner**

v.

The State of Madras .. *Opposite Party.*

Madras Maintenance of Public Order Act (XXIII of 1949), section 9 (1-A)—Validity—Order under section 9 (1-A) prohibiting entry into and circulation in State of Madras of a weekly journal—How far violation of fundamental rights of freedom of speech and expression under Article 19 of the Constitution of India—Remedy of citizen—The Constitution, articles 32 and 226—Respective scope of jurisdiction of Supreme Court and High Courts—Direct approach to Supreme Court without resort to High Court—Permissibility.

On the question whether an order under section 9 (1-A) of the Madras Maintenance of Public Order Act prohibiting entry into and circulation in the State of Madras of a Weekly Journal violates the fundamental rights of freedom of speech and expression guaranteed under Article 19 of the Constitution of India,

Held (Fazl Ali, J., dissenting) : Unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19 of the Constitution although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. It follows that under section 9 (1-A) of the Madras Maintenance of Public Order Act, 1949, which authorises imposition of restrictions for the wide purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under clause (2) of Article 19 and is therefore void and unconstitutional.

Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the Constitutional limits as it is not severable. So long as the possibility of its being applied to purposes not sanctioned by the Constitution cannot be ruled out it must be held to be wholly unconstitutional and void. In other words clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved an enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

An order under section 9 (1-A) of the Madras Maintenance of Public Order Act prohibiting the entry and circulation of the petitioner's journal in the State of Madras must be quashed.

Freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation.

Article 32 of the Constitution of India does not merely confer power on the Supreme Court as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III of the Constitution or for any other purpose as part of its general jurisdiction. In that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights. A citizen can resort directly for such relief to the Supreme Court in the first instance and need not resort to the High Court under section 226 of the Constitution.

Per Fazl Ali, J.—Anything which affects public tranquillity within the State or Province will also affect public order and the State Legislature is therefore competent to frame laws on matters relating to public tranquillity and public order. Public disorders and disturbances of public tranquillity do undermine the security of the State and the Madras Maintenance of Public Order Act fulfils the requirements of the Constitution.

C. R. Pattabhiraman, Advocate, Supreme Court, for Petitioner.

K. Rajah Ayyar, Advocate-General of Madras (*Ganapathi Ayyar*, Advocate, Supreme Court, with him) for the Opposite Party.

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* Petition No. XVI of 1950. 26th May, 1950.

The Court delivered the following

JUDGMENTS : *Fazl Ali, J.*—For the reasons given by me in *Brij Bhushan and another* v. *The State*[1], which practically involves the same question as is involved in this case, I hold that the reliefs sought by the petitioner cannot be granted. In this view, I would dismiss this petition, but I should like to add a few observations to supplement what I have said in the other case.

It appears to me that in the ultimate analysis the real question to be decided in this case is whether " disorders involving menace to the peace and tranquillity of the Province " and affecting " public safety " will be a matter which undermines the security of the State or not. I have borrowed the words quoted within inverted commas from the preamble of the Act which shows its scope and necessity and the question raised before us attacking the validity of the Act must be formulated in the manner I have suggested. If the answer to the question is in the affirmative, as I think it must be, then the impugned law which prohibits entry into the State of Madras of " any document or class of documents." for securing public safety and maintenance of public order should satisfy the requirements laid down in article 19 (2) of the Constitution. From the trend of the arguments addressed to us, it would appear that if a document is seditious, its entry could be validly prohibited, because sedition is a matter which undermines the security of the State ; but if, on the other hand, the document is calculated to disturb public tranquillity and affect public safety, its entry cannot be prohibited, because public disorder and disturbance of public tranquillity are not matters which undermine the security of the State. Speaking for myself, I cannot understand this argument. In *Brij Bhushan and another* v. *The State*[1], I have quoted good authority to show that sedition owes its gravity to its tendency to create disorders and an authority on criminal law like Sir James Stephen has classed sedition as an offence against public tranquillity. If so, how could sedition be a matter which would undermine the security of the State and public disorders and disturbance of public safety will not be such a matter ? It was argued that a small riot or an affray will not undermine the security of the State, but to this line of argument there is a two-fold answer :—

(1) The Act, as its preamble shows, is not intended for petty disorders but for disorders involving menace to the peace and tranquillity of the Province. (2) There are degrees of gravity in the offence of sedition also and an isolated piece of writing of mildly seditious character by one insignificant individual may not also, from the layman's point of view, be a matter which undermines the security of the State, but that would not affect the law which aims at checking sedition. It was also said that the law is it stands may be misused by the State executive, but misuse of the law is one thing and its being unconstitutional is another. We are here concerned with the latter aspect only. I shall not pursue the matter further as I have said enough on the subject in the connected case.

Patanjali Sastri, J. (*Kania, C.J., Mehrchand Mahajan, Mukherjea and Das, JJ., agreeing*).—The petitioner is the printer, publisher and editor of a recently started weekly journal in English called Cross Roads printed and published in Bombay. The Government of Madras, the respondents herein, in exercise of their powers under section 9 (1-A) of the Madras Maintenance of Public Order Act, 1949 (hereinafter referred to as the impugned Act) purported to issue an order No. MS. 1333, dated 1st March, 1950, whereby they imposed a ban upon the entry and circulation of the journal in that State. The order was published in the Fort St. George Gazette and the notification ran as follows :

" In exercise of the powers conferred by section 9 (1-A) of the Madras Maintenance of Public Order Act, 1949 (Madras Act XXIII of 1949) His Excellency the Governor of Madras, being satisfied that for the purpose of securing the public safety and the maintenance of public order, it is necessary so to do, hereby prohibits, with effect on and from the date of publication of this order in the Fort St. George Gazette the entry into or the circulation, sale or distribution in the State of Madras or any part thereof of the newspaper entitled CROSS ROADS an English weekly published at Bombay."

1. (1950) S.C.J. 424.

The petitioner claims that the said order contravenes the fundamental right of the petitioner to freedom of speech and expression conferred on him by Art. 19 (1) (*a*) of the Constitution and he challenges the validity of section 9 (1-A) of the impugned Act as being void under Art. 13 (1) of the Constitution by reason of its being inconsistent with his fundamental right aforesaid.

The Advocate-General of Madras appearing on behalf of the respondents raised a preliminary objection, not indeed to the jurisdiction of this Court to entertain the application under Art. 32, but to the petitioner resorting to this Court directly for such relief in the first instance. He contended that, as a matter of orderly procedure, the petitioner should first resort to the High Court at Madras which under section 226 of the Constitution has concurrent jurisdiction to deal with the matter. He cited criminal revision petitions under section 435 of the Criminal Procedure Code, applications for bail and applications for transfer under section 24 of the Civil Procedure Code as instances where, concurrent jurisdiction having been given in certain matters to the High Court and the Court of a lower grade, a rule of practice had been established that a party should proceed first to the latter Court for relief before resorting to the High Court. He referred to *Emperor* v. *Bishshwar Prasad Sinha*[1], where such a rule of practice was enforced in a criminal revision case, and called our attention also to certain American decisions *Urquhart* v. *Brown*[2] and *Hooney* v. *Kolohan*[3] as showing that the Supreme Court of the United States ordinarily required that whatever judicial remedies remained open to the applicant in Federal and State Courts should be exhausted before the remedy in the Supreme Court—be it *habeas corpus* or *certiorari*—would be allowed. We are of opinion that neither the instances mentioned by the learned Advocate-General nor the American decisions referred to by him are really analogous to the remedy afforded by Art. 32 of the Indian Constitution. That Article does not merely confer power on this Court, as Art. 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. No similar provision is to be found in the Constitution of the United States and we do not consider that the American decisions are in point.

Turning now to the merits, there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation.

"Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value"—Ex parte *Jackson*[4].

See also *Lovell* v. *City of Griffin*[5]. It is therefore perfectly clear that the order of the Government of Madras would be a violation of the petitioner's fundamental right under Article 19 (1) (*a*), unless section 9 (1-A) of the impugned Act under which it was made is saved by the reservations mentioned in clause (2) of Article 19 which (omitting immaterial words regarding laws relating to libel, slander, etc., with which we are not concerned in this case) saves the operation of any "existing law in so far as it relates to any matter which undermines the security of, or tends to overthrow, the State". The question accordingly arises whether the impugned Act, in so far as it purports by section 9 (1-A) to authorise the Provincial Government

1. (1933) I.L.R. 56 All. 158 (F.B.).
2. 205 U.S. 179.
3. 294 U.S. 103.
4. 96 U.S. 727.
5. 303 U.S. 444.

"for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof of any document or class of documents" is a "law relating to any matter which undermines the security of or tends to overthrow the State".

The impugned Act was passed by the Provincial Legislature in exercise of the power conferred upon it by section 100 of the Government of India Act, 1935, read with Entry No. 1 of List II of the Seventh Schedule to that Act, which comprises among other matters, "public order". Now "public order" is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the government which they have instituted. Although section 9 (1-A) refers to "securing the public safety" and "the maintenance of public order" as distinct purposes, it must be taken that "public safety" is used as a part of the wider concept of public order, for, if public safety were intended to signify any matter distinct from and outside the content of the expression "public order", it would not have been competent for the Madras Legislature to enact the provision so far as it relates to public safety. This indeed was not disputed on behalf of the respondents. But it was urged that the expression "public safety" in the impugned Act, which is a statute relating to law and order, means the security of the Province, and, therefore, "the security of the State" within the meaning of Article 19 (2) as "the State" has been defined in Article 12 as including, among other things, the Government and the Legislature of each of the erstwhile Provinces. Much reliance was placed in support of this view on *Rex* v. *Wormwood Scrubbs Prison*[1], where it was held that the phrase "for securing the public safety and the defence of the realm" in section 1 of the Defence of the Realm (Consolidation) Act, 1914, was not limited to securing the country against a foreign foe but included also protection against internal disorder such as a rebellion. The decision is not of much assistance to the respondents as the context in which the words "public safety" occurred in that Act showed unmistakably that the security of the State was the aim in view. Our attention has not been drawn to any definition of the expression "public safety," nor does it appear that the words have acquired any technical signification as words of art.

"Public safety" ordinarily means security of the public or their freedom from danger. In that sense, anything which tends to prevent dangers to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context. In the classification of offences in the Indian Penal Code, for instance, Chapter XIV enumerates the "offences affecting the public health, safety, convenience, decency and morals," and it apparently includes rash driving or riding on a public way (section 279) and rash navigation of a vessel (section 280), among others, as offences against public safety, while Chapter VI lists waging war against the Queen (section 121), sedition (section 124-A), etc., as "offences against the State", because they are calculated to undermine or affect the security of the State, and Chapter VIII defines "offences against the public tranquillity" which include unlawful assembly (section 141), rioting (section 146), promoting enmity between classes (section 153-A), affray (s. 159), etc. Although in the context of a statute relating to law and order "securing public safety" may not include the securing of public health, it may well mean securing the public against rash driving on a public way and the like, and not necessarily the security of the State. It was said that an enactment which provided for drastic remedies like preventive detention and ban on newspapers must be taken to relate to matters affecting the security of the State rather than trivial offences like rash driving or an affray. But whatever ends the impugned Act may have been intended to subserve, and whatever aims its framers may have had in view, its application and scope cannot, in the absence of limiting words in the statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to endanger the

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1. (1920) 2 K.B. 305.

security of the State. Nor is there any guarantee that those authorised to exercise the powers under the Act will in using them discriminate between those who act prejudicially to the security of the State and those who do not.

The Government of India Act, 1935, nowhere used the expression "security of the State" though it made provision under section 57 for dealing with crimes of violence intended to overthrow the Government. While the administration of law and order including the maintenance of public order was placed in charge of a Minister elected by the people, the Governor was entrusted with the responsibility of combating the operation of persons who "endangered the peace or tranquillity of the province" by committing or attempting to commit "crimes of violence intended to overthrow the Government". Similarly, Art. 352 of the Constitution empowers the President to make a Proclamation of Emergency when he is satisfied that the

"security of India or any part of the territory thereof is threatened by war or by external aggression or by internal disturbance".

These provisions recognise that disturbance of public peace or tranquillity may assume such grave proportions as to threaten the security of the State.

As Stephen in his Criminal Law of England[1] observes:

"Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other and are not capable of being marked off by perfectly defined boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it."

Though all these offences thus involve disturbances of public tranquillity and are in theory offences against public order, the difference between them being only a difference of degree, yet for the purpose of grading the punishment to be inflicted in respect of them they may be classified into different minor categories as has been done by the Indian Penal Code. Similarly, the Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Article 19 (1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgment of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression; while the right of peaceable assembly [sub-clause (*b*)] and the right of association [sub-clause (*c*)] may be restricted under clauses (3) and (4) of Article 19 in the interests of "public order", which in those clauses includes the security of the State. This differentiation is also noticeable in Entry No. 3 of List III (Concurrent List) of the Seventh Schedule, which refers to the "Security of a State" and "Maintenance of Public Order" as distinct subjects of legislation. The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance treating for this purpose differences in degree as if they were differences in kind.

It is also worthy of note that the word "sedition" which occurred in Article 13 (2) of the draft Constitution prepared by the Drafting Committee was deleted before the Article was finally passed as Article 19 (2). In this connection it may be recalled that the Federal Court had, in defining sedition in *Niharendu Dutt Majumdar* v. *The King-Emperor*[2], held that:

"The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency",

but the Privy Council overruled that decision and emphatically reaffirmed the view expressed in *Tilak's case*[3] to the effect that

1. Vol. II, p. 242.
2. (1942) F.C.R. 38.
3. (1897) I.L.R. 22 Bom. 112.

"the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small." (*King-Emperor* v. *Sadashiv Narayan Bhalerao*[1].)

Deletion of the word 'sedition' from the draft Article 13 (2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security or tend to overthrow the State. It is also significant that the corresponding Irish formula of "undermining the public order or the authority of the State" [Article 40 (6) (i) of the Constitution of Eire, 1937], did not apparently find favour with the framers of the Indian Constitution. Thus, very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was

"the leading spirit in the preparation of the First Amendment of the Federal Constitution", that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." (Quoted in *Near* v. *Minnesotta*[2].)

We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. It follows that section 9 (1-A) which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under clause (2), and is therefore void and unconstitutional.

It was, however, argued that section 9 (1-A) could not be considered wholly void, as, under Article 13 (1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. In so far as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision was covered by clause (2) of Article 19 and must, it was said, be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

The application is therefore allowed and the order of the respondents prohibiting the entry and circulation of the petitioner's journal in the State of Madras is hereby quashed.

Agent for Petitioner : *K. J. Kale.*

Agent for Opposite Party : *P. A. Mehta.*

G.R./V.S. *Application allowed.*

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1. (1947) 1 M.L.J. 343 : L.R. 74 I.A. 89 : I.L.R. 1947 Bom. 110 (P.C.).
2. 283 U.S. 607, 717-8.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Chukka Annam Naidu (died) and others .. *Appellants**

v.

Kolachala Apparao and others .. *Respondents.*

Madras Estates Land (Third Amendment) Act (XVIII of 1936), sections 8 (5) and 6 (1), Explanation (2)—Scope and effect—Inamdar getting decree for eviction on 7th April, 1933 and after obtaining possession leasing the lands to defendants for one year ending 15th March, 1934—Tenants continuing in possession—If acquire occupancy rights—Inamdar's right to kudivaram under section 8 (5).

An inamdar in an agraharam which became an estate by virtue of the Madras Estates Land (Third Amendment) Act, 1936, obtained a decree for eviction in respect of the suit lands on 7th April, 1933 and obtained delivery of them on 23rd May, 1933. He let those lands on lease to the defendants by a lease dated 22nd June, 1933. The period of lease was one year ending 15th March, 1934. The defendants however continued to remain in possession thereafter. In 1937 the inamdar gave a notice to quit and eventually filed a suit for eviction on 24th April, 1944. The defence was that the defendants had acquired occupancy rights under the Madras Estates Land (Third Amendment) Act, 1936 and therefore the suit was not maintainable. Negativing the defence,

Held : It cannot be held that on any date before the coming into force of Madras Act XVIII of 1936 the defendants had acquired any occupancy right by virtue of Explanation (2) to section 6 (1) of the Act which was to come into force from 31st October, 1936. It is wrong to assume that the effect of section 6 (1), Explanation (2) is to confer permanent occupancy rights on tenants as and from 30th June, 1934 or such other later date when the tenant was admitted into possession. The Explanation only lays down who are the tenants who would be entitled to the benefits of Madras Act XVIII of 1936. This does not mean that they are deemed to have obtained rights of occupancy from 30th June 1934. They obtained such rights only from 31st October, 1936.

Accordingly the inamdar is entitled to the rights declared by section 8 (5) of the Act of 1936 as the kudivaram interest has been recognised before the 1st November, 1933, to vest in the inamdar by the eviction decree.

Korada Atchanna v. *Jayanti Seetharamaswami*, (1950) 1 M.L.J. 114, disapproved and *Demudu* v. *Papayya Raju*, (1943) 2 M.L.J. 657, approved.

Appeal against the decree of the Court of the Subordinate Judge of Srikakulam in A.S. No. 185 of 1945 preferred against the decree of the Court of the District Munsiff of Parvathipur in O.S. No. 182 of 1944.

C. V. Dikshatulu for Appellants.

S. Ramamurthi for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This second appeal originally came on before Panchapagesa Sastry, J., who referred it to a Division Bench in view of the conflict of decisions between *Demudu* v. *Papayya Raju*[1] and *Korada Atchanna* v. *Jayanti Seetharamaswami*[2].

This second appeal arises out of a suit for evicting certain tenants in occupation of lands in an agraharam which became an estate by virtue of the Madras Estates Land (Third Amendment) Act, 1936, which amended clause (*d*) of section 3 (2) of the Madras Estates Land Act (I of 1908). The only facts necessary for understanding the point which falls for decision are as follows :—The first respondent's father, an inamdar, obtained a decree for eviction in respect of the suit lands on 7th April, 1933 and obtained delivery of them on 23rd May, 1933. He let the lands to the defendants by a lease, dated 22nd June, 1933. The period of lease was one year ending 15th March, 1934. The defendants, however, continued to remain in possession thereafter. In 1937, the inamdar gave a notice to quit and eventually filed the suit for eviction on 24th April, 1944. The main defence of the tenants was that they had acquired occupancy rights under the Madras Estates Land (Third Amendment) Act, 1936 and therefore the suit for eviction was not maintainable. Both the courts decreed the suit and defendants 1 and 2 are the appellants.

* S.A. No. 850 of 1947. 6th April, 1950.

1. (1943) 2 M.L.J. 657. 2. (1950) 1 M.L.J. 114.

The relevant provisions which have a material bearing on the question to be decided are section 6, sub-section (1), Explanations (1) and (2) and section 8, sub-section (5) of the Madras Estates Land Act (I of 1908) as amended by Act XVIII of 1936, *i.e.*, the Madras Estates Land (Third Amendment) Act, 1936. Section 6 (1) declares that

> "Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding".

Explanation (1) runs thus—

> "For the purposes of this sub-section, the expression ' every ryot now in possession ' shall include every person who, having held land as a ryot, continues in possession of such land at the commencement of this Act".

Ordinarily the word " now " in sub-section (1) and the words " at the commencement of this Act " must be taken to refer to the date of the passing of Madras Act I of 1908. Explanation (2) became necessary, because by the provisions of Madras Act XVIII of 1936 certain inam villages, which did not fall within the definition of an estate originally contained in Madras Act I of 1908, became estates by virtue of the new provisions. It was necessary to provide for a different construction of the words " now " and " at the commencement of this Act " in relation to such inam villages. Explanation (2), therefore, declares that the expressions " now " and " commencement of this Act " in sub-section (1) and Explanation (1) shall be construed as meaning the thirtieth day of June, 1934, and the expression " hereafter " in the sub-section shall be construed as meaning the period after the thirtieth day of June, 1934. Madras Act XVIII of 1936 came into force on 31st October, 1936. But for reasons which need not detain us now, the Legislature took a date prior to the date of the coming into force of that Act as the material date to denote the tenants in occupation of the lands in such villages who would be entitled to permit rights of occupancy.

It will be noticed that sub-section (1) of section 6 commences with the words " subject to the provisions of this Act " and the provisions of section 8 (5) are to take effect notwithstanding anything contained in the Act. That sub-section provides that

> "If before the first day of November, 1933, the landholder has obtained in respect of any land in a village which became an estate by virtue of Act XVIII of 1936 a final decree or order of competent Civil Court".

Declaring that the tenant has no occupancy right in such land, the landholder shall, if the land is not private land, have the right for a period of 12 years from the commencement of Madras Act XVIII of 1936, *i.e.*, from 31st October, 1936, of admitting any person to the possession of such land on such terms as may be agreed upon between them, provided also that

> "no tenant has acquired any occupancy right in such land before the commencement of the Madras Estates Land (Third Amendment) Act, 1936".

It is this last condition that has given rise to a difference of opinion between Horwill, J. and Viswanatha Sastri, J. The construction which found favour with Viswanatha Sastri, J., in *Korada Atchanna* v. *Jayanti Seetharamaswami*[1] was that the landholder would not have the rights declared under that sub-section against tenants who were in possession or who might have been admitted into possession on and after the 30th day of June, 1934, and before the 30th October, 1936, *i.e.*, the commencement of Madras Act XVIII of 1936. The reasoning of the learned Judge is that though the Amending Act came into force on 31st October, 1936 and its operation commenced on that date, still, section 6, Explanation (2) of that Act (*sic*) gives it retrospective operation from 30th June, 1934, in respect of one important matter, namely, the accrual of occupancy rights. In the case before him, the tenant had been let into possession of the land on 26th June, 1936. Speaking of such a tenant the learned Judge says :

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1. (1950) 1 M.L.J. 114.

"In the present case, it could not be said that the tenant had not acquired occupancy rights in the land before the commencement of the Amending Act XVIII of 1936, *i.e.*, 31st October, 1936, because Explanation (2) to section 6 which, by express declaration, operates retrospectively from 30th June, 1934, clothed him with a right of occupancy as from 26th June, 1936, the date when he was admitted to possession by the landholder. The tenant, therefore, had acquired occupancy rights before the commencement of the Amending Act XVIII of 1936, as a result of the provision in that very enactment embodied as Explanation (2) to section 6."

With great respect to the learned Judge we are not in agreement with this construction of section 8 (5) or of Explanation (2) to section 6 (1). "Before the commencement of the Madras Estates Land (Third Amendment) Act, 1936," can mean only before 31st October, 1936. It is impossible to give an earlier date, because that Act did not commence to have operation before that date. This much was also conceded by Mr. Dikshatulu, the learned counsel who appeared for the appellant before us. Now the only question is whether before the date, *i.e.*, before 31st October, 1936, it could be said that a tenant has acquired any occupancy right, because he was in possession on and after 30th June, 1936. The only provision under which it is contended that the tenant has acquired such rights is a provision contained in that very Act which did not come into force till 31st October, 1936. Therefore it follows that the tenant did not acquire any right prior to the commencement of that Act under a provision of that Act which did not exist at the time. In other words it cannot be held that on any date before the coming into force of Madras Act XVIII of 1936 he had acquired any occupancy right by virtue of a provision in that Act which was to come into force. With due deference to the learned Judge Viswanatha Sastri, J., we think that it is wrong to assume that the effect of section 6 (1), Explanation (2) is to confer permanent occupancy rights on tenants as and from 30th June, 1934, or such other later date when the tenant was admitted into possession. There is nothing in Explanation (2) which says anything of the sort. It only lays down who are the tenants who would be entitled to the benefits of Madras Act XVIII of 1936. It helps us to ascertain the class of such tenants. They are ryots who were in possession on 30th June, 1934, and ryots who had been admitted subsequently and continued in possession. This does not mean that they are deemed to have obtained rights of occupancy from 30th June, 1934. They obtained such rights only from 31st October, 1936. It follows therefore that such tenants cannot be deemed to be tenants who have acquired occupancy rights before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, within the meaning of section 8 (5) of the Act. Horwill, J., took practically the same view which we are taking in *Demudu* v. *Papayya Raju*[1], though the way in which he put his view is slightly different. The learned Judge observed :

"There seems to me no doubt when the Legislature spoke of the tenant acquiring occupancy right during the period between passing of the final decree and the commencement of the Act they were referring to an acquisition of occupancy right otherwise than under the Act * * * * The Legislature must have intended by this sub-rule to except from the general operation of section 6 all cases where the landholder had obtained a decree prior to 1st November, 1933, unless the tenant subsequent to the passing of the final decree had acquired occupancy right independently of the Act."

The dates which occur in section 6 (1), Explanation (2) and section 8 (5) have a meaning and significance in relation to a prior Act, namely, Madras Act VIII of 1934. 30th June, 1934, happens to be the date on which that Act became law. Section 127 (2) of that Act was as follows :

"No tenant in possession on the 1st day of November, 1933, of any land in an inam village, not being an estate within the meaning of sub-clause (*d*) of clause (2) of section 3 of the said Act as amended by this Act, or admitted by the inamdar to possession of any such land subsequent to the said date shall be liable to be ejected until the 1st day of November, 1936 and all proceedings in ejectment of any such tenant and all proceedings involving a decision whether or not the inamdar has the kudivaram right in such land, shall be stayed until the 1st day of November, 1936".

The proviso to this sub-section is the forerunner to section 8 (5) which was inserted by Act XVIII of 1936. It runs thus :

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1. (1943) 2 M.L.J. 657.

"Provided that nothing contained in this sub-section shall apply to any land the kudivaram interest in which has been declared or recognised before the 1st day of November, 1933, to vest in the inamdar by a decree or order of a competent Court which has become final."

It is therefore clear that the rights of an inamdar which had ripened into a final decree or order of a competent Court were intended to prevail over the rights which the Legislature was conferring for the first time on tenants of inam villages which became estates by virtue of Madras Act XVIII of 1936. Section 8 (5) declared definitely what the rights of such inamdars were.

This second appeal must therefore be dismissed with costs of the first respondent.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

V. S. Shanmuga Mudaliar .. *Petitioner.**

Stamp Act (II of 1899)—*Board of Revenue—Revision against order of Revenue Divisional Officer levying stamp duty and penalty on a document—Board if bound to give opportunity to petitioner to be orally heard—Writ of* certiorari *to quash order made without oral hearing—Cannot issue—Mandamus to Board to refer question of liability to stamp duty—If can issue.*

There is nothing in the Stamp Act or in the rules framed thereunder which enjoins on the Board of Revenue the duty to give an oral hearing to a person who invokes their revisional jurisdiction. All that *quasi* judicial Tribunals like the Board of Revenue have to do is to give sufficient opportunity to the persons who approach them for the exercise of their jurisdiction to state their case. Where the petitioner has stated all his grounds of objection to the order of the Revenue Divisional Officer (levying stamp duty and penalty on a document), in his revision petition to the Board of Revenue, it cannot be said that the order of the Board dismissing the petition without an oral hearing is contrary to the principles of natural justice. A writ of *certiorari* to quash such an order cannot therefore be issued.

Under section 57 of the Stamp Act it is left to the discretion of the Board to refer or not to refer any question as to the stamp duty payable on a document. A writ of mandamus therefore to the Board to refer the question of liability of the document to a stamp duty cannot issue from the High Court as it cannot be said that the Board has failed to exercise any "statutory duty".

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records and papers from the Board of Revenue in B. P. No. 2096, dated 4th April, 1950, and quashing the order of rejection of the revision petition against the order of the R. D. O. Cheyyar in R. O. F. No. 6657 of 1949, dated 19th September, 1949, levying stamp duty of Rs. 922-8-0 and a penalty of Rs. 1,845 aggregating to Rs. 2,767-8-0 contrary to law and rules of natural justice or to issue a writ of mandamus directing the Revenue Board to refer the question raised, namely, the liability of the document to stamp duty as a partition deed, to the High Court, under section 57 of the Indian Stamp Act.

N. R. Raghavachariar for Petitioner.

The Order of the Court was made by

The Chief Justice.—In this application the petitioner seeks both for a writ of *certiorari* and for a writ of mandamus. The *certiorari* is sought to quash the order of the Board of Revenue refusing to interfere on behalf of the petitioner with the order of the Revenue Divisional Officer, Cheyyar, levying stamp duty and penalty on a document which the officer held to be a partition deed. The only ground on which this writ is sought is that the Board did not give an opportunity to the petitioner to be orally heard. There is nothing in the Act or in the Rules framed thereunder which enjoins on the Board the duty to give an oral hearing to a person who invokes their revisional jurisdiction. All that *quasi* judicial Tribunals like the Board of Revenue have to do is to give sufficient opportunity to the persons who approach them for the exercise of their jurisdiction to state their case, *Local Government Board* v. *Alridge*[1]. This opportunity has been given

*C.M.P. No. 3877 of 1950. 19th April, 1950.

1. (1915) A.C. 120.

to the petitioner, because presumably he has stated all his grounds of objection to the order of the Revenue Divisional Officer in his revision petition. He is not entitled as of right to be heard and it cannot be said that the order of the Board passed without hearing him is contrary to the principles of natural justice. We must therefore refuse to issue a writ of *certiorari* to quash the order.

There is also a prayer for the issue of a writ of mandamus to refer the question of the liability of the document to stamp duty to this Court under section 57 of the Indian Stamp Act. Before such a writ can issue, it must be established that the Board of Revenue has failed to perform a duty which was incumbent on it under the statute. Under section 57 it is left to the discretion of the Board to refer or not to refer any question as to the stamp duty payable on a document. It cannot therefore be said that the Board has failed to exercise any statutory duty. A writ of mandamus cannot therefore issue from this Court.

The application is therefore dismissed.

K. S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

SP. RM. Ramaswami Chettiar .. *Petitioner**

v.

SP. RM. SP. Ramanathan Chettiar and others .. *Respondents.*

Constitution of India (1950), *Articles* 135 133, *and* 134—*Scope—Subject-matter of judgment of High Court delivered before the commencement of Constitution of over Rs.* 10,000 *but less than Rs.* 20,000 *in value—Leave to appeal to Supreme Court after commencement of Constitution—Right to.*

When a question arises as to whether an appeal lies to the Supreme Court against a judgment of the High Court unless the Constitution confers such a right no such appeal would lie.

Under the provisions of the Constitution of India an appeal lies against the judgment and decree of the High Court delivered prior to the commencement of the Constitution if an appeal lay to the Federal Court having regard to the provisions of sections 109 and 110 and Order 45 of the Code of Civil Procedure.

"Matter" in Article 135 of the Constitution of India is a word of wide connotation. It may include subject-matter not dealt with by Articles 133 and 134 but governed by specific Acts in regard to which appeals lay to the Federal Court immediately before the commencement of the Constitution. But there is no reason to exclude from its operation subject-matter below the pecuniary limits prescribed under Article 133 of the Constitution if the jurisdiction and powers in relation to that matter were exercised by the Federal Court immediately before the commencement of the Constitution. It would certainly be a subject-matter in regard to which the provisions of Article 133 or 134 do not apply.

Petition under sections 109 and 110 and Order 45, rules 2, 3, 7 and 8, Civil Procedure Code and under section 3 of Act I of 1948 praying that the High Court will be pleased to grant leave to the petitioner herein to appeal to the Federal Court of India against the judgment and decree of the High Court, Madras, in Appeal No. 451 of 1945, preferred against the decree of the Court of the Subordinate Judge of Sivaganga in O.S. No. 1 of 1944.

G. R. Jagadesa Iyer for Petitioner.

A. Sundaram Iyer for *M. Natesan* for Respondents.

The Order of the Court was made by

Subba Rao, J.—This is an application for leave to appeal to the Supreme Court. The judgment of the High Court was delivered on 1st December, 1948. On 19th April, 1949, the application for leave to appeal to the Federal Court was filed under sections 109, 110 and Order 45, rule 2, Civil Procedure Code, and section 3 of Act I of 1948. By the decree of the High Court, the judgment of the Subordinate Judge was reversed. Admittedly, the value of the subject-matter in the suit as well

*C.M.P. No. 4729 of 1949. 29th March, 1950.

as on appeal to the Federal Court was more than Rs. 10,000. But for the Constitution of India, the applicant had a right to appeal to the Federal Court under sections 109 and 110, Civil Procedure Code, subject to a certificate under Order 45, Civil Procedure Code, to the effect that the requirements of section 110 were complied with. The learned counsel for the respondent based his objection mainly on the ground that as the subject-matter was below Rs. 20,000 no appeal lay to the Supreme Court under Article 137 of the Constitution of India (hereinafter referred to as the Constitution). The relevant provisions of the Code may be extracted :

"Section 109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India and to the provisions hereinafter contained, *an appeal shall lie to His Majesty in Council*—

(*a*) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(*b*) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

(*c*) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Section 110. In each of the cases mentioned in clauses (*a*) and (*b*) of section 109 the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or, the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such a decree or final order, the appeal must involve some substantial question of law.

Order XLV, rule 3 : (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

Rule 6. Where such certificate is refused, the petition shall be dismissed.

Rule 8. Where such security has been furnished and deposit made to the satisfaction of the Cou t, the Court shall—

(*a*) declare the appeal admitted,

(*b*) give notice thereof to the respondent,

(*c*) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them."

The relevant provisions from the Constitution are extracted below :—

"Article 132. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

Explanation : For the purposes of this article, the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

Article 133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(*a*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law ; or

(*b*) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property or the like amount or value ; or

(*c*) that the case is a fit one for appeal to the Supreme Court ;

and where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law ;

(2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of the Judge of a High Court.

Article 134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

Article 135. Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

Article 374. (2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court."

Section 3 of the Federal Court (Enlargement of Jurisdiction) Act, 1947, reads :

"As from the appointed day,—

(a) an appeal shall lie to the Federal Court from any judgment to which this Act applies—

(i) without the special leave of the Federal Court, if an appeal could have been brought to His Majesty in Council without special leave under the provisions of the Code of Civil Procedure, 1908, or of any other law in force immediately before the appointed day, and

(ii) with the special leave of the Federal Court in any other case ; and

(b) in any such appeal as aforesaid it shall be competent for the Federal Court to consider any question of the nature mentioned in sub-section (1) of section 205 of the Government of India Act, 1935 ; and

(c) no direct appeal shall lie to His Majesty in Council, either with or without special leave from any such judgment."

A combined reading of the provisions brings out the following salient features : (1) The Supreme Court is now made the final authority both in civil and criminal proceedings ; the jurisdiction of the Privy Council and the Federal Court ceases with the commencement of the Constitution and all appeals and other proceedings pending in those Courts are transferred to the Supreme Court ; (2) in civil proceedings for the purpose of an appeal the pecuniary value of the subject-matter was raised from Rs. 10,000 to Rs. 20,000 presumably in view of the present enhanced value of the property ; and (3) Art. 135 saves the right of appeal in respect of any matter not covered by Articles 133 and 134 of the Constitution if jurisdiction and powers were exercised by the Federal Court in relation to that matter, immediately before the commencement of the Constitution.

The learned counsel for the petitioner contended that, as he filed the application for leave to appeal to the Federal Court prior to the date when the Constitution came into force, and that as the jurisdiction and the powers of the Federal Court were exercisable in regard to the subject-matter of the appeal immediately

before the commencement of the Constitution, he would be entitled to file an appeal under Article 135 of the Constitution; whereas the learned counsel for the respondent argued that Article 135 of the Constitution provides for a matter different from and unconnected with the subject-matter dealt with in Articles 133 and 134 of the Constitution in regard to which or in respect whereof the Federal Court would have exercised jurisdiction before the commencement of the Constitution, that Article 135 could not be construed as a proviso to Article 133 in regard to matters coming below the pecuniary limits set up in that Article, and that, in any view, the Federal Court's jurisdiction and the powers in regard to the subject-matter of this appeal were not exercisable immediately before the commencement of the Constitution as such exercise depended on the leave of the High Court being granted, but in this case was not obtained. It may be premised that the question can only be decided on a construction of the provisions of the Constitution. The Supreme Court derived its powers and jurisdiction under the Constitution and therefore the limits of its jurisdiction should be gathered only from its provisions. The learned advocate for the applicant relied upon the decision of the Judicial Committee in *Colonial Sugar Refining Co.* v. *Irving*[1]. In that case, the facts were the order in Council of June 30, 1860, gave a right of appeal from the Supreme Court of Queensland to His Majesty in Council. By the Australian Commonwealth Judiciary Act, 1903, that right of appeal had been taken away and instead an appeal had been provided to the High Court of Australia. The suit was pending when the latter Act was passed, and was decided by the Supreme Court after the right of appeal was taken away. The question arose whether the Supreme Court had power to grant leave to appeal to the King in Council. The Judicial Committee held that an appeal lay to the King in Council. The reason for the decision is found at page 372 as follows:

> "The Judiciary Act is not retrospective by express enactment or by necessary intendment and therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? . . . . . In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

The principle of this decision has been applied by a Full Bench of this Court in *Vasudeva Samiar, In re*[2], where in a suit instituted on the 30th July, 1919, a second appeal was presented on 15th July, 1924, and finally disposed of by a single Judge of the High Court on 9th February, 1928. An appeal was preferred against that judgment under the Letters Patent on 24th April, 1928, without leave to appeal having been obtained from the learned Judge who decided the second appeal. The Letters Patent was amended and came into force on 31st January, 1929, whereunder it is provided that no such appeal would lie without the leave of the Judge being obtained. The learned Judges held, following the aforesaid principle, that the appeal lay though no leave was obtained. At page 366, they say:

> "We must therefore hold, however reluctantly, that the institution of the suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career, unless the Legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect."

The two cases relate to amending Acts and therefore the decision turned upon the question whether the amending Act affected the vested rights of a suitor. But in the case of the Constitution which made India for the first time a sovereign democratic Republic, the powers and jurisdiction of the Supreme Court must be found within the four corners of the Constitution. The Federal Court was abolished and, for the first time, the Supreme Court of India came into existence under the new Constitution. When a question arises as to whether an appeal lies to the Supreme Court against a judgment of the High Court, unless the Constitution confers such a right no such appeal would lie. Therefore it becomes necessary to decide whether Article 135 confers any such right of appeal against the judgment now in question. "Matter" in Article 135 is a word of wide connotation. It may include subject-matter not dealt with by Articles 133 and 134 but governed by specific Acts in regard to *which* appeals lay to the Federal Court immediately

1. (1905) A.C. 369. 2. (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.)

before the commencement of the Constitution. But there is no reason to exclude from its operation subject-matter below the pecuniary limits prescribed under Article 133 of the Constitution if the jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately, before the commencement of the Constitution. It would certainly be a subject-matter in regard to which the provisions of Article 133 or 134 do not apply.

The next point is whether in regard to the subject-matter in question the jurisdiction and powers of the Federal Court were exercisable before the commencement of the Constitution. It cannot be disputed that an appeal would have lain against the decree and judgment of this Court if it complied with the provisions of sections 109 and 110, Civil Procedure Code, but it is said that the Federal Court could not have exercised jurisdiction till this Court gave leave and that, as no leave was obtained before the commencement of the Constitution, the jurisdiction and powers of the Federal Court were not exercisable in regard to this matter. But a perusal of the relevant provisions indicate that the party had a right of appeal against the judgment of the High Court if the conditions laid down under sections 109 and 110, Civil Procedure Code, had been complied with though a certificate by the High Court under Order 45, Civil Procedure Code, was required to the effect that such conditions were complied with. The jurisdiction of the Federal Court did not depend upon the certificate but on a compliance of the conditions laid down in the relevant sections, though without such a certificate the appeal to the Federal Court would not have been admitted. Further, under section 3 of the Federal Court (Enlargement of Jurisdiction) Act, 1947, though the High Court did not issue the requisite certificate, the Federal Court could have exercised its jurisdiction by granting special leave.

If the argument of the respondent were to be accepted in view of Article 374 (2) of the Constitution, Article 135 would become redundant and unnecessary. For, under Article 374 (2) all suits, appeals, proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court and the Supreme Court shall have jurisdiction to hear them and therefore Article 135 must have been intended to provide for other cases not pending in the Federal Court. The construction we are inclined to put upon Article 135 reconciles the provisions of both the Articles without making Article 133 otiose for some years to come. We, therefore, hold that, under the provisions of the Constitution, an appeal lies against the judgment and decree of the High Court delivered prior to the commencement of the Constitution if an appeal lay to the Federal Court having regard to the provisions of sections 109 and 110 and Order 45, Civil Procedure Code.

In the result, the application is allowed.

K.S. ——— *Application allowed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE SOMASUNDARAM.

Srimathi Champakam Dorairajan and another .. *Petitioners* *

v.

The State of Madras, represented by the Chief Secretary .. *Respondent.*

Constitution of India (1950), *Articles* 15 *and* 29 (2)—*Fundamental rights—If violated by Madras Communal Government Order regarding admission to Colleges.*

On the contention of the petitioners that the rules laid down in the Madras Communal Government Order for regulating the admission of students to colleges discriminate against citizens on the ground of their caste, or religion and thereby violate the rights guaranteed under Articles 15 (1) and 29 (2) of the Constitution.

* C.M.P. Nos. 5255 and 5340 of 1950. 27th July, 1950.

Held: The Communal Government Order violates Article 15 (1) of the Constitution and cannot be given effect to and the petitioners' applications for admission to the Government colleges should be considered without any discrimination being made against them on the ground of religion, race or caste.

Per Rajamannar, C.J.—Article 15 (1) of the Constitution of India in unambiguous terms declares that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. "Discriminate against" means "make an adverse distinction with regard to", "distinguish unfavourably from others." What the Article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that he belongs to a particular religion or caste. The Communal Government Order states that a limited number of seats only are allotted to members of a particular caste, namely, Brahmins. The qualifications which enable a Brahmin candidate to secure a seat in a college would necessarily be higher than the qualifications which would enable a person of another caste or religion to secure admission. There is discrimination against Brahmins and the petitioners' applications for admission should be considered without any discrimination being made against them on grounds of religion, race or caste.

Article 46 cannot override the provisions of Articles 15 (1) and 29 (2) or justify any law or act of the State contravening their provisions.

Per Viswanatha Sastri, J.—The Communal Government Order violates Article 15 (1) of the Constitution. It statedly classifies students seeking admission to State Colleges, on the basis of caste and religion and allots a definite number of seats to students belonging to particular castes or communities irrespective of their merit. It makes caste and religion a ground of admission or rejection. In its working it results in the adoption of different qualifications and different standards for students seeking admission to the same institution according to their caste, community or religion. By its allotment of a fixed number of seats to students of a particular caste or community the Communal Government Order denies equal treatment for all citizens under like circumstances and conditions, both in the privileges conferred and disabilities imposed. In its effect and operation the Communal Government Order discriminates very markedly against members of a particular caste and shuts out students having high qualifications solely on the ground of their caste or religion and lets in others with inferior qualifications on the same ground.

The Communal Government Order is subversive of the basic provisions of the Constitution.

Per Somasundaram, J.—The word "only" in both Article 15 (1) and Article 29 (2) of the Constitution in the context in which it is used in the Articles mean that discrimination or denial should not be on the ground of religion, race, caste or language alone. It follows therefore that one of the grounds of discrimination or denial may be on the basis of religion, race, caste, or language, but it should not be the sole ground. It is only if the denial or discrimination is based on the bare ground of religion, race, caste etc., the Article is hit.

Article 46 of the Constitution may not override the Articles in Part III. But Articles 15 (1) and 29 (2) must be read with Article 46. In distributing the seats the State can take into account the fundamental principles embodied in the Article which it cannot ignore.

As there is considerable force in the arguments advanced by my Lord Chief Justice and my learned brother Viswanatha Sastri for the view they have taken, I would agree, though not without hesitation, in the order proposed.

C.M.P. No. 5255 *of* 1950.—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or any other suitable prerogative writ restraining the respondent and all officers and subordinates thereof from enforcing, observing, maintaining or following or requiring the enforcement, observance, maintenance or following by the concerned authorities in the State of the Notification or order generally referred to as the Communal Government Order in and by which admissions to the Madras Medical College is sought or purported to be regulated in such a manner as to infringe and involve the violation of the fundamental rights referred to in the clauses of the Constitution of India and that the Communal Government Order so called being against the Constitution of India, the rules and regulations and restrictions contained therein should not be enforced, observed, maintained or followed or required so to be by any subordinate authority either directly or indirectly and for costs of the application ;

C. M. P. No. 5340 *of* 1950.—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or any other suitable prerogative writ restraining the respondent and all officers and subordinates thereof from enforcing, observing or maintaining or following or requiring the enforcement, observance, maintenance or following by the concerned authorities in the State of G.O. No. 1254—Education, dated

17th May, 1948, in and by which admissions to the Engineering College is sought or purported to be regulated in such a manner as to infringe and involve the violation of the fundamental rights referred to in the clauses of the Constitution of India and that the above Government Order being against the Constitution of India, the Rules and Regulations and restrictions contained therein should not be enforced, observed, maintained or followed or required so to be by any subordinate authority either directly or indirectly and for costs of the application.

V. V. Srinivasa Aiyangar, N. R. Raghavachariar and *V. Devarajan* for Petitioner in C.M.P. No. 5255 of 1950.

Alladi Krishnaswami Aiyar for *N. Rajagopala Aiyangar* and *V. Sethuraman* for Petitioner in C.M.P. No. 5340 of 1950.

The Advocate-General (*K. Kuttikrishna Menon*) instructed by the Government Solicitor on behalf of the respondent in both the petitions.

The Court made the following Order :—

The Chief Justice.—In these two applications substantially the same questions fall to be decided and they were therefore heard together. In C.M.P. No. 5255 of 1950 the petitioner is one Srimathi Champakam Dorairajan. In the affidavit filed by her in support of the application, she states that she is a graduate of the Madras University having passed in 1934 the B.A. degree examination taking Physics and Chemistry for her subjects, that owing to financial and other difficulties she could not join forthwith or seek to join the Medical College, that she has since been able to decide on reading for a medical degree, that she made enquiries with regard to her admission into the Government Medical College at Madras in the M.B., B.S. course, that she ascertained that in respect of admissions into the said College the authorities were enforcing and observing an order of the Government referred to as the Communal Government Order, in and by which the admission into the Medical College is to be regulated not by qualification or suitableness of the candidate applying for admission, but by directions involving the making of discriminations between applicant and applicant on the ground of caste, sex, etc., and that in the face of that order she had little or no chance of being admitted into the said College. She contends that the said Order of Government is void as it is inconsistent with the provisions of the Constitution of India and operates as an infringement of her personal right as a citizen of the State of Madras, and that the maintenance of that order is an infringement of the fundamental rights declared and formulated by the Constitution of India. She therefore prays for the issue of a writ of *mandamus*, or any other suitable prerogative writ restraining the State of Madras and all its officers and subordinates from enforcing, observing, maintaining or following or requiring the enforcement, observance, maintenance or following by the concerned authorities in the State of the Notification or Order generally referred to as the Communal Government Order in and by which admissions into the Madras Medical College is sought or permitted to be regulated in such a manner as to infringe and involve the violation of the fundamental rights referred to in the clauses of the Constitution of India, namely, Article 15, clause (1) and Article 29, clause (2).

In C.M.P. No. 5340 the petitioner is one C.R. Srinivasan. In his affidavit he states that he has passed the Intermediate Examination of the Madras University held in March, 1950, in Group I taking Mathematics, Physics and Chemistry as his optionals in the first class and obtained for a maximum of 450 marks in the optionals 369 marks; that he has filed an application for admission to the Engineering College at Guindy, that he learns that the admission in the Engineering College is governed by a Government Order whereby admission is governed by communal proportion (the order already referred to in the previous Civil Miscellaneous Petition), that he apprehends that there is no prospect of his application being considered on its merits with due regard to his qualifications, ignoring considerations of race, caste or religion. The petitioner contends that the said Government Order is inconsistent with Article 15 and Article 29 (2) of the Constitution and

prays that the Government may rescind the Order and direct the Committee appointed to select the candidates for admission into the Engineering College to consider his application for admission on its relative merits without reference to considerations of religion, race, caste, language or any of them and to dispose of the same in accordance with the terms of Articles 29 (2) and 15 of the Constitution.

On behalf of the State of Madras counter-affidavits were filed in the two petitions setting forth practically the same legal contentions. In the counter-affidavit filed in C.M.P. No. 5255 of 1950 it is stated that the total number of seats available in the four Medical Colleges run by the Government of Madras is only 330, that out of these, 17 seats are reserved for students coming from outside the State, 12 seats for discretionary allotment by the Government in consultation with the Surgeon-General; that the balance of seats available are apportioned between four distinct groups of districts in the State, that the seats so apportioned are filled up according to the rule intended to protect the weaker sections of the people and to provide equal opportunities to all, that accordingly out of 14 seats 6 are allotted to Non-Brahmin Hindus, 2 to backward Hindu communities, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims. The above allocation is claimed to be based not solely on population figures, but that it has been worked out after a due consideration of the numerical strength, literary attainments and the economic conditions of the various communities in the State. Subject to these regional and protective provisions, selection from among the applicants from a particular community from one of the groups of districts is made on certain principles, preference being given in a particular order. No less than 20 per cent. of the total number of seats available for students of the State are filled by women candidates separately for each region. It is open to the Selection Committee to admit a larger number of women candidates in any region if qualified candidates are available and if they are eligible for selection on merits *vis-a-vis* the men candidates. On behalf of the State it is contended that the Order of Government regulating admissions to the Colleges is not invalid, because under Article 46 of the Constitution, the State is bound to promote with special care the educational interests of the weaker sections of the people and protect them from social injustice and all forms of exploitation, and that the State has the sole discretion to decide who are weaker sections of the people. It is pleaded that as the number of seats available in educational institutions maintained by the State represents only a fraction of the number of applications for such seats, quite a large number of applicants have to be denied admission, but such denial is not on grounds only of religion, caste, etc., but on a multiplicity of grounds including the paucity of seats, the necessity for regional and linguistic representations, the necessity for promoting with special care the interests of the backward communities and other factors and that the said Order of Government is neither illegal nor opposed to any Article of the Constitution of India.

In C.M.P. No. 5340 of 1950 a counter-affidavit similar to that filed in the previous Civil Miscellaneous Petition was filed on behalf of the State. The total number of seats available in the Government Engineering Colleges is only 395 out of which 21 seats are reserved for students coming from outside the State including refugee students.

Reply affidavits were filed by the petitioners in both the applications. They contain mostly legal arguments which will be noticed later on in the judgment. In C.M.P. No. 5340 of 1950 a further affidavit was filed on behalf of the State appending three statements, one showing the selection of candidates from the various communities in the respective zones according to the present Government Order, another showing the selection of candidates on the basis of only the marks obtained in Part III of the Intermediate examination and a third showing the percentage of seats which the various communities would get on the basis of population, on the basis of marks obtained in the examinations, on the basis of the existing rules and on the basis of the proposed admissions this year. It is pointed out that if the present Government Order is disregarded and selection is made on the basis

of marks, the Brahmin community stands to gain by 172 seats, the Non-brahmin communities lose 50 per cent of their seats totalling 112; none of the Harijans would be selected, *i.e.*, they would lose 26 seats and the Muslim community would lose 23 seats.

The applications were fully and ably argued by Mr. V. V. Srinivasa Aiyangar and Mr. Alladi Krishnaswami Aiyar for the two petitioners and by the learned Advocate-General for the State of Madras. None of them was able to cite any authority which directly dealt with the question to be decided and it was common ground that provisions in *pari materia* with the material Articles of the Constitution of India are not to be found in any of the well known constitutions of the world.

The two provisions of the Constitution on which learned counsel for the petitioners strongly relied in support of their contention that the Government Order above mentioned was invalid are clause (1) of Article 15 and clause (2) of Article 29. They run as follows:

"15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. . . . .

29. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

Article 14 of the Constitution was also incidentally referred to. This Article embodies the principle of equality before the law, which is a part of the rule of law as enunciated by Professor Dicey and the rule of equal protection of the laws contained in the Fourteenth Amendment to the Constitution of the United States of America. Certain decisions of the Supreme Court of America construing the phrase "the equal protection of the laws" were cited to us, but learned counsel for petitioners agreed that it was not necessary to rely on them as direct authorities in their favour, because there were other Articles in our Constitution which directly supported their contention.

The contention on behalf of the petitioners briefly is that the fundamental rights of the petitioners as citizens of India declared by Article 15 (1) and Article 29 (2) of the Constitution would in effect be denied by the enforcement of the Order of Government referred to as the Communal Government Order, because (1) the State is discriminating against them on grounds of religion, caste and sex, and (2) they are likely to be denied admission on grounds only of religion and caste. All that they pray for is that their applications for admission should be considered on their merits without taking into consideration their religion, caste or sex.

The question is: Is the Communal Government Order when applied to the case of the two petitioners in any way inconsistent with either or both the said provisions of the Constitution? Has the fundamental right of the petitioners either under Article 15 or under Article 29 been ignored by the Government in seeking to enforce the said order?

Article 29, clause (2), expressly refers to admissions to educational institutions. Mr. Alladi Krishnaswami Aiyar invited our attention to the proceedings of the Constituent Assembly which relate to the passing of this Article by that Assembly. In the Constitution as originally drafted the corresponding provision was Article 23 (2) which was in the following terms—

"No minority, whether based on religion, community or language, shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State."

In the place of this provision the clause as we now find was substituted by an amendment proposed by Pandit Thakur Das Bhargava. The three points of difference between the provision as originally drafted and the provision as substituted were (1) the words "no citizen" were substituted for the words "no minority", (2) not only institutions maintained by the State but also institutions receiving aid out of State funds were included, (3) instead of the words "religion, community or language", the words adopted were "religion, race, caste, language or any of them".

Mr. Alladi Krishnaswami Aiyar contended that the right given to a citizen under Article 29 (2) of the Constitution is an individual right given to the citizen as such and not as a member of a community or caste. The right is expressed in unequivocal terms, a right not to be denied admission into any State maintained or State aided educational institution on any of the grounds of religion, race, caste or language. There is no reservation in favour of any class of citizens, as for instance, in Article 16 which deals with appointments and offices under the State, Clause (4) of which says—

> "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the Services under the State."

On behalf of the State the learned Advocate-General relied strongly on the word "only" which occurs in Article 29 (2). His contention was that the petitioners would be denied admission not *only* on any of the grounds mentioned in the Article, but also on other grounds, namely, paucity of seats and necessity to make due provisions for weaker sections of the citizens. There was some controversy as to the exact connotation of the word "only" in the place where it occurs. Petitioners' counsel contended that the word meant "merely" or "solely" and that what the Article prohibits is, taking any of these factors into consideration. If one of the reasons for the denial of admission is the fact that the applicant belongs to a particular religion, race or caste, then the denial is wrong. In other words, it is only these grounds or any of them which are mentioned in the Article that are prohibited from being taken into account. There may be other valid grounds for refusing to admit any applicant. If otherwise there is no disqualification or disability attaching to an applicant, he should not be denied admission solely on the ground that he belongs to a particular religion or race or caste. Speaking for myself, I do not think much turns on the presence of the word "only" in the Article. Even if that word had been omitted, the effect of the Article would probably be the same (*vide* Article 325 for a similar use of the word "only"). I however, think that there is some force in the Advocate-General's contention that this Article would apply only if the persons of a particular religion, race or caste are totally excluded on the ground of their religion, race or caste, but would not apply when no person of any religion, race or caste is denied admission as such. Now let us look at the case of the present applicants. They say they are likely to be denied admission. On what ground? They would say that it is because they belong to the Brahmin caste. But is that all? Is it not also because that they apprehend that their qualifications would not enable them to compete with other Brahmin candidates for the limited number of seats allotted to the Brahmins? Without reference to other factors, like, *e.g.*, marks and the class secured by the candidate, it cannot be predicated in every case from the simple fact that the applicant is a Brahmin that he will be denied admission. No doubt in the two petitions before us, we were told that the applicants were not included in the provisional list compiled by the Selection Committee. That may be so. But if the applicants had probably secured more marks than they actually got, they might well have been included in the list in spite of the fact that they belong to the Brahmin caste. This is one way of looking at the matter. Another way is this. Here is a candidate who if he had not been a Brahmin, but had been a member of another caste or had belonged to another religion, might have secured admission, but because he is a Brahmin, he has been denied admission. The applicants before us, supposing they had been Harijans, would have been certainly admitted on the marks they had got and on their other qualifications. But they have been denied admission, because they are Brahmins. I must confess that there is much to be said for both points of view. I would, however, refrain from deciding these applications on this point either way. But I will indicate my opinion. In my view, it is only when it can be said that under the impugned Government Order a person *per se*, because he belongs to a particular religion or caste, cannot obtain admission into a particular institution that the Article is contravened. I have in mind the instances of the American cases cited to us in which Negroes have been denied admission

solely because they are Negroes and the regulations of the educational institution to which they sought admission prohibited completely the admission of the members of the coloured races, see *Sipuel* v. *Board of Regents*[1], *Sweatt* v. *Painter*[2], and *McLaurin* v. *Oklahoma State of Regents*[3].

The clause in the Fourteenth Amendment to the United States Constitution which provides for the equal protection of the laws has been always interpreted as a provision for preventing the enforcement of discriminatory measures. The equal protection of the laws has been understood as a pledge of the protection of equal laws (*Yickwo* v. *Hopkins*[4]). In the words of Chief Justice Taft

"The guarantee was aimed at undue favour and individual or class privileges on the one hand and at hostile discrimination or the oppression of inequality on the other . . . . . The guarantee was intended to secure equality of protection not only for all but against all similarly situated." (257 U.S. 312 at 332).

This clause requires that there shall be no distinction made on the sole basis of race or colour. Though the cases on this subject are legion, it will be not without interest to refer to cases relating to admissions to educational institutions. In *Missouri ex. Rel. Gaines* v. *Canada*[5], it was held that a State which precluded Negroes from a State-maintained Law School open to White students could not be said not to have discriminated against Negroes in violation of this clause. In *Sipuel* v. *Board of Regents*[1], the Supreme Court held that the equal protection clause required a State-maintained Law School for White students to provide legal education for a Negro applicant. The Court said :

"The petitioner is entitled to secure legal education afforded by a State institution. To this time it has been denied her although during the same period many White applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."

Two recent decisions decided in June, 1950, may also be referred to, namely, *Sweatt* v. *Painter*[2] and *McLaurin* v. *Oklahoma State Regents*[3]. In the former case an application by a Negro student for admission to the Univesity of Texas Law School was rejected solely because he was a Negro. This was in accordance with the State law which restricted admission to the University to White students. The Supreme Court held that the petitioner was entitled to his full constitutional right, namely, legal education equivalent to that offered by the State to students of other races and that he could not be denied admission solely on the ground that he was a Negro. In the latter case the question was whether a State after admitting a Negro student to graduate instruction in its State University afford him different treatment from other students solely because of his race. The Supreme Court answered the question in the negative. They held that the Fourteenth Amendment precludes differences in treatment by the State based upon race. As I remarked during the course of the argument—and I understood Mr. Alladi Krishnaswami Aiyar to concede—the American decisions are not directly applicable in construing Articles 15 (1) and 29 (2) though they may have some bearing in construing Article 14 of our Constitution. There is one important difference introduced by Article 29 which is absent in the United States. There it has been held that the equality clause would not be violated by a segregation of the races in separate educational institutions, provided equal facilities for study were provided for the two races. But according to our Constitution, such segregation on grounds of race would be invalid. It may also be noted that the American cases deal with State Laws or regulations which totally excluded all Negroes from particular educational institutions. Not a single case has been brought to our notice in which there was any such total exclusion, but there was a restriction of the number of seats available for them similar to what we have in the Communal Government Order. In the American instances, the fact that the applicant was a Negro was sufficient to exclude

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1. 92 U.S. Lawyers' Edn., page 247 : 332 U.S. 631.
2. (1950) 63 L.W. 89 (Journal section).
3. (1950) 63 L.W. 91 (Journal section).
4. 118 U.S. 356.
5. (1938) 305 U.S. 337.

him from admission to an institution. That is not the case according to the Communal Government Order, for it is not suggested that any applicant who happens to be a Brahmin would be invariably denied admission to either the Medical or the Engineering College.

Mr. Alladi Krishnaswami Aiyar referred us to the decision in *McCabe* v. *Atchison*[1] and *Missouri ex Rel. Gaines* v. *Canada*[2], in support of his contention that the right asserted by the applicant in these petitions is a personal and individual right as citizens and not as members of a particular religion or caste. I agree with him. In the recent case of *Sweatt* v. *Painter*[3], as Chief Justice Vinson observed :

"It is fundamental that these cases concern rights which are personal and present".

In *Missouri ex Rel. Gaines* v. *Canada*[2], Chief Justice Hughes declared thus :

"The petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws and the State was bound to furnish him within its borders facilities for legal education substantially equal to those the State there afforded for persons of the White race, whether or not other Negroes sought the same opportunity."

I agree that it is no answer to the petitioners' applications to say that other Brahmin students have been admitted into the Medical and Engineering Colleges. The question is : whether there has been any discrimination against the petitioners, because they belong to a particular caste.

In my opinion these applications must be decided in favour of the petitioners on the terms of Article 15 (1). That Article in unambiguous terms declares that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. "Discriminate against" means "make an adverse distinction with regard to" ; "distinguish unfavourably from others" (Oxford Dictionary). What the Article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste. Now what does the Communal Government Order purport to do ? It says that a limited number of seats only are allotted to persons of a particular caste, namely, Brahmins. The qualifications which would enable a candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a persons of another caste or religion, say, Harijan or Muslim to secure admission. A perusal of the statements filed on behalf of the State demonstrates this fact amply. We find, for instance, that while the four Brahmin candidates selected from Rayalaseema to the Engineering College secured marks ranging from 398 to 417, the two Harijan candidates who were selected secured only marks between 214 and 231. It appears to me that in view of these facts, it is impossible for the State to contend that there has been no discrimination. If a Harijan candidate who gets 231 marks can be admitted, but a Brahmin candidate even if he gets 390 is not admitted, there is obvious disparity in the treatment of the candidates, because they belong to different castes.

In a way the learned Advocate-General did not deny the fact of discrimination. Only he attempted to justify such discrimination on grounds of public policy and as necessary to bring about social justice by promoting the interests of the educationally backward sections of the citizens. In this connection Article 46 of the Constitution was very strongly relied on by the learned Advocate-General. It runs thus :

"The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation."

This Article occurs in Part IV of the Constitution which contains directive principles of State policy which according to Article 37, are not enforceable by any Court but are nevertheless fundamental in the governance of the country, and have to be applied by the State in making laws. Though the Government Order in question was passed long prior to the coming into force of the Constitution, it was sought

1. 235 U.S. 151.
2. (1938) 305 U.S. 337.
3. 63 L.W. 89 (Journal section).

to be justified as carrying out the principle adopted by the Constitution in Article 46. The Advocate-General drew a vivid picture of the injustice which would result if no discrimination were made between, say, Brahmins and Harijans, and both the applications were dealt with on merits. If the marks standard were to be applied uniformly, the result would be, he stated, that while 249 Brahmin candidates would secure admission, no Harijan and only three Muslims would be selected.

It is an undeniable fact that the citizens of the Indian Union profess different religions and belong to several castes and speak many languages. One should probably also add that they belong to different races. There are many Articles of the Constitution which expressly refer to these differences and there are other Articles which clearly imply their existence. There are minorities as well as majorities based on religion, caste or language. One finds running through the Constitution two underlying conceptions which inform the entire scheme of national life envisaged by it. One is the principle of equality not only of status but also of opportunity and the other is the establishment of a social order based on social, economic and political justice. As necessarily following from such an ideal, there is the exhibition of an anxiety to promote the interests of the backward and weaker sections of the people. With this end in view, the Constitution provides for safeguarding their interests in several respects. Article 16 (4) is an instance already mentioned. There are other provisions as well. Part XVI contains special provisions relating to certain classes. There are provisions for reservations of seats in the House of the People and in the Legislative Assemblies of every State for the Scheduled castes and tribes. Power is given to the President to nominate members of the Anglo-Indian community if that community is not adequately represented. Article 335 enjoins the claims of the members of the Scheduled castes and the Scheduled tribes to be taken into consideration consistent with the miaintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State. Articles 336 and 337 are special provisions for the Anglo-Indian community in the matter of services and education. According to Article 338, there shall be a Special Officer for the scheduled castes and scheduled tribes whose duty shall be to investigate all matters relating to the safeguards provided for them under the Constitution and report to the President upon the working of those safeguards. Article 340 provides for the appointment by the President of a Commission to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or by the State.

Granting that one of the objectives of the Constitution is to provide for the uplift of the backward and weaker sections of the people, which *inter alia* is embodied in Article 46, can we hold that the State is at liberty to do anything to achieve that object? The obvious answer is " yes ", so long as no provision of the Constitution is contravened and no fundamental right declared by the Constitution is infringed or impaired. It may be conceded that in one sense Articles which prohibit discriminatory treatment in any matter relating to the State are inconsistent by themselves with any action on the part of the State to make provisions specially favourable to the backward and weaker sections of the people. That is why we find exceptions have been made expressly to the principles of non-discrimination in certain specified matters the most important of which is in respect of appointments and offices under the State. After reiterating the principle of non-discrimination in Article 16 (2), Article 16 (4) makes an exception and provides for discrimination in favour of backward classes of citizens.

Now there is no such provision for reservation as regards admissions into educational institutions. Whether the omission to make such reservation was deliberate or accidental we cannot speculate. The learned Advocate-General pressed upon us the condition of educational backwardness which prevails among

several sections of the people in the State, and represented that unless special reservations are made in favour of such sections, the State cannot promote adequately their educational interests. Presumably this state of affairs was well known to the representatives of this part of the country on the Constituent Assembly. If they and others who felt a similar difficulty had urged upon the Assembly the necessity for such a provision for reservation, the Assembly might well have agreed to a provision similar to Article 16 (4) in respect of admissions to educational institutions as well. Actually, however, there is no such provision and we do not feel justified in adding a new provision by way of an exception to the expressed declaration made in Article 15 (1) and Article 29 (2). In our opinion Article 46 cannot override the provisions of these two Articles or justify any law or act of the State contravening their provisions.

The learned Advocate-General contended that in all State Legislation and executive action, classification is inevitable and there is nothing in the Constitution which prohibits such classification. It is true that the equal protection of laws clause of the Fourteenth Amendment to the Constitution of the United States has been often held not to preclude legislative classification provided it is reasonable and not arbitrary. As Mr. Chief Justice Taft observed in the leading case of *Trumax* v. *Corrigan*[1] :

> " In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be, I fully concede, that perfect uniformity of treatment of all persons is neither practical nor desirable, though classification of persons is constantly necessary."

Mr. Justice Frankfurter in a later case observed :

> " The equality at which the Equal Protection Clause aims is not a disembodied equality. The Fourteenth Amendment enjoins the equal protection of the laws and laws are not abstract propositions. They do not relate to abstract units A, B and C but are expressions of policy arising out of special difficulties addressed to the attainment of specific needs by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

Two things, however, cannot be overlooked. Firstly, that classification does not necessarily mean discrimination and secondly, classification which is prohibited by the Constitution cannot justify legislation or State action based thereon. That is why the Supreme Court of the United States has in innumerable cases held discriminatory legislation to be bad, particularly in cases where the ground of discrimination has been race or colour. No one has attempted even to adduce the argument that discrimination against the coloured races is only one kind of classification and therefore permissible.

In this connection the Advocate-General relied on certain observations in two decisions of the American Supreme Court, but they are not of any material assistance to him. In *Republic Natural Gas Co.* v. *Oklahoma*[2], the Supreme Court was called upon to decide the validity of an order made by the Oklahoma State Corporation Commission requiring a producer of natural gas to market *pro rata* gas of another producer in the same field. The order was upheld, because it was held to be in the exercise of the power of the State to preserve the correlative rights of producer of natural gas in the same field. Mr. Justice Douglas observed in the course of his judgment thus :

> " Oklahoma's power to regulate correlative right in the Hugotan field does not stem from her interest merely in the preservation of natural sources. It stems rather from the basic aim and authority of any Government which seeks to protect the rights of its citizens and to secure a just accommodation of them when they clash."

It will be seen that there could be no question of discrimination in this matter. In *Toomer* v. *Witsell*[3], a majority of the Supreme Court of America held that the imposition of a discriminatory licence fee for boats owned by non-residents was without reasonable basis and therefore a violation of the Privileges and Immunities clause. That clause so far as relevant reads as follows :—

1. 257 U. S. 312.
2. 334 U.S. 62.
3. 334 U.S. 385.

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

In dealing with this clause Chief Justice Vinson said :

"Like many of the constitutional provisions the Privileges and Immunities Clause is not absolute. It does ban discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the enquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."

It was found that the discrimination against non-residents was so great that its practical effect was virtually exclusionary and it was held that the levy was invalid. I fail to see how the principle of this decision can be applied to the cases before us.

The learned Advocate-General laid great stress on the fact that one of the ideals of the Republic of India is the establishment of social justice and protection of weaker sections from social injustice. Expressions like "social justice" and "social injustice" are very vague and elastic in their connotation and it is often difficult to determine whether any particular action of the Government leads to social injustice or not. It is said that without some provision like that contained in the Communal Government Order, no member or very few members of the backward communities can secure admission to colleges with limited accommodation like the Medical and Engineering Colleges and to deny them the opportunity to obtain professional education would be to perpetuate social injustice. That is one side of the medal. But there is also the other side that candidates well qualified otherwise and with more than average merit should be denied opportunity to secure such education, because they belong to castes or communities more advanced than others. Of course the most satisfactory solution would be to provide equal and adequate facilities to all applicants. If on account of various causes the State is unable to do so, then, as the Articles of the Constitution stand at present it is difficulty to see how the State can make a discrimination between applicant and applicant on the ground of religion or caste and restrict the number of seats that could be secured by applicants of any particular religion or caste, or prescribe different qualifications to applicants of different religions and castes, to the advantage of some and to the disadvantage of others.

In my opinion both the applications must be allowed and there should be a direction that the applications of the two petitioners should be considered without any discrimination being made against them on grounds of religion, race or caste. It is not for us to say what circumstances should be taken into account, what qualifications should be prescribed, what tests should be applied in making a selection. As Mr. Alladi Krishnaswami Aiyar rightly pointed out during the course of his argument, marks may not be the one and only criterion. All that we should say on these applications is that grounds of religion, race or caste cannot be the basis of selection.

Mr. V. V. Srinivasa Aiyangar in C. M. P. No. 5255 of 1950, contended that his client was being discriminated against even on the ground of sex. That does not seem to be correct. On the other hand, there appears to be a special provision in favour of women candidates, a provision which may probably be justified by Article 15 (3). As stated already in the counter-affidavit filed on behalf of the State not less than 20 per cent. of the total number of seats available for students of the State are filled by women candidates separately for each region, and it is open to the Selection Committee to admit a larger number of women candidates in any region if qualified candidates are available in that region and if they are eligible for selection on merits *vis-a-vis* the men candidates in accordance with the general principles governing such admissions as laid down in the rules. I fail to see how the petitioner can complain that any discrimination is being made against her on the ground of sex.

The writs issued will be made absolute in the terms mentioned above. There will be no order as to costs.

Viswanatha Sastri, J.—These two applications raised substantially the same questions. The applicant in C. M. P. No. 5255 of 1950 is a Brahmin lady, and in C. M. P. No. 5340 of 1950, a Brahmin male student, who sought, but did not get admission to the Medical and Engineering Colleges maintained by the State of Madras. The applicants impugn the legality of a Government order, G. O. No. 1254—Education, dated 17th May, 1948, regulating the admission of students to these colleges. Though this Government Order, referred to as the Communal Government Order in the arguments before us and in this judgment, was passed before the Constitution of India was enacted, it is common ground that it is being acted upon and enforced by the State and its officers in selecting students for admission to the Engineering and Medical Colleges. Taking the Engineering College of the State—the position is much the same as regards the Medical Colleges—the total number of seats available is in the region of 400. Under the direction of the Government as embodied in the Communal Government Order, 12 out of these seats are reserved for allotment by the ministers of Government at their discretion. 21 seats are reserved for students coming from outside the State. The remaining seats are apportioned and allotted among four groups of districts comprised in the States, popularly known as Rayaleseema, Andhra, Tamilnad and Kerala. The seats apportioned and allotted to each of these four divisions are filled up in this way : taking 14 seats as a unit, Non-brahmin Hindus are allotted 6 seats, Non-brahmin backward Hindus 2 seats, Brahmin 2 seats, Harijans 2 seats, Anglo-Indians and Indian Christians one seat, and Muslims one seat. Both " forward " Non-brahmins and " backward " Non-brahmins are grouped together for the purpose of selection. The appellation of the various communities is not mine. Subject to the above overriding allotments based on regional and communal and caste divisions, selection of candidates from each community is made on the basis of marks obtained by students in the Intermediate, B. A., or B. Sc. examinations of the Universities in the State. As a result of applying the above rules of selection during the current year, 77 Brahmins, 224 Non-brahmins, 51 Christians, 26 Muslims and 26 Harijans have been selected for admission to the Engineering Colleges. The 12 seats reserved for allotment at the discretion of Government have been filled up presumably on the same or a slightly different basis. If the rule of allotment of seats according to castes and communities had been ignored and the selection of candidates had been made on the basis of merit, that is to say, the marks obtained by the candidates in the qualifying examinations, irrespective of their caste, community or religion, 249 Brahmins, 112 Non-brahmin Hindus, 22 Christians, 3 Muslims and no Harijans would have been selected. The result of applying the Communal Government Order is that 172 Brahmin candidates who would have been admitted on the basis of a uniform standard or test of eligibility for all candidates, have been refused admission, and 112 Non-brahmin candidates, who would have been refused admission on the same basis, have been selected. These figures have been taken from the statements filed by the respondent. The applicant in C. M. P. No. 5340 of 1950 avers—and this averment is not denied—that though he got more marks than many candidates of other castes and communities, he has been refused admission while the latter have been admitted.

The contention of the applicants are that the rules laid down by Government for admission of students are based on criteria which the State is prohibited from taking into account by the Constitution of India ; that the rules discriminate against citizens on the ground of their caste or religion, and thereby violate the rights guaranteed to the applicants under Articles 15 (1) and 29 (2) of the Constitution ; and that the State of Madras should be directed by a writ of *mandamus* to consider their applications for admission on their merits without reference to the Communal Government Order. The respondent states that the allocation of seats on caste, communal and religious basis was made after due consideration of the numerical strength, literary attainments and economic condition of the different communities in the State and in the discharge of the obligation laid upon the State by Article 46 of the Constitution to promote with special care the educational and economic

interests of the "weaker sections" of the people. The respondent denies that the rules framed by it for the admission of students transgress the law in any manner.

It might be useful at the outset to have a look at the circumstances that led to the emergence of the Constitution of India. Help from extraneous facts existing at the time of the framing of the Constitution might be obtained in ascertaining the intention of its framers, though that intention must, primarily and in the ultimate resort, be ascertained from the language of the enacted words. Though the Constitution of India is a blend of many principles and even turns of expression taken from the Constitutions of other States and the Government of India Act, 1935, it is nevertheless *sui generis*. I make this observation at the outset in order to explain why I have not been able to derive any considerable benefit from the judicial exposition and development of American constitutional law during the course of a century and half. This is not to say that I have not listened with interest to the numerous decisions cited before us by learned counsel on both sides. Most of the rules with regard to constitutional powers and limitations found hidden in the interstices of the American Constitution have been brought out and formulated only by judicial decisions which purport to interpret the Fourteenth Amendment or rather the two phrases "due process of law" and "equal protection of the laws" found in section 1 of the Fourteenth Amendment. These judge-made principles and doctrines of America are found stated in a categorical manner and almost in the language of the decisions, in the Articles of the Constitution of India so far as the makers of our Constitution thought fit to adopt them. In *A. K. Gopalan* v. *The State of Madras*[1], the learned Chief Justice of the Supreme Court of India recently sounded a note of caution against placing implicit reliance on American precedents without due regard to the fact that our Constitution, unlike the American, runs into details and considerably narrows the scope for judicial interpretation and without paying due attention to the difference in language between the Articles of the two Constitutions. It is for this reason, and not out of any disrespect to the arguments of learned counsel or the very eminent American judges whose decisions were cited before us, that I have made a somewhat parsimonious use of the embarrassing wealth of American precedents.

The Constitution of India, as its preamble proclaims, is an ordinance of the people of India having its sanction in the popular will and for its aim, the establishment of a new structure of security, social, political and economic, for all its citizen on the basis of justice, liberty and equality. These are the great objects which[s] the Constitution and the government established by it are intended to serve and promote. But the preamble does not furnish any definition of the respective rights of citizens and of the State exercising governmental power. Chapter III of the Constitution deals with that topic, and I shall presently refer to the relevant Articles. It is not difficult to understand why the makers of our Constitution who, as representatives of the people, were fashioning an instrument for the governance of a free republic, were so much concerned with the threat to individual liberty and civil rights from governmental activity as to place in the forefront of the Constitution the chapter on "Fundamental Rights". They had long and costly experience of the previous regime with its frequent encroachments on the personal liberty of citizens, especially during the period of the last world war; its emphasis on, if not encouragement of communal and other differences which seriously weakened national unity; and its discriminating practices in favour of individuals and communities designed to win their support. With a vivid recollection of their physical, intellectual and emotional struggles against an alien Government, it is not surprising that the makers of our Constitution were apprehensive lest the freedom of the individual citizen—using "freedom" in the same comprehensive sense in which it is used in Article 19—be curtailed unduly by any abuse of political or social power in the future. Further, the average citizen had also learnt by this time to prize certain fundamental freedoms like personal liberty, freedom of speech and

1. (1950) 2 M.L.J. 42 : (1950) S.C.J. 174 (S.C.).

peaceful assembly, the right of all men to equality under the law and to equal opportunity for securing their material well-being. The last world war had been widely proclaimed as one fought for establishing the freedom and dignity of man and for putting an end to the tyranny of authoritarian government. The people of this country had also become painfully aware of the evils of communal discard and distrust culminating as they did in the partition of the country and were presumably keen on eradicating the virus of communalism which had infected the body politic. Chapter III of the Constitution of India reflects these widely prevalent feelings and ideas of the time and is both a reaction to the evils of the past and a guarantee of constitutional liberty to the citizen in the future. The rights singled out for such protection and guarantee are such as might be regarded as highly important to a citizen in a free civilised State and are appropriately styled "fundamental rights". These rights of the individual citizen were regarded by the framers of the Constitution to be of so transcendant a character as to deserve special enunciation and an express constitutional guarantee against government encroachment, legislative or administrative. On the face of the Constitution itself, the provisions regarding "fundamental rights" occupy the forefront, evidently because they have been considered to be of great national importance. The Articles relating to fundamental rights have come up to be looked upon as muniments of a citizen's right and obligations whose inviolability is secured by constitutional restraints imposed on government. The protection of these guaranteed rights of the citizen and the enforcement of the limitations imposed on the acts of government, are both secured by judicial process which is, to quote an American case :

> "the device of self-governing communities to protect the rights of individuals and minorities as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority even when acting in the name and wielding the force of government." (*Hurtado* v. *California*[1].)

The Constitution derived its birth from the deliberations of the Constituent Assembly, a body representative of the people of India. It is a matter of common knowledge that the task of framing the Constitution took over two years, and many experienced and distinguished statesmen as well as able and skilled constitutional lawyers were engaged in this task. The Constitution must clearly be regarded as an instrument which was fashioned with great deliberation, with full knowledge of the working of other republican Constitutions and with an intimate appreciation of the peculiar local conditions. There were difficulties in attaining ready agreement on many matters, natural enough in the case of large assemblages of people drawn from different communities and representing divergent interests. Amendments and alternative proposals were discussed, debated and weighed against each other. There were intricate networks of current politics and communal and local rivalries. The Constitution as it finally emerged, struck a balance between the rights and privileges of the citizen and the powers of government. It accommodated and defined the spheres of operation of the two competing doctrines, namely, the right of the individual citizen to life, liberty and property, and the power of the State to impose restraints on the exercise or enjoyment of those rights in the interests of good government and the welfare of the State as a whole. It is true that under our present democratic Constitution, government acts more often as a friend than as a foe of individual freedom. Nevertheless, conflicts might arise between a citizen and the Government if the constitutional rights of the citizen are violated by the exercise of governmental power. The Courts are therefore empowered and enjoined to resolve such conflicts by an impartial interpretation of the Constitution.

We have been told on high authority that a Constitution must not be construed in any narrow and pedantic sense, especially a federal Constitution with its nice balance of jurisdictions and of individual rights and State power, and that we must approach it in a broad and liberal spirit, so as, if possible, to validate legislative and administrative action. A person who assails the legislative or administrative

1. (1884) 110 U.S. 516, 536.

action of government must carry the burden of demonstrating beyond doubt its unconstitutionality. We have also been warned by equally high authority that we have to interpret the Constitution on the same principles of interpretation as apply to ordinary law and that we have no right to stretch or twist the language in the interests of any political, social or constitutional theory. The principle that in interpreting a Constitution, a construction beneficial to the exercise of legislative or executive power should be adopted, may not be of any great help when the statutory provisions that fall to be considered relate to constitutional guarantees of the freedom and civil rights of idividual citizens against abuse of governmental power. We must assume that there was a sufficient and indeed a grave need, for the enactment of the chapter on fundamental rights as part of the Constitution. The question before us is not as to the expediency, still less as to the wisdom of these provisions, but is one of law depending on the constructions of the relevant Articles of the Constitution. It is no doubt a legitimate, and in the case of a Constitution, a cogent argument, that the framers could not have meant to enact a measure leading to manifestly unjust or injurious results to the nation and that any admissible construction which avoids such results ought to be preferred. Having regard to the precise and comprehensive provisions of the Chapter III of the Constitution, we are not in the happy position of a learned Judge of the United States, who is said to have observed that there was no limit to the power of judicial legislation under the " due process " clause of the Fifth and Fourteenth Amendments, except the sky. I consider it to be both legally and constitutionally unsound, even though the invitation has been extended to us by learned counsel, to eviscerate the Constitution by our own conceptions of social, political or economic justice. Keeping these principles in mind, I proceed to consider the relevant Articles of the Constitution. Article 14 is in these terms :—

" The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

The Article applies to citizens as well as non-citizens found here. The first part of the Article is of Irish and the latter part, of American origin. The words "equal protection of the laws " have been the subject of judicial interpretation in numerous decisions of the Supreme Court of America, many of which have been cited before us. If I were to rest my decision in this case solely on the provisions of Article 14, I would be bound to examine individually the several decisions cited to us interpreting the same language of section 1 of the Fourteenth Amendment of the American Constitution. But in the view I take, it is unnecessary to pursue the course of American decisions to the full length. I shall content myself with stating what, in my view, is the effect of the decisions.

One cannot shut one's eyes to the fact that inequality is a fundamental or basic fact in actual life. Absolute equality, there is not, among human beings. It is a matter of commonsense that you cannot treat an adult and a child, a sane man and an idiot or lunatic, a millionaire and a pauper, a convict and an innocent man, a literate and an illiterate person, an engineer and a bricklayer, a qualified physician or surgeon and a quack, as occupying the same or equal position in actual life. Though Article 14 recognises a general or constitutional equality among all human beings, some distinction, some classification, some gradation or differentiation either in legislative practice or in day to day administration is inevitable, if one has to reconcile constitutional or legal equality with the facts of life and the needs of public administration. The whole system of State taxation, particularly income-tax, rests on a classification or differentiation of citizens according to their income and a capacity to pay. The insane and feebleminded persons might be put in a special class or category by themselves. Persons serving the public, as for instance, inn-keepers, vendors of food stuffs, common carriers, medical practitioners, factory and mine owners, might be subjected to special regulations designed to ensure public health, safety or convenience. Again, part of the area of a State may be affected by diseases originating in local conditions, and appropriate legislative or administrative action confined to that locality may be taken. This power of the State to ensure public health, safety, morals, in short, the general welfare

of the people, has been styled the "police power" in American decisions. This power to govern men and things is inherent in every State and it involves classification, differentiation and abridgement of individual freedom. So long as the power is exercised *bona fide* and in a reasonable manner for the end designed and subject to the express provisions of the Constitution, the exercise of that power is not hit at by Article 14, though to some extent it might trench upon the freedom of the individual citizen. Clauses 2 to 6 of the Article 19 of our Constitution expressly permit regulation and control of the exercise of their fundamental rights by citizens. But the classification or differentiation of citizens in the exercise of this power

"must 'always' rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed and can never be made arbitrarily and without any such basis." *Gulf G and S.F. Ry. Co.* v. *Ellis*[1].

The guarantee of equality before law and equal protection of the laws given to the citizen by Article 14 of the Constitution does not require that absolutely the same rules shall apply to all persons irrespective of differences of circumstances. It merely enacts that equal protection and security of the laws should be given to all under like circumstances and conditions in the enjoyment of their civil rights.

The identical language of section 1 of the Fourteenth Amendment in America, was, to quote only a few typical decisions, explained as follows :—

"The fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by these maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilisation under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself . . . . . The equal protection of the laws is a pledge of the protection of equal laws." (*Yick Wo* v. *Hopkins*[2]).

This last statement was substantially adopted and much the same language was used in *Connolly* v. *Union Sewer Pipe Co.*[3] and *German Alliance Insurance Co.* v. *Hale*[4].

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation." (*Southern Railway Co.* v. *Greene*[5]).

"The Fourteenth Amendment does not prohibit legislation which is limited in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed" (*Hayes* v. *Missouri*[6]).

Class legislation or administrative action discriminating in substance and in effect though not in form, against some citizens and favouring others, is unconstitutional as violating the guarantee of equal protection of the laws given to all persons by section 1 of the Fourteenth Amendment, corresponding to Article 14 of our Constitution. Any classification or differentiation of persons reasonably relevant and germane to the recognised principles of good and just government is not unconstitutional. In deciding whether an exercise of governmental power, whether legislative or administrative, violates these principles, the court is entitled to go behind the face of things and enquire into its fairness in actual working and enforcement. Colourable legislation or administrative action in the pretended exercise of the "police power" of the State designed to cause or actually resulting in an invasion of the rights of a particular class or section of citizens would be unconstitutional. The rule is thus stated :—

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (*Yick Wo* v. *Hopkins*[2]).

1. (1897) 165 U.S. 150, 155.
2. (1886) 118 U.S. 357.
3. (1902) 184 U.S. 540, 559.
4. (1911) 219 U.S. 307, 319.
5. (1910) 216 U.S. 400, 412.
6. (1887) 120 U.S. 68, 71.

It is argued by the learned Advocate-General that different rules have to be applied to different castes and communities in the matter of admission to colleges in view of the disparity in their educational and economic conditions. The allotment of eight seats out of every 14 for Non-brahmin Hindus, as compared with 2 seats each for Brahmins and Harijans, and one seat each for Christian and Muslims, is said to be a reasonable and permissible classification having regard to the educational and economic conditions and needs of the various communities. I am unable to assent to the suggestion of the Advocate-General that Non-brahmin Hindus constitute one of the " weaker sections of the community ". A community which has furnished successive Vice-Chancellors of great distinction for all the three universities in this State, several law officers of the State like Advocate-Generals, Public Prosecutors and Government Pleaders, distinguished Judges of this court, competent administrative officers functioning both in the Union Government and as heads of districts and departments in this State, physicians, surgeons and obstetricians of all-India reputation, industrial magnates, mill-owners and entrepreneurs of great business ability and affluence, and nine out of twelve ministers of this State administering its affairs to-day, cannot, with any sense of appropriateness, be described as a weak section of the body politic requiring discriminative protection against other sections. In all the competitive walks of life the members of the Non-brahmin Hindu community are in the forefront having won their place, I dare say, by reason of their ability, industry, educational attainments and organising capacity. I am not bound, as a Judge, to affect a cloistered aloofness or seclusion from facts that every person in the State is aware of and to insist pedantically on detailed evidence of matters of common knowledge especially when dealing with the constitutional rights and privileges of citizens. I am by no means clear that the Communal Government Order allotting 8 out of 14 seats for Non-brahmin Hindus and 2 seats each for Brahmins and Harijans and one seat each for Christians and Muslims is not a discrimination violative of Article 14 of the Constitution. As, however, this point was touched upon, but not fully argued on behalf of the applicants, I do not rest my conclusion on the ground that the Communal Government Order is in violation of Article 14 of the Constitution.

Article 14 of the Constitution enacts a general rule while the succeeding Articles are particular applications of that rule. The exercise of government power, be it legislative or executive, would be illegal and unconstitutional if it violates the rights and privileges guaranteed to citizens by these Articles. Article 15 runs thus :

" (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." . . . .

(2) Nothing in this Article shall prevent the State from making any special provision for women and children."

Article 29 (2) runs as follows :

" No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

The right to develop his natural faculties, physical and intellectual, is an incontestable right of every citizen and inheres in him. The gift of public education through institutions maintained by the State or with State aid is intended to improve the personal significance and stature of the individual citizen and to enable him to qualify for any lawful profession or employment. Every citizen is a beneficiary entitled to the benefit of this gift from the State if he has the requisite aptitude or qualification. Equality of opportunity for enjoying the amenities provided by the State to all citizens, subject only to such regulations as may be made in the interests of good government and public welfare, is guaranteed by Article 14. The makers of the Constitution were not content with enacting a general provision like Article 14, leaving the rights of citizens to the vicissitudes of judicial interpretation. They were aware of the huge mass of judicial decisions, not always consistent nor speaking with one voice, that had accumulated in America round the words " equal protection of the laws ", in section 1 of the Fourteenth Amendment.

With this knowledge and with their experience of the baneful results of discriminatory rules and practices based on considerations of caste, race or religion resulting in undue advantage to certain communities and serious detriment to other sections of the public, they enacted Article 15 containing an express prohibition of discrimination by the State against any citizen on grounds of caste, race, religion, etc. Article 29 (2) forbids denial of admission to a citizen to educational institutions maintained by the State or receiving State aid only on grounds of caste, race or religion. Evidently the right of a citizen to receive the benefit of education provided at State expense, if he had the requisite qualification, was regarded as of so important a character as to require a categorical statement and a special guarantee in Article 29 (2). Though the Articles are expressed in strong negative terms, the negative necessarily implies and involves the affirmative. The right that is recognised and guaranteed against discrimination by Articles 15 (1) and 29 (2) in the personal right of every individual citizen, his caste, race or religion being wholly irrelevant, not only irrelevant, but expressly tabooed from consideration. The rights of a caste or community do not come into the picture at all. The previous tendency to think in terms of majorities and minorities and of caste, race or religion, in adjusting the relations between the citizen and the State, was resolutely combated and definitely shut out.

The learned Advocate-General sought diligently to persuade us that the strength of his argument lurked in the word "only" found in Article 15 (1) of the Constitution. The meaning of Article 15 (1) would be wholly unaffected if the word "only" were deleted from it. I might here observe that the phraseology of this Article like that of Article 325 relating to electoral rights, has been adopted from American decisions dealing with discriminatory legislation directed against Negroes and citizens of Asiatic origin. I was told by one of the learned counsel, whose literary attainments are far greater than mine that the expression "discriminate against a citizen on grounds only of caste" was not happy English, though the Oxford dictionary defines "discriminate against" as "make an adverse distinction with regard to; distinguish unfavourably from others." I find, however, that the expression is used frequently in American decisions and it is evidently a good Americanism imported in our Constitution. But whatever be the source, the plain meaning of this plain enactment is that the State shall not make a distinction between one citizen and another on the ground of his caste, race or religion. The significance of the word "only" is that, other qualifications being equal, the race, religion or caste of a citizen should not be a ground of preference or disability. The use of the words "or any of them" in Article 15 (1) and 29 (2) after the words "religion, race, caste, etc." shows emphatically that not one of the enumerated grounds, namely, race, religion, caste, etc., is a valid ground for admitting or refusing admission to students to educational institutions maintained by the State or with State aid.

This is perhaps a convenient place to examine some of the American decisions cited to us, though, as I have said, the language of our Constitution is specific and emphatic and there is not the same scope for judicial interpretation here as there is in America. The discrimination in America was based on colour. Negroes and persons of Japanese or Chinese origin were the victims of discrimination. The Jim Crow laws and the "Yellow Peril" threatening California, the "White Man's Paradise", were the subject of frequent controversy. Notwithstanding the civil war as a result of which Negroes were freed from slavery, and the enactment of the Fourteenth Amendment guaranteeing to all persons the equal protection of the laws, and the Fifteenth Amendment giving the right to vote to all citizens irrespective of colour, discrimination against Negroes and citizens of Asiatic origin, direct or indirect, open or covert, "simple or sophisticated", has been a persistent feature of State legislation, especially in the southern States of America. The Supreme Court has declared such legislation unconstitutional if it violated the clause as to "equal protection of the laws". The law has been progressively built up by judges who very often discarded the doctrine of *stare decisis* in their attempt to reconcile the Constitution with the needs of a changing world and a socialist economy. The

phrase " equal protection of the laws " has been interpreted as meaning that similar or substantially similar amenities and privileges should be provided for Negroes and citizens of Asiatic origin as for the white people. " Similar, but not the same " was the rule of construction adopted by the Supreme Court. It was held to be quite legal and constitutional to provide separate and exclusive accommodation for white people in inns, hotels, tramcars, omnibuses, railways, schools, etc., provided that substantilly similar accommodation or amenity was provided for the coloured citizen elsewhere. Such a discrimination would be unconstitutional in India under Article 15. The tendency of the Supreme Court has been somewhat liberal in the matter of recognising the equal rights of Negroes and citizens of Asiatic origin with reference to property, but somewhat conservative though progressive, in recognising social equality.

In *Oyamma* v. *California*[1], a Japanese father had a son who was born in America and therefore became an American citizen. The Supreme Court upheld the right of the latter to acquire land anywhere in the United States, overruling previous decisions sustaining State laws which discriminated against people of Japanese origin residing in America. The Court relied on the following observations in *Hirabayashi* v. *U. S.*[2]:

" Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

In *Shelly* v. *Kraemer*[3], restrictive covenants in agreements excluding coloured persons from the ownership or occupancy of property covered by such agreement were held not to be legal. The following passage in the judgment is instructive :

" The rights created by the 1st section of the Fourteenth Amendment, are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the Court may also be induced to deny white persons' rights of ownership and occupancy on grounds of race or colour . . . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequality."

In *Buchanan* v. *Wagley*[4], the Court upheld the right of a white man to sell his property to a coloured man declaring the unconstitutionality of a State law enforcing segregation by inhibiting occupancy of property by a Negro. This decision has, I understand, been criticised as giving greater protection to the property of Negroes than had been accorded to their personal rights.

With reference to educational matters, the Negro, whose tenacity both in the playing ground as well as in the arena of constitutional fight has been remarkable, has been scoring. Incidentally this line of cases would illustrate how the fabric of the American Constitution has been and is being built by the Judges of the Supreme Court. In *Plassey* v. *Ferguson*[5], the Court said :

" The object of the Amendment (Fourteenth) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on colour or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognised as within the competency of State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and coloured children, which has been held to be a valid exercise of the legislative power."

In *Missouri Ex Rol Games* v. *Canada*[6], a Negro was refused admission to the School of Law of the State University of Missouri, and he applied to the Supreme Court. It was held by that Court that there was a denial of the equal protection of the laws to the applicant and that the refusal was improper. The Court observed :

" The basic consideration is . . . . . as to what opportunity Missouri itself furnishes to white students and denies to Negroes solely upon the ground of colour. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the

1. (1948) 332 U.S. 633.
2. (1942) 330 U.S. 81, 100.
3. (1948) 334 U.S. 1, 22.
4. (1917) 245 U.S. 60.
5. (1896) 163 U.S. 537.
6. (1938) 305 U.S. 337.

privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up."

After the second world war where Negroes fought by the side and in front of white soldiers, judicial opinion has tended to improve the position of Negroes considerably in the matter of professional and collegiate education. Two recent decisions of the Supreme Court in *Sweatt* v. *Painter*[1], and *McLaurin* v. *Oklahoma*[2], have been placed before us and they illustrate the expansion of the Constitutional rights of the Negro. In the former case it was held by the Supreme Court that a Negro was entitled to be admitted to the Law School of the University of Texas, from which he was sought to be excluded on grounds which would, perhaps, have been upheld by the Judges of the Supreme Court of a previous generation. Another law school for Negroes had been established *pendente lite*, but it had fewer professors, fewer law books and had not the same high academic reputation of the older institution established for the white population. The Supreme Court observed :

"In terms of number of the faculty, variety of courses and opportunity for specilization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to far greater degree those qualities which are incapable of objective measurement, but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the *alumni*, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close."

In the second of the two decisions above referred to, a Negro was admitted to a college for the pursuit of higher studies to qualify him for a doctorate. At first he was completely segregated in the class room by a wired fence and he was later on assigned a seat in the class room specified for coloured students, a separate table in the library on the ground floor and a special table in the cafeteria. The Supreme Court held that these distinctions were illegal and unconstitutional and observed :

"They signify that the State, in administering the facilities it affords for professional and graduate study sets McLaurin apart from the other students. The result is that the appellant (Negro) is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students and in general, to learn his profession."

In view of the peremptory and specific provision contained in Article 15 (1) of the Constitution of India, it would be unnecessary to rely upon the American decisions taking a liberal view of the rights of the Negro in the matter of admission to State colleges. At the same time, it is interesting to note that the Judges of the Supreme Court felt bound under the impact of changing political and economic conditions both in America and in the world, to make a departure from their previous pronouncements restricting the rights of the Negro. In my opinion, the Communal Government Order violates Article 15 (1) of the Constitution. It statedly classifies students seeking admission to State colleges on the basis of caste and religion and allots a definite number of seats to students belonging to particular castes or communities irrespective of their merit. It makes caste and religion a ground of admission or rejection. In its working, it results in the adoption of different qualifications and different standards for students seeking admission to the same institution according to their caste, community or religion. By its allotment of a fixed number of seats to students of a particular caste or community, the Communal Government Order denies equal treatment for all citizens under like circumstances and conditions, both in the privileges conferred and disabilities imposed. In its effect and operation the Communal Government Order discriminates very markedly against members of a particular caste and shuts out students having high qualification solely on the ground of their caste or

6. (1950) 63 L.W. 89 (Journal). 2. (1950) 63 L.W. 91 (Journal).

religion and lets in others with inferior qualifications on the same ground. The "charter of liberties of the student world" which the sponsors of the Constitution proudly proclaimed they were enacting has been so abridged and mutilated by the Communal Government Order as to reduce it to a charter of servitude for a class of deserving students who have the misfortune to belong to a particular caste or religion.

It was argued by the learned Advocate-General that there was here no discrimination based on the ground of caste or religion. He maintained that other considerations such as want of sufficient accommodation for all applicants for admission, and the duty of the Government to advance the educational and economic interests of the backward classes, to ensure social justice for all sections of the public and to prevent State or State-aided colleges from being monopolised by one section of the public to the detriment of others, guided the action of Government. I am free to admit that these considerations are legitimate and proper to be taken into account in shaping or formulating Government policy. But they have to be accommodated within the framework of the Constitution. Here I may observe that I do not think so ill of our Constitution as to suppose that these principles of good government and social and economic justice were ignored or not given due weight by its makers when they enacted Article 15 (1). Individual rights of citizens of so fundamental and transcendent a character, as for example, the right of every citizen to develop his faculties to the best advantage with the aid of the educational facilities provided by the State or at State expense, were considered to be so inviolable that the power of the Government to interfere with such rights according to its changing notions of policy or expediency, was put under strict restraint by the Constitution. If the persons in charge for the time being of a State, elected no doubt by a majority of voters at the polls, were free to enforce their own notions of social and economic justice unfettered by constitutional restraints, there is a possibility of serious and undeserved hardship and injury to large classes of citizens who are in a minority. To avoid this possible abuse of government power the framers of the Constitution erected the steel frame of fundamental rights on which alone government could build. Part III of the Constitution is itself a categorical statement of those very principles of individual and social justice whose transgression in the exercise of governmental power is expressly forbidden. The constitution has struck the balance between government power and the rights of individual citizens and it has to be obeyed. Article 15 (1) controls the

"temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the whole nation",

to quote the words of the learned Chief Justice of the Supreme Court of India in *A. K. Gopalan* v. *The State of Madras*[1].

Let me not be misunderstood. The economic resources of the State are limited. It is impossible to provide seats for all students seeking admission to Government Colleges. Therefore some citizens have to be winnowed out. The prescribing of some qualifications and standards for admission of students is therefore inevitable. The qualifications may vary with the different branches of academic or professional studies. Special qualifications or aptitudes for particular types of education may be laid down, based on physical fitness, marks obtained in preparatory examinations and so on. They must however, be reasonably relevant to the recognised purposes of professional or other kind of education and the qualifications prescribed must be the same for all citizens seeking admission to a State or State-aided educational institution, irrespective of whether they belong to this or that caste, community or religion. It may be that through the fortuitous operation of a rule which, in itself is not discriminatory, a special advantage is enjoyed by some citizens belonging to a particular caste or community. This advantage is not taken away by Article 15 (1). If, for instance, students belonging to a certain community or caste by reason of their caste discipline, habits and modes of life, satisfy the prescribed requirements in larger numbers than others, it is not permissible to shut them out on that

1. (1950) 2 M.L.J. 42 at 57 : 1950 S.C.J. 174 (S.C.).

score. Nor is it permissible to lay down wholly fanciful, arbitrary or irrational tests unrelated to education, academic or professional.

If, other qualifications being equal, a Christian who has got 500 marks is excluded on the ground that only one seat is allotted to Christians and that seat has been filled up, while a Hindu who has got 300 marks is admitted on the ground that 350 seats allotted for Hindus have not been filled up, there is clearly a discrimination against a Christian citizen on the ground only of his being a Christian. The position with reference to the Brahmins and Non-brahmins would be the same, except that the discrimination is based on caste and not on religion. Now if we are going to classify on the basis of castes, where are we to stop? If exclusive privileges of a discriminatory character are to be granted to one caste, why not extend the same principle to sub-castes and sub-divisions of each sub-caste? There are Smarthas and Vaishnavites among Brahmins and among the Smarthas and Vaishnavas there are further sub-divisions. There are more sub-divisions among Non-brahmins than it is possible to enumerate. Islam and Christianity do not exhibit so many differences. It was with a view to exterminate these communal and class consideration in the realm of State activity, that Article 15 (1) has been enacted. The Communal Government Order is subversive of this basic provision of the Constitution.

I was not able to understand—I am not sure I am any wiser now—the argument of the learned Advocate-General that if one Brahmin or Christian student is admitted, there is no question of discrimination amongst Brahmins or Christians within the meaning of Article 15 (1). This argument is sought to be seriously supported by citation of some American decisions. It is best answered in the language of one of those decisions dealing with a legislation requiring Negroes to apply for registration within a fortnight on pain of losing their right to vote. The Supreme Court held :

"The Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the coloured race although the abstract right to vote may remain unrestricted as to all races." See *Lane* v. *Wilson*[1].

Again, as observed in *Shelley* v. *Kraemer*[2],

"Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

The contention that there must be an exclusion of Brahmins or Christians altogether in order to constitute discrimination within the meaning of Article 15 (1) ignores the language and purpose of the Article. This argument may be relevant to an interpretation of Article 29 (2) as I shall show presently. The prohibition in Article 15 (1) is against differentiation between one citizen and another citizen on the ground of caste, race or religion. The rights that are protected and guaranteed by this Article are the personal rights of each individual citizen, his caste, race or religion being wholly ruled out of consideration. It is not the rights of a caste or community or the rights of citizens as representing or forming integral parts of a caste or community that this Article deals with and guarantees. The right guaranteed is the personal right of every individual citizen *qua* citizen, and not as belonging to a particular caste or professing a particular religion. The American decisions already cited emphasise that the right is the personal right of each individual citizen unaffected by his race or colour.

Learned counsel for the applicants took their stand mainly on Article 29 (2) and the Advocate-General adroitly turned his counter-attack against them on their own chosen ground. Not sufficient importance was given to Article 15 (1) in the course of the arguments. To avoid a long discussion, I take the liberty of stating the argument of the respondent in the form of a syllogism. The applicants have been refused admission because (*a*) they are Brahmins; (*b*) Brahmins have an allotment of only two seats out of 14 on the basis of some principle of communal justice; and (*c*) the two seats have already been filled up by other Brahmin candidates. A denial of admission based on these three grounds is not a denial only or solely or exclusively on the ground of the applicants being Brahmins, which

1. (1939) 307 U.S. 268.
2. (1948) 334 U.S. 1, 22.

alone is prohibited by Article 29 (2). This, in substance is the contention of the Advocate-General and it looks plausible. It may not be a complete answer to say that the right guaranteed under Article 29 (2) is the individual right of a citizen. Denial of admission is different from discrimination, the former involving a wholesale refusal and the latter a preference of some and rejection of others. Discrimination is hit at by Article 15 (1) and denial of admission by Article 29 (2). Whatever difficulty there may be in holding that the Communal Government Order offends Article 29 (2), in my opinion, it flies in the face of Article 15 (1) of the Constitution. For this reason I refrain from referring to the original draft of Article 29 (2) and the speeches in the Constituent Assembly at the time when Article 29 (2) in its present form was enacted.

The learned Advocate-General further contended that it was open to the Government to take candidates in proportion to the numerical strength of the various communities and that this was also one of the considerations which weighed with the Government in enforcing the Communal Government Order. This contention is again shipwrecked on the language of Article 15 (1) of the Constitution. If you classify students seeking admission to colleges according to the castes and the communities to which they belong and fix and allot a number of seats for students of each caste or community according to the numerical strength of the members of that caste or community, you are differentiating between citizens on the ground of caste or religion. A Brahmin student who gets 450 marks is told that he has no seat because there are only two out of 14 seats allotted for his community, and these two seats have been filled up by Brahmin students with higher marks. A Non-brahmin student who obtains 350 marks is admitted because there are 8 seats out of 14 allotted for his community and 8 students with more than 350 marks have not been forthcoming. The Brahmin is rejected and the Non-brahmin is admitted only because the former is a Brahmin and the latter, a Non-brahmin. If a Brahmin student had turned overnight into a Non-brahmin —assuming such a feat were possible—he might have been admitted and a Non-Brahmin, if he proved to be in fact a Brahmin under Non-brahmin disguise, would have been rejected. What else is this but patent discrimination on the basis of caste?

The learned Advocate-General referred us to Article 337 of the Constitution in support of his contention that discrimination on the basis of communities was recognised by the Constitution. In my opinion, this is far-fetched argument. Article 337 purports to be a special transitory provision occurring in the Chapter entitled "Special provisions relating to certain classes". Anglo-Indian educational institutions had been receiving in pre-independence days lavish grants from Governments, very much in excess of the scale prescribed for other institutions. The makers of the Constitution considered that it would work a hardship if this preferential treatment were stopped all at once and therefore provided a limited measure of protection to Anglo-Indian institutions for a strictly limited period. Article 337 is a special provision and in any case, it is a part of the Constitution itself. The absence of any similar provision for other communities in Article 15 (1) and 29 (2) is an argument against the respondent.

It was further argued that Article 16 (4) of the Constitution provided for the reservation of appointments or posts for backward classes of citizens and that in order to enable them to obtain the benefit of this reservation, preferential treatment in the matter of admission to colleges had to be extended to them. This is an ingenious but unsound argument. It is significant that there is no such reservation in favour of backward classes in Article 15. The makers of the Constitution made specific provisions for conferring special privileges on backward classes, and Article 16 (4) is one such provision. There is no corresponding provision either in Article 15 or in Article 29 reserving seats for backward classes in educational institutions maintained by the State or with State-aid. On the other hand, the language of Article 15 (1) is peremptory that no distinction on the basis of caste, race or religion should be made between one citizen and another in the exercise of his constitutional rights and one such right is the right to admission to State or State-aided institutions

provided he has the prescribed general qualifications. It will be ludicrous to suggest that in order to enable the backward classes to enter public service a provision could be made entitling a student of the backward class to a pass in the Intermediate, Bachelor of Arts or Science Examinations of the University if he gets 10 per cent. of the total marks as against a 40 per cent. minimum fixed for other students. It is not the less objectionable if under the guise of allotment of seats to different communities you set different qualifications and different standards for students seeking admission, the said qualifications and standards varying with their caste, community or religion.

Lastly, it was contended that the Communal Government Order was justified by Article 46 of the Constitution, which directs the State to promote with special care the educational and economic interests of the weaker sections of the people, particularly the scheduled castes and tribes. Article 46 occurs in Part IV dealing with "Directive principles of State Policy". It is a Code of morals and ideals for State governments like the commandments of the Bible. Article 37 expressly states that the provisions of Part IV shall not be enforceable by any court. The rights conferred by Article 15 (1) and 29 (2) are expressly made justiciable by Articles 32 and 226 of the Constitution. Article 46 lays down the general policy to be followed by the State in the sphere of legislation or executive action. It cannot and does not purport to override the provisions of Article 15 (1) and it must be read subject to the provision, according to the elementary rule of statutory interpretation, that the different parts of a statute should, as far as possible, be construed so as to avoid a conflict. The contention of the Advocate-General really comes to this: that discrimination is shut out by the front door of Article 15 (1) but immediately readmitted by the backdoor of Article 46. There are also other difficulties in the way of upholding his contention. The Communal Government Order in the form in which it is now worked has been in existence for a long time prior to the coming into force of the Constitution. It has not been framed or issued by the Government in the exercise of the powers and the discharge of the duties specified in Article 46 of the Constitution. The same old classification of communities on the basis of caste and religion, into Brahmins, and Non-brahmins, Christians, Muslims and Hindus, is kept up and enforced. There is nothing to show that the Government applied its mind to a determination of who the "weaker sections" of the people were, before allotting seats in the Engineering and Medical Colleges to the different castes and communities. Even in the same caste or community there are stronger and weaker sections. Economically, culturally and educationally, a caste is not a homogenous body. Further, it is not the case that the Communal Government Order advances the educational interests of the weaker sections. Taking the case of Harijans as an illustration, two of 14 seats are allotted to them. It is not as if two seats are reserved for them and the remaining seats are thrown open to Harijans along with other communities to be filled upon a competitive basis. If there are six Harijans who have secured higher marks than all the candidates of the other communities, only two Harijans would be admitted, and the remaining 4 will be denied admission solely on the ground of their being Harijans. In this sense, the Government Order discriminates against backward classes. In any case, it is an indiscriminate imposition of inequalities, on the basis of caste, race or religion. The Communal Government Order divides citizens into water-tight compartments according to the caste or religion and prefers citizens of one caste or community to the detriment of others, even though the qualifications of the students who are preferred are inferior to those of the students who are rejected.

I may briefly advert to one other point which arose during the course of the arguments. Article 15 (3) allows the reservation of educational institutions exclusively for the benefit of women. There is no such correspondent provision for males, and Article 15 (1) is wide and general in its terms. It is however significant that Article 29 (2) omits all reference to sex and place of birth among the prohibited grounds of discrimination. It may therefore be reasonably argued that educational institutions intended exclusively or primarily for men could be maintained by the State without a violation of the Constitution.

To sum up :—Articles 14 and 15 (1) of the Constitution are plain and indeed, quite intractable. Their language is express, explicit and peremptory. They guarantee certain valuable personal rights to every citizen. These rights are made inviolable by the exercise of Government power except in conformity with the Constitution. The State is prohibited by Article 15 (1) from discriminating against any citizen on the ground of his caste or religion, when he attempts to exercise Constitutional rights guaranteed to him by Chapter III. It prohibits the State from discriminating against citizens seeking to avail themselves of opportunities provided by the State for their intellectual development and material advancement by joining educational institutions maintained at the expense of the State, on the ground of caste or religion, if they satisfy reasonable tests prescribed alike for all citizens similarly situated. The Communal Government Order which classifies citizens according to their caste and religion for purposes of admission to Government Medical and Engineering Colleges, which allots seats in definite and fixed proportions to different castes and religions and communities and which operates effectively to shut out a large number of students with higher qualifications and to let in a large number of students with lower qualifications, solely, on account of their belonging to particular caste and communities, discriminates against citizens on the ground of caste, community or religion, and therefore violates Article 15 (1) of the Constitution. It is unnecessary to decide whether it is also hit at by Article 14 as being a colourable exercise of Government power depriving the citizen of the protection of equal laws. Declaration of a guaranteed right in Article 15 (1) of the Constitution would be worthless if the Government could disregard or nullify it by executive acts like the Communal Government Order. The fact that the Constitution reverses previous administrative principles and practices widely prevalent in this State is not a ground for neutralising its operation and effect, for, Article 15 (1) of the Constitution was specially intended to abrogate and expressly abrogated, discrimination against citizens on grounds of race, religion or caste.

The appeal made by the learned Advocate-General to some vague and undefined principle of social justice, does not justify a court of construction—and construction of the Constitution is the whole of our task—in refusing to obey the plain command of the Constitution by which the legislature, the executive and the judiciary are all bound alike. Does social justice or the welfare of the State require a suppression of the integrity and freedom of the individual personality of a citizen by reason of his belonging to a particular caste ? I do not apprehend any calamitous or untoward results from our decision in view of the rapid progress—economic and educational—now being made by all sections of the people under our democratic-republican Constitution. An appreciable amount of constructive work for the uplift of Harijans is done not only by the State but by non-official organizations comprising citizens of all communities. The need for improving the economic and educational level of backward classes is there, but there are many legitimate methods of satisfying this need without causing detriment to other communities and individual citizens. May it not be met by a process of levelling up rather than levelling down ? Is the lynch spirit having its rootage in caste and colour and religious differences, to be fostered and recognised as a principle of State policy ? That the end justifies the means was no part of the creed of the makers of our Constitution, who drew their inspiration not from Machiavalli but from Mahatma Gandhiji. It would be strange if, in this land of equality and liberty, a class of citizens should be constrained to wear the badge of inferiority because, forsooth, they have a greater aptitude for certain types of education than other classes. It would be very unjust—it is now unconstitutional—to deprive deserving youths of a particular community of a right of so elementary a character, that deprivation of its enjoyment in common with and on the same footing as others, is a deprivation, in the competition of life, of one of the most essential means of existence ; and this for no sin or fault of theirs and for no other reason than that they belong to a particular caste or religion. Article 15 (1) of the Constitution of India would become an empty bauble if the Communal Government Order regulating admission of students were held to be legal and constitutional.

For these reasons I agree with my Lord the Chief Justice in the form of the order which he proposes to make and in the direction as to costs.

Somasundaram, J.—The question that falls to be decided in these two petitions is whether the G.O. No. 1254, Education, dated 17th May, 1948, which regulates the admission of students into Medical and Engineering Colleges is valid under the present Constitution. The facts are fully set out in the judgment of my Lord the Chief Justice that it is unnecessary for me to restate them here ; nor is it necessary for me to state the circumstances in which the Government Order was passed. If I remember right the principle behind it was recognised and laid down by representatives of the people and it is maintained upto date by those in authority and they are the accredited representatives of the people. There is therefore behind it the sanction and the will of the people of the State. We are not called upon here to comment on the circumstances that have led up to this Government Order. Nor do I think it necessary to enter into a discussion of the principles underlying the draft Constitution or the background of Article 29 (2). We are here concerned only with the validity of the order. The decision on the questions turns upon the proper interpretation of Article 15 (1) and 29 (2) of the Constitution. A number of American decisions were cited before us but they are not of material assistance in arriving at the decision and it was practically so conceded at the Bar. It is also conceded that provisions similar to Articles 15 (1) and 29 (2) are not to be found in any of the Constitutions of other countries in the World and no direct authority bearing on the point is available.

The contention of the petitioners is that the discrimination in Article 15 (1) and the denial in Article 29 (2) should on no account be based on religion, race, caste or language or any of them and they should not form the basis of selection. The term " only " in both the sections according to them means " because of ". On the other hand the contention of the learned Advocate-General is that emphasis must be laid on the word " only " and according to canons of interpretation of statutes the word must be given a meaning appropriate to the context and it cannot be ignored in the construction unless it would lead to an absurdity. The meaning of the term may vary with the context. In my opinion there is considerable force in the contention of the Advocate-General. The word " only " in the Oxford Dictionary has the following meanings : Solely, merely, exclusively by or of itself alone, without anything else. " Only " in the context therefore means solely or for this reason *alone*. So construed the Articles mean that the discrimination or denial should not be on the ground of religion, race, caste or language alone. It follows therefore that one of the grounds of discrimination or denial may be on the basis of religion, race, caste, language, but it should not be the sole ground. It may be that the ground of denial or discrimination may involve or bring in the question of caste, but it would not be on that sole ground (*i.e.*,) a ground unaffected by any other consideration than that based on religion, race, caste, etc. It appears to me that the framers of the Constitution have used the word " only " deliberately. In my opinion the framers were and must have been conscious of the fact that this Sub-Continent of India is composed of people of varying degrees of culture and civilization differing from State to State. They may legitimately have thought that in the circumstances it would not be safe to enact a rigid and inelastic rule that the caste, religion, language, etc., should not be the basis of selection at all and that it might hamper and fetter the policy of the State in the Government of the country. Therefore the term " only " was included for emphasising that the denial or discrimination should not be on the sole ground of caste, etc., and that circumstances in each State or carrying out certain policies may involve denial or discrimination on the ground of caste, etc., but that such denial or discrimination would not be in contravention of Articles 15 (1) and 29 (2). It is neither possible nor necessary for us to state what are those circumstances or facts or policies which the State may legitimately take into account or pursue or adopt. Where the construction of a section is doubtful it is competent for us to look into the preamble which states that all citizens shoul have equality of opportunity. How this equality of opportunity in the matter of education should be worked

out is a matter entirely for the State depending on various circumstances and if it is worked out in a particular way *bona fide* it cannot be said that in the matter of working out, denial or discrimination in the matter of admission involves the ground of caste, etc., and Articles 15 (1) and 29 (2) are contravened ; because the Articles postulate the taking of other considerations than religion, race, caste, etc., some of which might bring in the question of religion, race, caste, etc., and some of which might not. It is only if the denial or discrimination is based on the bare ground of religion, race, caste, etc., the Articles are hit.

Article 46 of the Constitution is a very relevant and important Article to be considered in this connection. It runs thus :

> " The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled castes and the Scheduled tribes, and shall protect them from social injustice and all forms of exploitation "

This is placed in the Chapter relating to Directive Principles of State Policy. Article 37 states that though the provisions in that part are not enforceable in Court, nevertheless the principles therein are fundamental in the governance of the country. I emphasise the word " fundamental " in the Article. In this connection I may usefully refer to the speech made by Dr. Ambedkar when he introduced the Draft Constitution for consideration by the Constituent Assembly.

> " The Directive Principles are like the Instrument of Instructions which are issued to the Governor-General and to Governors of the Colonies and to those of India by the British Government under the 1935 Act. What are called Directive Principles is merely another name for Instrument of Instructions . . . . The only difference is that they are instructions to the Legislature and the Executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these Instruments of Instructions which are called Directive Principles. He cannot ignore them."

It is therefore the duty of the State to respect and give effect to the principle contained in Article 46. Those responsible for the Constitution were perfectly aware of these provisions and in fact Article 29 (2) was passed after Article 46 was passed. The use of the word " Fundamental " is significant in view of the use of the same word in Part III of the Constitution. The principles in this chapter are therefore as fundamental as those in Part III. The Constitution provides for the exercise of these principles in the governance of the country and administering the laws laid down in various Articles of the Constitution. The framers were perfectly conscious that in administering Article 15 (1) and Article 29 (2) the State has to deal with other grounds than those mentioned therein. Article 46 may not override the Articles in Part III. But as contended by the Advocate-General, Articles 15 (1) and 29 (2) must be read with Article 46 of the Constitution. In distributing the seats the State can take into account the fundamental principles embodied in the Article which it cannot ignore.

It is contended that the right conferred by the Articles 15 (1) and 29 (2) is an individual right. It may be so but the extent of the right is that conferred by the Articles which as I have pointed out is not an unqualified right as contended for. It is again urged that it is unqualified is clear from the omission of a clause like 16 (4), in Article 29 (2). Article 16 (4) gives effect only to the fundamental principle contained in Article 46 and as I have pointed out Article 29 (2) was passed after Article 46 and the omission of a clause similar to Article 16 (4) does not preclude the State from giving effect to the principle contained in Article 46, which they are bound to.

This is the view of the two Articles which I am inclined to take. At the same time I must admit that there is considerable force in the arguments advanced by my Lord Chief Justice and my learned brother Viswanatha Sastriar for the view they have taken. I would therefore agree though not without hesitation in the order proposed by my Lord the Chief Justice.

We certify that the case involves a substantial question of law as to the interpretation of the Constitution, in particlular, Articles 14, 15, 29 and 46 thereof.

K. S. ——— *Petition allowed.*

[THE SUPREME COURT OF INDIA].

(Original Jurisdiction.)

(Under Article 32 of the Constitution of India for a writ of *certiorari* and prohibition.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND S. R. DAS, JJ.

Brij Bhushan and another ... *Petitioners**

v.

The State of Delhi ... *Opposite Party.*

East Punjab Public Safety Act (*V of* 1949), *section* 7 (*i*) (*c*)—*Validity—Order on printer, publisher and editor of a Weekly to submit matter for pre-censorship—If infringement of freedom of speech guaranteed under Article* 19 (1) (*a*) *of the Constitution—Section* 7 (*i*) (*c*) *of the Punjab Public Safety Act if saved by clause* (2) *of Article* 19 *of the Constitution.*

On the question whether section 7 (i) (*c*) of the East Punjab Public Safety Act which authorises the imposition of pre-censorship on a journal is valid and constitutional,

Held (*Fazl Ali dissenting*) : There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1) (*a*) of the Constitution of India. Unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19 of the Constitution although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. Accordingly section 7 (i) (*c*) of the East Punjab Public Safety Act which authorises imposition of restrictions for the wider purposes of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under clause (2) and is therefore void and unconstitutional.

Per *Fazl Ali, J.*—Section 7 (i) (*c*) of the East Punjab Public Safety Act, 1949, under which an order against a Weekly is made requiring the printer, publisher and editor to submit for scrutiny "all communal matter and news and views" before publication is saved by clause (2) of Article 19 of the Constitution.

Anything which affects public tranquillity within the State or the Province will also affect public order and the State Legislature is therefore competent to frame laws on matters relating to public tranquillity and public order. The framers of the Constitution have used the more general and basic words "undermines the security of or tends to overthrow the State" which are apt to cover sedition as well as other matters which are as detrimental to the security of the State as sedition. Public disorders and disturbances of public tranquillity do undermine the security of the State and the East Punjab Public Safety Act aimed at preventing such disorders fulfils the requirement of the Constitution.

N. C. Chatterjee, Senior Advocate, Supreme Court (*B. Banerji*, Advocate, Supreme Court, with him) for Petitioners.

M. C. Setalvad, Attorney-General for India (*S. M. Sikri*, Advocate, Supreme Court, with him) for Respondent.

The Judgment of the Court was delivered by

Fazl Ali, J.—The question raised in this case relates to the validity of section 7 (*i*) (*c*) of the East Punjab Public Safety Act, 1949 (as extended to the Province of Delhi), which runs as follows :

"The Provincial Government or any authority authorised by it in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor—

* * * * * * *

(*c*) require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny ;"

It should be noted that the provisions of sub-clause (*c*) are not in general terms but are confined to a "particular subject or class of subjects", and that having regard to the context in which these words are used, they must be connected with "public safety or the maintenance of public order".

* Petition No. XXIX of 1950.

The petitioners, on whose behalf this provision is assailed, are respectively the Printer (and Publisher) and Editor of an English Weekly of Delhi called '*Organiser*', and they pray for the issue of writs of *certiorari* and prohibition to the Chief Commissioner, Delhi, with a view "to examine and review the legality" of and "restrain the operation" of and "quash" the order made by him on the 2nd March, 1950, under the impugned section, directing them

"to submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies . . . . ."

The order in question recites among other things that the Chief Commissioner is satisfied that the "*Organizer*" has been publishing highly objectionable matter constituting a threat to public law and order and that action to which reference has been made is necessary for the purpose of preventing or combating activities prejudicial to the public safety or the maintenance of public order. It is contended on behalf of the petitioners that notwithstanding these recitals the order complained against is liable to be quashed, because it amounts to an infringement of the right of freedom of speech and expression guaranteed by Article 19 (1) (*a*) of the Constitution. Article 19 (1) (*a*) and (2), which are to be read together run as follows:

"19. (1) All citizens shall have the right—

(*a*) to freedom of speech and expression;

* * * * * * *

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

It is contended that section 7 (1) (*c*) of the Act, under which the impugned order has been made, cannot be saved by clause (2) of article 19 of the Constitution, because it does not relate to any matter which undermines the security of, or tends to overthrow, the State. Thus the main ground of attack is that the impugned law is an infringement of a fundamental right and is not saved by the so-called saving clause to which reference has been made.

There can be no doubt that to impose pre-censorship on a journal, such as has been ordered by the Chief Commissioner in this case, is a restriction on the liberty of the press which is included in the right to freedom of speech and expression guaranteed by article 19 (1) (*a*) of the Constitution, and the only question which we have therefore to decide is whether clause (2) of article 19 stands in the way of the petitioners.

The East Punjab Public Safety Act, 1949, of which section 7 is a part, was passed by the Provincial Legislature in exercise of the power conferred upon it by section 100 of the Government of India Act, 1935, read with entry No. 1 of List II of the Seventh Schedule to that Act, which includes among other matters 'public order'. This expression in the general sense may be construed to have reference to the maintenance of what is generally known as law and order in the Province, and this is confirmed by the words which follow it in entry No. 1 of List II and which have been put within brackets, *viz.*,

"but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power."

It is clear that anything which affects public tranquillity within the State or the Province will also affect public order and the State Legislature is therefore competent to frame laws on matters relating to public tranquillity and public order. It was not disputed that under the Government of India Act, 1935 (under which the impugned Act was passed) it was the responsibility of each Province to deal with all internal disorders whatever their magnitude may be, and to preserve public tranquillity and order within the Province.

At this stage, it will be convenient to consider the meaning of another expression "public safety" which is used throughout the impugned Act and which is also chosen by its framers for its title. This expression, though it has been variously used in different contexts (*see* the Indian Penal Code, Ch. XIV), has now acquired a well-recognized meaning in relation to an Act like the impugned Act, as a result of a long course of legislative practice, and may be taken to denote safety or security of the State. In this sense, it was used in the Defence of the Realm (Consolidation) Act, 1914, as well as the Defence of India Act, and this is how it was judicially interpreted in *Rex* v. *Governor of Wormwood Scrubbs Prison*[1]. The headnote of this case runs as follows :—

"By section 1 of the Defence of the Realm (Consolidation) Act, 1914, power was given to His Majesty in Council 'during the continuance of the present war to issue regulations . . . . for securing the public safety and the defence of the realm' :—

Held, that the regulations thereby authorized were not limited to regulations for the protection of the country against foreign enemies, but included regulations designed for the prevention of internal disorder and rebellion."

Thus 'public order' and 'public safety' are allied matters, but, in order to appreciate how they stand in relation to each other, it seems best to direct our attention to the opposite concepts which we may, for convenience of reference, respectively label as 'public disorder' and 'public unsafety'. If 'public safety' is, as we have seen, equivalent to 'security of the State', what I have designated as public unsafety may be regarded as equivalent to 'insecurity of the State'. When we approach the matter in this way, we find that while 'public disorder' is wide enough to cover a small riot or an affray and other cases where peace is disturbed by or affects a small group of persons, 'public unsafety' (or 'insecurity of the State') will usually be connected with serious internal disorders and such disturbances of public tranquillity as jeopardize the security of the State.

In order to understand the scope of the Act, it will be necessary to note that in the Act 'maintenance of public order' always occurs in juxtaposition with 'public safety', and the Act itself is called 'The East Punjab *Public Safety* Act.' The prominence thus given to 'public safety' strongly suggests that the Act was intended to deal with serious cases of public disorder which affect public safety or the security of the State, or cases in which, owing to some kind of emergency or a grave situation having arisen, even public disorders of comparatively small dimensions may have far-reaching effects on the security of the State. It is to be noted that the Act purports to provide "special measures to ensure public safety and maintenance of public order." The words "special measures" are rather important, because they show that the Act was not intended for ordinary cases or ordinary situations. The ordinary cases are provided for by the Penal Code and other existing laws, and with these the Act which purports to be a temporary Act is not apparently concerned. It is concerned with *special* measures which would presumably be required for special cases or special situations. Once this important fact is grasped and the Act is viewed in the proper perspective, much of the confusion which has been created in the course of the arguments will disappear. The line of argument advanced on behalf of the petitioners is that since the Act has been passed in exercise of the power granted by the expression 'public order,' used in the Government of India Act, which is a general term of wide import, and since it purports to provide for the maintenance of public order, its provisions are intended or are liable to be used for all cases of breaches of public order, be they small or insignificant breaches or those of a grave or serious nature. This is, in my opinion, approaching the case from a wrong angle. The Act is a piece of special legislation providing for special measures and the central idea dominating it is public safety and maintenance of public order in a situation requiring special measures.

It was argued that "public safety" and "maintenance of public order" are used in the Act disjunctively and they are separated by the word "or" and

1. (1920) 2 K.B. 305.

not " and ", therefore we cannot rule out the possibility of the Act providing for ordinary as well as serious cases of disturbance of public order and tranquillity. This, as I have already indicated, is a somewhat narrow and technical approach to the question. In construing the Act, we must try to get at its aim and purpose, and before the Act is declared to be invalid, we must see whether it is capable of being so construed as to bear a reasonable meaning consistent with its validity. We therefore cannot ignore the fact that preservation of public safety is the dominant purpose of the Act and that it is a special Act providing for special measures and therefore it should not be confused with an Act which is applicable to ordinary situations and to any and every trivial case of breach of public order. In my opinion, the word 'or' is used here not so much to separate two wholly different concepts as to show that they are closely allied concepts and can be used almost interchangeably in the context. I think that "public order" may well be paraphrased in the context as public tranquillity and the words "public safety" and "public order" may be read as equivalent to "security of the State" and "public tranquillity".

I will now advert once more to clause (2) of article 19 and state what I consider to be the reason for inserting in it the words "matter which undermines the security of, or tends to overthrow, the State". It is well-recognized in all systems of law that the right to freedom of speech and expression or freedom of press means that any person may write or say what he pleases so long as he does not infringe the law relating to libel or slander or to blasphemous, obscene or seditious words or writings (*see* Halsbury's Laws of England, 2nd Edition, Vol. II, page 391). This is practically what has been said in clause (2) of article 19, with this difference only that instead of using the words 'law relating to sedition', the framers of the Constitution have used the words mentioned above. It is interesting to note that sedition was mentioned in the original draft of the Constitution, but subsequently that word was dropped and the words which I have quoted were inserted. I think it is not difficult to discover the reason for this change and I shall briefly state in my own words what I consider it to be.

The latest pronouncement by the highest Indian tribunal as to the law of sedition is to be found in *Niharendu Dutt Majumdar* v. *The King*[1], which has been quoted again and again and in which Gwyer, C.J., laid down that public disorder, or the reasonable anticipation or likelihood of public disorder, is the gist of the offence of sedition and

> "The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."

For this view, the learned Chief Justice relied on certain observations of Fitzgerald, J., in *R.* v. *Sullivan*[2] and he also added that he was content to adopt

> "The words of that learned judge which are to be found in every book dealing with this branch of the criminal law."

There is no doubt that what Gwyer, C.J., has stated in that case represents the view of a number of judges and authors and was also the view of Sir James Stephen in regard to whom Cave, J., in his charge to the jury in a case relating to the law of sedition, *R.* v. *Burns*[3], said :—

> "The law upon the question of what is seditious and what is not is to be found stated very clearly in a book by Stephen, J., who has undoubtedly a greater knowledge of criminal law than any other judge who sits upon the bench, and what he has said upon the subject of sedition was submitted to the other judges, who sometime back were engaged with him in drafting a criminal code, and upon their report the commissioners say that his statement of law appears to them to be stated accurately as it exists at present."

The decision of Gwyer, C.J., held the field for several years until the Privy Council, dealing with a case under the Defence of India Rules, expressed the view in *King-Emperor* v. *Sadhashiv Narayan Bhalerao*[4] that the test laid down by the learned

1. (1942) F.C.R. 38.
2. (1868) 11 Cox C.C. 44.
3. (1886) 16 Cox 355.
4. (1947) 1 M.L.J. 343 : L.R. 74 I.A. 89 : I.L.R. 1947 Bom. 110 (P.C.).

Chief Justice was not applicable in India where the offence under section 124-A of the Indian Penal Code should be construed with reference to the words used in that section. They also added :—

"The word 'sedition' does not occur either in section 124-A or in the Rule; it is only found as a marginal note to section 124-A, and is not an operative part of the section, but merely provides the name by which the crime defined in the section will be known. There can be no justification for restricting the contents of the section by the marginal note. In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, some of which are referred to by the Chief Justice, but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case.

Their Lordships are unable to find anything in the language of either section 124-A or the Rule which could suggest that 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that this is their intention or tendency'."

The framers of the Constitution must have therefore found themselves face to face with the dilemma as to whether the word 'sedition' should be used in article 19 (2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected in some way or other with public disorder; and, on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word "sedition" in clause (2) but used the more general words which cover sedition and everything else which makes sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the State usually through the medium of public disorder is also a matter on which eminent judges and jurists are agreed. Therefore it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State.

It will not be out of place to quote here the following passage from Stephen's Criminal Law of England (Vol. II, pp. 242 and 243) :—

"It often happens, however, that the public peace is disturbed by offences which without tending to the subversion of the existing political constitution practically subvert the authority of the Government over a greater or less local area for a longer or shorter time. The Bristol riots in 1832 and the Gordon riots in 1780 are instances of this kind. No definite line can be drawn between insurrections of this sort, ordinary riots, and unlawful assemblies. The difference between a meeting stormy enough to cause well-founded fear of a breach of the peace, and a civil war the result of which may determine the course of a nation's history for centuries, is a difference of degree. Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other, and are not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it.

Another class of offences against public tranquillity are those in which no actual force is either employed or displayed, but in which steps are taken tending to cause it. These are the formation of secret societies, seditious conspiracies, libels or words spoken.

Under these two heads all offences against the internal public tranquillity of the State may be arranged."

This passage brings out two matters with remarkable clarity. It shows firstly that sedition is essentially an offence against public tranquillity and secondly that broadly speaking there are two classes of offences against public tranquillity: (*a*) those accompanied by violence including disorders which affect tranquillity of a considerable number of persons or an extensive local area, and (*b*) those not accompanied by violence but tending to cause it, such as seditious utterances, seditious conspiracies, etc. Both these classes of offences are such as will undermine the security of the State or tend to overthrow it if left unchecked, and, as I have tried to point out, there is a good deal of authoritative opinion in favour of the view that the gravity ascribed to sedition is due to the fact that it tends to seriously affect the tranquillity and security of the State. In principle, then, it would not have been logical to refer to sedition in clause (2) of article 19 and omit matters which are

no less grave and which have equal potentiality for undermining the security of the State. It appears that the framers of the Constitution preferred to adopt the logical course and have used the more general and basic words which are apt to cover sedition as well as other matters which are as detrimental to the security of the State as sedition.

If the Act is to be viewed as I have suggested, it is difficult to hold that section 7 (1) (*c*) falls outside the ambit of article 19 (2). That clause clearly states that nothing in clause (1) (*a*) shall affect the operation of any existing law relating to any matter which undermines the security of, or tends to overthrow, the State. I have tried to show that public disorders and disturbance of public tranquillity do undermine the security of the State and if the Act is a law aimed at preventing such disorders, it fulfils the requirement of the Constitution. It is needless to add that the word ' State ' has been defined in article 12 of the Constitution to include

"the Government and Parliament of India and the Government and Legislature of each ol the States and all local or other authorities within the territory of India or under the contro of the Government of India."

I find that section 20 of the impugned Act provides that the Provincial Government may by notification declare that the whole or any part of the Province as may be specified in the notification is a dangerously disturbed area. This provision has some bearing on the aim and object of the Act, and we cannot overlook it when considering its scope. It may be incidentally mentioned that we have been informed that, under this section, Delhi Province has been notified to be a " dangerously disturbed area ".

It must be recognised that freedom of speech and expression is one of the most valuable rights guaranteed to a citizen by the Constitution and should be jealously guarded by the courts. It must also be recognised that free political discussion is essential for the proper functioning of a democratic Government, and the tendency of modern jurists is to deprecate censorship though they all agree that " liberty of the press " is not to be confused with its " licentiousness ". But the Constitution itself has prescribed certain limits for the exercise of the freedom of speech and expression and this court is only called upon to see whether a particular case comes within those limits. In my opinion, the law which is impugned is fully saved by article 19 (2) and if it cannot be successfully assailed it is not possible to grant the remedy which the petitioners are seeking here.

As has been stated already, the order which is impugned in this case recites that " the weekly ' *Organizer* ' has been publishing highly objectionable matter constituting a threat to public law and order " and that the action which it is proposed to take against the petitioners

" Is necessary for the purpose of preventing or combating activities prejudicial to public safety or the maintenance of public order."

These facts are supported by an affidavit sworn by the Home Secretary to the Chief Commissioner, who also states among other things that the order in question was passed by the Chief Commissioner in consultation with the Central Press Advisory Committee, which is an independent body elected by the All-India Newspaper Editors' Conference and is composed of representatives of some of the leading papers such as ' *The Hindustan Times* ', ' *Statesman* ', etc. In my opinion, there can be no doubt that the Chief Commissioner has purported to act in this case within the sphere within which he is permitted to act under the law, and it is beyond the power of this Court to grant the reliefs claimed by the petitioners.

In these circumstances, I would dismiss the petitioners' application.

Patanjali Sastri, J. (*Kania, C.J., Mehrchand Mahajan, Mukherjea and Das, JJ. agreeing*).—This is an application under Article 32 of the Constitution praying for the issue of writs of *certiorari* and prohibition to the respondent, the Chief Commissioner of Delhi, with a view to examine the legality of and quash the order made by him in regard to an English weekly of Delhi called the *Organizer* of which the first applicant is the printer and publisher, and the second is the editor. On

2nd March, 1950, the respondent, in exercise of powers conferred on him by section 7 (1) (c) of the East Punjab Public Safety Act, 1949, which has been extended to the Delhi Province and is hereinafter referred to as the impugned Act, issued the following order :

"Whereas the Chief Commissioner, Delhi, is satisfied that *Organiser*, an English weekly of Delhi, has been publishing highly objectionable matter constituting a threat to public law and order and that action as is hereinafter mentioned is necessary for the purpose of preventing or combating activities prejudicial to the public safety or the maintenance of public order.

Now therefore in exercise of the powers conferred by section 7 (1) (c) of the East Punjab Public Safety Act, 1949, as extended to the Delhi Province, I, Shanker Prasad, Chief Commissioner, Delhi, do by this order require you Shri Brij Bhushan, Printer and Publisher and Shri K. R. Halkani, Editor of the aforesaid paper to submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies, *viz.*, Press Trust of India, United Press of India and United Press of America to the Provincial Press Officer, or in his absence, to Superintendent of Press Branch at his office at 5, Alipur Road, Civil Lines, Delhi, between the hours 10 A.M. and 5 P.M. on working days."

The only point argued before us relates to the constitutional validity of section 7 (1) (c) of the impugned Act which, as appears from its preamble, was passed "to provide special measures to ensure public safety and maintenance of public order". Section 7 (1) (c) under which the aforesaid order purports to have been made reads (so far as material here) as follows :—

"The Provincial Government or any authority authorised by it in his behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny."

The petitioners claim that this provision infringes the fundamental right to the freedom of speech and expression conferred upon them by Article 19 (1) (a) of the Constitution inasmuch as it authorises the imposition of a restriction on the publication of the journal which is not justified under clause (2) of that Article.

There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1) (a). As pointed out by Blackstone in his Commentaries :

"The liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public ; to forbid this, is to destroy the freedom of the press[1]."

The only question therefore is whether section 7 (1) (c) which authorises the imposition of such a restriction falls within the reservation of clause (2) of Article 19.

As this question turns on considerations which are essentially the same as those on which our decision in Petition No. XVI of 1950[2] was based, our judgment in that case concludes the present case also. Accordingly, for the reasons indicated in that judgment, we allow this petition and hereby quash the impugned order of the Chief Commissioner, Delhi, dated the 2nd March, 1950.

Agent for Petitioners : *Ganpat Rai.*

Agent for Opposite Party : *P. A. Mehta.*

G.R./V.S. *Petition allowed.*

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1. Blackstone's Commentaries, Vol. IV, pp. 151, 152.
2. (1950) 2 M.L.J. : (1950) S.C.J. 418.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Padmanabha Kakkothaya and others .. *Appellants* *

v.

Keshava Derinjithaya and another .. *Respondents.*

Indian Contract Act (IX of 1872)—Excess payment by one joint promissor—Right to claim contribution from a surety—Non-payment by one joint promisor of his share—Mode of division of that amount among the other contributors.

A promisee is entitled to realise the entire sum due to him from all the executants of the promissory note or from any of them individually and the fact that as between the promisors one of them is only a surety would not detract from the right of the promisee to collect the entire amount under the contract law from such surety. But as between joint promisors one of them cannot claim any contribution from a surety for the excess amount more than his share which he had to pay to absolve himself from liability to the original promisee.

If one of the persons liable to contribute did not or could not pay his proportion, that amount has to be divided between other contributors only in the proportion of the benefit which each of them has received at the time of the original contract. The Contract Act has not provided for such a contingency and seems to be a *casus omissus.*

Abraham Servai v. *Raphial Muthirian*, (1914) 27 M.L.J. 746 : I.L.R. 39 Mad. 288, followed.

Appeals against the decree of the Court of the Subordinate Judge, South Kanara, in O.S. No. 37 of 1945.

K. Kuttikrishna Menon and *K. N. Karunakaran* for Appellants.

K. Y. Adiga, K. P. Adiga, C. Vasudeva Mannadiar and *T. K. Raman Nambisan* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—Both these appeals arise out of O.S. No. 37 of 1945, on the file of the Court of the Subordinate Judge of South Kanara and since the facts are interrelated a common judgment would be sufficient to dispose of the contentions of the parties.

The 5th defendant is the appellant in Appeal No. 33 of 1947 and the defendants 1 to 4 are appellants in Appeal No. 624 of 1946. The plaintiff, Vishnu Kakkothaya, Rama Asra and the 5th defendant together executed a promisory note for Rs. 9,000 in favour of the Karnataka Bank in Mangalore and received the proceeds. *Inter se* it was arranged that out of the Rs. 9,000 the plaintiff was to take Rs. 4,000, Vishnu Kakkothaya Rs. 2,000, Rama Asra Rs. 3,000, and the 5th defendant was only a guarantor or surety to the bank for the due repayment of the sum of Rs. 9,000 by all the three other executants of the promissory note. This is common ground and there is no dispute whatever that the fifth defendant when he joined in the execution of the promissory note did so only as a guarantor and not as any beneficiary who received any part of the proceeds of the promissory note. Since the money was not paid in time the Karnataka Bank brought O.S. No. 4 of 1934 on 9th January, 1934, on the file of the lower Court for the recovery of the principal, interest and costs. To that suit all the executants of the promissory note were made party defendants, including the present 5th defendant. Pending the disposal of the suit Rama Asra died. No steps were taken to bring on record his legal representatives in the suit, since the plaintiff did not take any action and the other defendants did not also request the Court to bring the legal representatives of the deceased Rama Asra. Therefore, the suit proceeded without any one representing Rama Asra's liability and a decree was passed against the defendants for the principal amount, interest and costs on 17th July, 1934, evidenced by Exhibit P-1. Consequently, the bank took out execution proceedings and during the course of the execution proceedings Vishnu Kakkothaya also died and his legal

* Appeals Nos. 624 of 1946 & 33 of 1947. 24th March, 1950.

representatives who are present defendants 1 to 4 were brought on record in execution. In order to satisfy the decree, the plaintiff paid Rs. 12,748-13-5 and defendants 1 to 4 jountly paid Rs. 2,458-8-0. A sum of Rs. 461 belonging to the 5th defendant was in deposit with the bank which amount was appropriated by the bank towards the balance portion of the decree amount due to it; thereby the entire decree amount was satisfied. Thereafter, the plaintiff brought the suit out of which the above appeals have arisen for contribution from defendants 1 to 4 forming one group and the 5th defendant another. So far as the plaintiff was concerned what was claimed was that his share of the total amount due to the bank would not come to Rs. 12,478 but he has paid an excess amount of Rs. 5,464-0-11 and this amount he wanted to recover from the defendants. The contention of defendants 1 to 4 was that since the bank did not implead any representatives of Rama Asra in the suit and since no steps were taken to realise moneys due from Rama Asra, defendants 1 to 4 are not liable to pay any portion of the due share of Rama Asra. On the other hand, the 5th defendant contended that being only a surety or guarantor as between the principal debtors and himself *inter se* he was not bound to pay any sum whatever. The learned Subordinate Judge disagreed with the contentions raised by the 5th defendant and found that the 5th defendant would be liable to pay Rs. 1,740-15-1 by way of contribution. The reason assigned by the learned Judge was that the fact that the 5th defendant was not one of the principal borrowers would not be enough to exclude him from the liability. As a joint executant of the promissory note he was as much responsible for the payment of the debt as the other executants and since the plaintiff has been made to pay more than his share of the liability the excess can be recovered from all the other debtors including the 5th defendant in proportion of their liability by way of contribution. It is this finding of the learned Subordinate Judge that is attacked by the 5th defendant in Appeal No. 33 of 1947. We are of opinion that the learned Subordinate Judge has not really appreciated the correct legal position. To the original promisee namely the Karnataka Bank the principal debtors as well as the surety or guarantor stand in the same footing, that is, the promisee is entitled to realise the entire sum due to him from all the executants of the promisory note or from any one of them individually. The fact that as between the promisors one of them is only a surety would not detract from the right of the promisee to collect the entire amount under the contract law from such surety. But the position is absolutely different as between the joint promisors. Where one of the joint promisors was only a surety, any of the other promisors cannot claim any contribution from him for the excess amount more than his share which he had to pay to absolve himself from liability to the original promisee. If authority for this position is needed we have it in the judgment of Wallace and Srinivasa Aiyangar, JJ., reported in *Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[1]. At page 598 the learned Judges observe as follows:

> "Thus if for instance one of the judgment-debtors should have had the decree passed against him merely because he was the guarantor of the debt which was exclusively payable by the other judgment-debtor as the principal, then it follows that the implied obligation of the principal debtor under the contract of guarantee to keep the guarantor indemnified from any loss or damage would displace or be available to be set off against the other implication of indemnity."

This is direct authority for holding that since the 5th defendant was only a guarantor or surety he is not liable to pay any contribution to the principal debtors themselves. Therefore, the learned Judge's view is unsupported by law and is erroneous. The appeal by the 5th defendant is therefore allowed, the decree against him will be set aside and the suit as against him dismissed. The 5th defendant will be entitled to get his costs in this Court from the plaintiff alone.

As regards the liability of defendants 1 to 4 the position stands on a somewhat different footing. Mr. Adiga for the plaintiff invited our attention to section 43 of the Indian Contract Act and contended that Rama Asra's share of the principal amount, interest and costs, should be divided equally between the plaintiff on the one hand and defendants 1 to 4 on the other, so that when the question of contri-

1 (1928) 27 L.W. 597.

bution comes, the liability should be on a fifty-fifty basis. On the other hand, the learned counsel for the appellant in Appeal No. 624, contends that defendants 1 to 4 would be liable only proportionately to the extent of the benefits received by them on the original promissory note, that is, what they contend is since the plaintiff received Rs. 4,000 and Vishnu Kakkothaya Rs. 2,000 the amount of Rs. 3,000 and interest due from Rama Asra should be divided in the ratio of 2 : 1 *i.e*, the plaintiff will be entitled only to a decree for one third of the amount and nothing more. Here again we have the observations of the learned Judges in *Arunachala Servai* v. *Nottam Beer Vavu Rowther*[1], to the following effect :—

"Again, if the judgment-debtors *inter se* should be found to have enjoyed the original consideration for the debt which became merged in the decree in unequal proportions, it follows that it is such proportion that will govern, as between them, their mutual obligations under the decree."

These observations have been followed by Meredith, J., in *Mst. Jagpati Kuar* v. *Firm Demri Sahu Halkhori Ram*[2]. But Mr. Adiga contends that the principles enunciated in this case cannot be applied to the facts of the present case because here it was the division of the contributory amount due from one of the alleged contributories between the other contributors whereas in those cases the division was between the contributories themselves in proportion of the benefit enjoyed by each one of them. He relies upon the third paragraph of section 43 of the Contract Act which lays down that if any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. The learned counsel placed emphasis on the words " equal shares " and urges that whatever amount was proportionately due from Rama Asra should be divided equally between the plaintiff on the one side and defendants 1 to 4 on the other. Otherwise, according to the learned counsel the words of paragraphs 3 of section 43 cannot be fulfilled and as such the contribution should be only on this basis. But in our opinion paragraph 3 does not contemplate cases where one of the joint contributors has not paid and the others have to pay that sum though those others received the benefits in the original contract in unequal proportions. There is not direct authority so far as our attention has been invited to in the Indian Courts except certain observations contained in *Abraham Servai* v. *Raphial Muthirian*[3]. Tyabji, J., in his judgment observed as follows :

" The first view is, I think, plainly the true one. When they signed the note the parties must have contemplated that it should be paid and that the burden should be shared equally. The fact that one happens to escape from legal liability to the creditor, without the consent of his associates, and perhaps even without their knowledge, cannot be allowed to disturb the original obligation between the co-debtors, *or to alter the proportions of liability or contribution, which must be ascertained from the note at the time that it was made*. The duty to contribute here binds all, so long as anyone remains legally liable by virtue of the joint contract." (the italics are ours).

This again is a quotation from *Gardner* v. *Brooke*[4], where O'Brian, C.J., in considering a similar matter observed as follows :

" The right comes, in equity, originally and absolutely, by the payment in discharge of a common burden, and has no existence whatever, inchoate or complete, till the payment is made. It is not therefore affected by what affects the contract. That rule was necessarily the consequence of *Dering* v. *Winchelsea*[5], because in that case the sureties were bound by different bonds, and there was no link of contract between them. And the Chief Baron states that there were precedents of contribution between co-lessees and co-feofees, which, however, was by the statute of Marbridege, and *Sir William Herbert's case*[6] was referred to as containing an example of contribution between parties having no relation of contract to each other. And, though the words of the writ of contribution, quoted by Fitzherbart " *ex assensu onum* " contain very early traces of the doctrine of contract, yet this element has certainly been worked out from all modern decisions. The principle came into the English from the Civil law, where it pursues exactly the same consequences, and distinctions that are found in equity, all based on community of burthen and benefit from payment, and none from agreement. So far, therefore, as rule in equity is concerned, to which the law is now made subject, the cause of action, which the statute must apply to bar, is that arising from the fact of payment. However, as the equitable rule applies no less because there is a contract, and the extent of the relief is the same, entitling the party to the whole of the payment that he has made in excess of his share, and from the solvent parties alone, and there is a contract in this case, we have to see whether there is anything

1. (1928) 27 L.W. 597 at 598.
2. (1941) I.L.R. 20 Pat. 811 at 826, 827.
3. (1914) 27 M.L.J. 746 : I.L.R. 39 Mad. 288.
4. (1897) 2 Ir. Rep. 6 at 12.
5. (1787) 1 Cox Eq. Cas. 318=2 Bos. & P. 270.
6. 3 Rep. 11.

in the words of the satute itself, as was contended, the force of which requires the collateral as well as the original remedy to be extinguished by time."

Another decision from which some little guidance can be got is the decision in *Lowe* v. *Dixon*[1]. At page 458 there are observations in the following terms,

> "At law, if several persons have to contribute a certain sum, the share which each has to pay is, the total amount divided by the number of contributors ; and no allowance is made in respect of the inability for some of them to pay their shares. But, in equity, those who can pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution. In as much, therefore, as the rules of equity prevail the defendants must make good each one half of that which Lund, Beveridge & Co., are unable to pay."

From these authorities it seems clear that if one of the persons liable to contribute did not or could not pay his proportion that amount has to be divided between other contributories only in the proportion of the benefits which each one of them has received at the time of the original contract. Section 43 of the Indian Contract Act did not envisage such a contingency. It seems to be a *causes omissus*. It only speaks of the liability of all the promisors to the original promisee and *inter se* the right of any one of the promissors to claim the excess amount from the other promissors ; but, where, as in this case one of the promisors was not able to pay or nothing could be obtained from him how is the proportionate liability to be divided among the other promisors is not considered in this section. The indication contained in the decision of the Irish Court of Appeal as well as in English cases which have found favour with the learned Judges in *Abraham Servai* v. *Raphial Muthirian*[2] is to the effect that in equity such amount must be divided between the other co-promisors only in proportion to the original benefit which one of them had received.

We have, therefore, to find out how the amount has to be divided in the present case. The learned Subordinate Judge has found in paragraph 16 of his judgment that the amount due to the Karnataka Bank was Rs. 15,668-8-1. If this is to be divided in the proportionate shares among the three joint promisors, the plaintiff will have to pay Rs. 6,963-12-5, Vishnu Kakkothaya in whose shoes the defendants 1 to 4 stand would have had to pay Rs. 3,481-14-2 the amount due from Rama Asra being the 3/9th share would come to Rs. 5,222-13-6. This sum of Rs. 5,222-13-6 reduced by Rs. 461-2-8 which sum has been appropriated by the Karnataka Bank from the fifth defendant should be divided in the ratio of 2 : 1 by the plaintiff and defendants 1 to 4, *i.e.*, deducting Rs. 461-2-8 the amount would be Rs. 4,761-10-10. If that is divided in the ratio of 2 : 1 the plaintiff will have to pay Rs. 3,174-7-4 and defendants 1 to 4 Rs. 1,587-3-8. Therefore, the total liability of defendants 1 to 4 will be Rs. 3,481-14-2 plus Rs. 1,587-3-8 making a total of Rs. 5,069-1-10. Towards this amount defendants 1 to 4 have paid Rs. 2,458-8-0. The balance which defendants 1 to 4 would have had to pay to Karnataka Bank would be Rs. 2,610-9-10. The plaintiff will be entitled to a decree for a sum of Rs. 2,612-9-10 with interest thereon at six per cent per annum from the date of plaint namely, 23rd March, 1945. The lower Court has decreed a sum of Rs. 2,764-5-4. The amount to which the appellant have succeeded being only a small proportion, we direct the appellants to pay the costs of the plaintiffs-respondents. The trial Court's decree as regards costs will stand.

V.P.S. *Decree modified.*

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1. (1885) 16 Q.B.D. 455.
2. (1914) 27 M.L.J. 746 : I.L.R. 39 Mad. 288.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Devulapalli Ramamoorthy Sastri .. *Appellant* *

v.

Jallu Ammanna .. *Respondent.*

Madras Estates Land Act (I of 1908), *section* 3 (2) (*d*), *as amended by Amending Act II of* 1945)—*Inam —When an estate.*

The crucial test for finding out whether the subject-matter of a grant falls within the definition of 'estate' in section 3 (2) (*d*) of the Act, is whether at the time of the grant the subject-matter was of a whole village or only part of a village. The Amending Act of 1945 makes no difference to this requirement that the village of which the grant has been made, confirmed or recognised by the Government must be an inam village and not a part of a village granted in inam. The definition introduced by the Amending Act itself presupposes, that a grant as an inam is expressed to be of a named village.

Case law discussed.

Appeal against the decree of the Court of the Subordinate Judge Eluru, in A. S. No. 18 of 1946, preferred against the decree of the Court of the District Munsif, Kovvur in O.S. No. 298 of 1943, etc.

V. V. Srinivasa Ayyangar, D. Narasaraju and *M. Appalachari* for Appellant in S. A. No. 1578 of 1946 and Petitioners in C.R.P. Nos. 1102 to 1106 of 1946.

T. C. A. Bhashyam and *C. V. Dikshitulu* for Appellants in C.M.A. Nos. 546, etc., of 1949.

C. A. Vaidyalingam, T. Venkatadri and *K. Ramachandra Rao* for the Respondents.

The Court delivered the following

JUDGMENT.—The question for determination in this batch of cases is whether as held by the Courts below the village of Timmarajupalem agraharam is a whole village inam falling within section 3 (2) (*d*) of the Madras Estates Land Act as amended by the Madras Estates Land Amending Act II of 1945. On that depends the determination of other questions such as whether the defendants have occupancy rights and whether the Civil Court has jurisdiction to entertain the suits. The Courts below (the District Munsif of Kovvur and on appeal the Subordinate Judge of Eluru) either dismissed the suits or returned the plaints for presentation to the revenue Court in the view that they took in favour of the defendants that the agraharam is an estate within the statute. The plaintiff, the senior proprietor of the agraharam village has therefore filed these second appeals, revision petitions and Civil Miscellaneous Appeals.

It is clear from Exhibit D-12, dated 8th December, 1902, a certified copy of the Permanent Settlement sanad given to the Zamindar of Nuzvid by the Governor-General, Lord Clive, that the agraharam was a *sivar* or hamlet included in the list of villages forming the estate for which the sanad was issued. It is clear too from Exhibit P-1, an extract of the register of inams prepared on 5th December, 1860, that the agraharam was a *sivar* or hamlet of Nidadavole granted by the Zamindar Sri Raja Venkatadri Apparao Garu to one Tripurantaka Somayajulu in fasli 1166. The later revenue documents filed in the case however show that the Agraharam came to be treated as an independent village satisfying the definition of "village" contained in section 3 (19) of the Act. On these facts the learned Subordinate Judge, founding himself upon an unreported decision of a single Judge of this Court, Shahabuddin, J., in C.R.P. Nos. 1007 to 1014 of 1942, has held that the agraharam is an "estate" within section 3 (2) (*d*) of the Act read in conjunction with Explanation (1) introduced by the Madras Act II of 1945.

If only the existence of minor inams in the agraharam were the impediment in the way of the Agraharam being regarded as a whole village inam, it certainly would stand removed by the Explanation which runs in these terms :

* S. A. No. 1578 of 1946 and C.R.P. Nos. 1102 to 1106 of 1946 and C.M.A. Nos. 546 to 555 of 1949. 6th April, 1950.

"Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes."

The question however is whether the agraharam satisfies the definition in section 3 (2) (*d*) which is as follows :

"Any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees."

That obviously and *prima facie* requires that the property of which the grant has been made, confirmed or recognised by the British Government must be an inam village, *i.e.*, at the date of the grant which has been made, confirmed or recognised by the British Government. Shahabuddin, J., however held in the unreported case above referred to that "village" as mentioned in this clause of the section should be understood in the same sense as is indicated by the definition of "village" in clause (19) of the section. The definition of "village" in this clause is as follows :

"Village means any local area situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams or which is now recognised by the Provincial Government or may hereafter be declared by the Provincial Government for the purposes of this Act to be a village and includes any hamlets which may be attached thereto."

It will be seen that the definition, excluding the inclusive part of it which is immaterial, consists of two parts, (i) any local area situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams, (ii) any local area situated in or constituting an estate which is now recognised by the Provincial Government or may hereafter be declared by the Provincial Government for the purpose of this Act to be a village. The word "now" which occurs in the second part does not occur in the first. "Now" obviously means the date of the coming into force of the Act, and in the absence of that word in the earlier part it is clear that the expression "is designated" occurring there cannot be treated as necessarily equivalent to "is now designated". When the first part of this definition is imported into section 3 (2) (*d*) which contains the word "village", there is, in my opinion, no strain on language involved in holding that at the time of the grant of the inam village contemplated by section 3 (2) (*d*) the subject-matter of the grant must be a local area which is designated at the time as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams. The words "is" and "are" in section 3 (19) in this view are to be regarded as equivalent to "was" and "were" with reference to the state of things pertaining to the village at the time of the grant. Otherwise, the reading of the definition in section 3 (19) into section 3 (2) (*d*) would introduce a repugnancy into the context of the latter, and if there should be something repugnant in the subject or context the definition of "village" in section 3 (19) could not as the opening words of section 3 would show enter into the interpretation of the word "village" in section 3 (2) (*d*).

This apparently is what Patanjali Sastri, J., had in mind in making the observation to which I shall presently refer in his judgment of the Court consisting of himself and Bell, J., in A. A. O. Nos. 584 of 1944 and 373 of 1945.* Those appeals

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*IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

(11*th October*, 1946.)

Appeals against Orders Nos. 584 of 1944 and 373 of 1945.

Iyyunni Venkata Rangacharyulu and another .. *Appellants*

v.

Mukku. Ganganna .. *Respondent.*

related to certain lands in Patha Pentapadu known as Pentapadu agraharam and described in the instrument of grant as a hamlet of Pentapadu village. It was observed in the judgment of the Court :

"No doubt, Patha Pentapadu, which was known as Pentapadu Agraharam even at the time of the Inam Settlement to distinguish it from the adjoining Government village of Kasba Pentapadu, had been recognised to be a separate village and treated as such in the revenue accounts long before the Madras Estates Land Act, 1908, was passed, and it might therefore be said that in view of the definition of village as meaning, among other things, a local area which is now recognised by the Provincial Government to be a village, it is sufficient for purposes of section 3 (2) (*d*), that the grant comprised a local area which was recognised by the Government to be a village at the

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Appeals against the orders of the Court of the Subordinate Judge, Ellore, dated 31st March, 1944, dated 20th October, 1944 in A. S. No. 49 and 312 of 1944 respectively, preferred against the decrees of the Court of the District Munsiff, Kovvur, in O. S. No. 87 and 126 of 1942, respectively.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—These connected appeals arise out of two suits relating to the same parcel of land comprised in a Bhatavrithi inam situated in a village called Pentapadu Agraharam, West Godavari district, and they raise the same questions, *viz.*, whether the land in dispute forms part of an "estate" as that term is defined in the Madras Estates Land Act, 1908, as amended by later Acts. Appellant claimed arrears of rent due in respect of the land in one of the suits and possession and mesne profits in the other. The suits were decreed by the District Munsiff of Kovvur, but on appeal the Subordinate Judge, Ellore, set aside the decrees holding that the land in question formed part of an "estate" and that the suits were triable exclusively by the Revenue Court. The correctness of this view is challenged in these appeals.

The material facts may be briefly stated. The village in question, which adjoins the Government village called Pantapadu Kasba, appears to have been granted in 1744 as *Sarva Agraharam* to an ancestor of the appellant, one Tirumala Singaracheriyulu Ayyavarlam Garu by Raja Apparayanim Garu, a former Zamindar of Nuzvid. The original patta, a copy of which has been produced and marked Ex. D-3, describes the subject-matter of the grant as "Patha Pantapadu," hamlet of Pantapadu village." At the Inam settlement in 1859 an area of 324 acres 42 cents being the aggregate extent of Bhatavrithi and Devadayam inams situated in the village was excluded from the *Gudikat* or total area of 636 acres 60 cents, and the remainder 312 acres 18 cents was confirmed and enfranchised in two equal shares under separate title deeds in favour of the then holders who were the successors of the original grantee. The excluded minor inams were similarly dealt with at the same time, separate title deeds being issued in each case.

The relevant provisions of the Madras Estates Land Act, 1908, as amended up-to-date, are as follows :

"Section 3. In this Act, unless there is something repugnant in the subject or context,—

(2) "Estate" means,

(*d*) any inam village of which the grant has been made, confirmed or recognised by the British Government, *notwithstanding that subsequent to the grant, the village has been partitioned among* the grantees or the successors in title of the grantee or grantees.

(19) "Village" means any local area situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more Karnams or which is now recognised by the (Provincial Government) or may hereafter be declared by the (Provincial Government) for the purposes of this Act to be a village, and includes any hamlet or hamlets which may be attached thereto."

It is urged that as the original grant was only of "Patha Pentapadu" (or old Pentapadu) which is described as "hamlet of Pentapadu village it does not fall within clause (*d*) which refers only to grants of "inam village", that is, of a whole village, and not portions thereof. Exhibit D-3 according to the official translation reads thus :

"Dharma Sasana Patrika in respect of Agraharam, executed and delivered on Monday the 2nd day of Sravana Sukla of the year Krodhana in favour of Srimad Advaita Marga Pratishtapanacharya, Vubhaya Vedanta Pravartaka, Srimat Tirumala Singaracharyulu Ayyavarlam Garu, by Apparayanim Garu. . . .

We have granted to you as a sarva Agraharam the aforesaid Patha Pentapadu from the ensuing fasli 1154 (1744-45). You shall cultivate the said Agraharam and happily enjoy the usufruct thereof every year, in the name of Sri Rama from your and our sons and grandsons and so on in succession.

* * * (*Sanskrit sloka omitted*)

Seal and Signature of Apparayanim Garu.

Sreeramulu.

Chakunama executed on Thursday, the 5th day of Magha Sukla of the year Krodhana, in favour of Srimad Advaita Marga Pratishtapanacharya Vubhaya Vedanta Pravartaka, Srimat Tirumala Singaracharyulu Ayyavarlam Garu, jointly by Kalisipudi Chittenna, Kalwacharla Venkanna, Veerabathula Venkatapthi, Sana Chowdary and others, Kapus and Pentapadu village Karnams.

commencement of the Act. But it is to be observed that section 3 (19) refers only to village "situated in or constituting an estate'. To import that definition into sub-clause (*d*) of Sec. 3 (2) which itself defines one category of "estates" would lead to repugnancy in the context. The defective draughtmanship involved in defining terms by employing them one in another, which gives rise to puzzles of construction, has been commented upon by their Lordships of the Privy Council in *Narayanaraju* v. *Suryanarayudu*."

Raja Sree Apparaynam Garu has granted to you as agraharam Patha Pentapadu, hamlet of the aforesaid (village) in fasli 1154 (1744-45). So, the boundaries of this agraharam are as follows :—

East—boundary limits of Darasanaparru and Pentapadu.

South—Gattu dandu chata Abotu (not clear)

West—The western bund of Metta cheruvu (tank) Dantu Kalipeelu and boundary limits of Vumamaheswaram ; and

North—Lingana Kunta and Chakalivani Cheruvu.

These boundaries have been fixed and shown and this Chakunama has been executed and delivered by us. You may cultivate your agraharam, which is comprised according to these boundaries. We shall not come beyond these boundaries. To this effect is the Chekunama executed and delivered with consent."

Mr. Rangachari placed strong reliance on the name "*Patha* Pentapadu" and its description as "hamlet of Pentapadu" as showing that only a portion of the village of Pentapadu was granted. He also submitted that the description of the eastern boundary was wrongly translated and that it should read "Boundary line (Pulmera) between Darsanaparru and Pentapadu" which, according to him, showed that Patha Pentapadu formed the eastern fringe of Pentapadu village. On the other hand, Mr. Viyanna for the respondent drew our attention to the latter "*ma*" used before the name "Patha Pentapadu," which was said to be an abbreviation of *mausa* indicating that it was "a village in which there were peasant proprietors owning cultivable lands" (See *Sathayya* v. *Somayajulu*[2]), and he also referred to the extract from the inam register, Ex. P-2, showing that Pentapadu Agraharam had its own village service inams and its own waste lands. These, he claimed, were strong indications that Patha Pentapadu was not a portion of the Pentapadu village at the time of the grant but was a separate revenue paying unit bearing a name of its own, that is to say, a distinct village. The circumstances relied on by Mr. Viyanna are inconclusive and cannot, in our opinion, out-weigh the description of Patha Pentapadu as "hamlet (sivaru) of Pentapadu" which clearly shows that what was granted as inam under Ex. D-3 was not a whole village but only a portion of a village. The description of the eastern boundary, though not equally clear, would also seem to point to the same conclusion. The lower appellate Court has not adverted to this important feature of the case which it has apparently overlooked, and hence its conclusion that Ex. D.-3 comprised a whole village cannot be supported.

No doubt, Patha Pentapadu, which was known as Pentapadu Agraharam even at the time of the Inam Settlement to distinguish it from the adjoining Government village of kasba Pentapadu, had been recognised to be a separate village and treated as such in the revenue accounts long before the Madras Estates Land Act, 1908, was passed, and it might therefore be said that in view of the definition of village as meaning, among other things, a local area which is *now* recognised by the Provincial Government to be a village, it is sufficient for purposes of section 3 (2) (*d*), that the grant comprised a local area which was recognised by the Government to be a village at the commencement of the Act. But it is to be observed that section 3 (19) refers only to village "situated in or constituting an *estate*." To import that definition in sub-clause (*d*) of section 3 (2) which itself defines one category of "estates" would lead to repugnancy in the context. The defective draughtsmanship involved in defining terms by employing them one in another, which gives rise to puzzles of construction, has been commented upon by their Lordships of the Privy Council in *Narayanaraju* v. *Suryanarayudu*[1].

In the lower Courts the appellant also relied on the existence of minor inams in the village as showing that the inam grant coulld not have comprised the whole village, as held in *Suri Reddi* v. *Agnihotrudu*[3], but that decision has since been superseded by the Madras Estates Land (Amendment) Act (II of 1945) which inserted the new Explanation (1) in section 3 (2) (*d*) with effect from 31st October, 1936.

In the view we have expressed above it becomes unnecessary to consider the correctness or otherwise of the decision of a single Judge of this Court in *Viswanatham Bros.* v. *Subbaiya* [4], which was followed by another learned Judge in *Achutharamayya* v. *Akkayya*[5].

The appeals are allowed, the orders of the lower appellate Court are set aside and the decrees of the trial Court restored with costs here and in the lower appellate Court.

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1. (1939) 2 M.L.J. 901 : L.R. 66 I.A. 278 : I.L.R. 1940 Mad. 1 (P.C.).
2. (1929) 56 M.L.J. 730 : L.R. 56 I.A. 146 : I.L.R. 52 Mad. 453 at 463 (P.C.).
3. (1943) 2 M.L.J. 528.
4. (1945) 1 M.L.J. 443.
5. C.R.P. No. 727 of 1945.

The view that for any village to be regarded as an estate within section 3 (2) (*d*) of the Act it must be a whole village granted as such and not a part of a whole village which subsequently might come to be recognised by the Government as a whole village is the view taken in two other decisions of this court by two single Judges, Panchapagesa Sastry, J., and Mack, J., in C.R.P. Nos. 593 to 601 of 1947 and C. R. P. Nos. 1432 to 1437 of 1946 respectively.

The view of Shahabuddin, J., in C. R. P. Nos. 1007 to 1014 of 1942, relied upon by the learned Subordinate Judge in the present case is inconsistent with the decisions above referred to by me and cannot be accepted as good law in view particularly of the Bench decision in A. A. O. Nos. 584 of 1944 and 373 of 1945, which is binding upon me and with which, with respect, I entirely agree. In the case before Shahabuddin, J., the facts were that at the time of the grant itself the agraharam was only a part of a whole village, although it had come to be recognised as a village by itself by the time that the inam settlement of 1860 was effected, and so it continued down to the date of the enactment of Madras Act I of 1908 down indeed to the date on which the question whether the subject-matter of the grant was an estate actually arose for consideration before the Court. In the case before me there is conclusive proof which has been accepted by the Courts below that as early as 1802 Timmarajupalem agraharam was only a *sivaru*, and there is no proof that at the time of the grant it was a whole village.

I had occasion in S.A. No. 2197 of 1946 to deal with a position analogous to the one which arises in the present case. There the village of Malkapuram in the District of Guntur happened to be dealt with at the time of the inam settlement in three different blocks. With reference to lands situated in one block the question arose whether they could be treated as lands situated within an estate as defined by the Madras Estates Land Act. There was no proof that Malkapuram village as a whole had been originally granted in inam. The learned District Munsif held that the block of the village in which the suit lands were situate was not an estate but on appeal the learned Subordinate Judge of Guntur reversed him basing himself upon Act II of 1945 which had since the date of the judgment of the Munsif been passed. I restored in second appeal the decree of the learned District Munsif holding that notwithstanding the Amending Act of 1945 the inam in question could not be tegarded as a whole village so as to attract the definition of estate. In so holding I observed as follows :

" It is said for the appellant that although where a grant as inam is expressed to be of a named village the legal result given effect to by the learned Subordinate Judge may follow, that result does not surely follow where the grant as inam is not expressed to be of a named village but of a particular block of land in the whole village, of which there happened to be two other blocks which were the subject-matter of two other grants evidenced by two other title deeds. If this contention is regarded as correct there is no doubt but that the judgment of the appellate Court must be set aside.

In support of this contention, reliance is placed by the learned advocate for the appellant on an unreported decision of Govindarajachari, J., in C. M. A. No. 321 of 1946 and C. R. P. No. 707 of 1946. It is beyond doubt that the decision lays down that the burden of proving that the suit lands are part of an estate and that the civil Court has therefore no jurisdiction to entertain any suit for recovery of rent or for ejectment would lie on the tenant. It is also beyond doubt that the judgment concerned had to deal with different blocks of land in one and the same village, which were dealt with by different title deeds at the time of the Inam Commission. But then, in the case before that learned Judge, there was no clear indication that out of the different blocks dealt with by different title deeds, any inams were in existence at the time of the inam commission proceedings which came in for deductions. As against the column " deduct rents," it would appear that there was no figure at all noted. On this point, says Mr. K. Kotayya, the learned advocate appearing at my instance for the respondent, the present case is distinguishable from the case before the learned Judge. Learned Counsel also urges that if there were some minor inams as well as a major inam at the time of the Inam Commission, which were all dealt with by separate title deeds, it does not necessarily follow that the grant of the major inam should be regarded as not that of a named but only as that of a specified portion of the whole village. No doubt there is some force in this argument of Mr. K. Kotayya for the respondent. At the same time, there is no denying the fact that what the amending Act, which is claimed to be of benefit to the respondent before me, requires, is that the grant must be expressed to be of a named village, before the village could be regarded as an estate or any occupancy right could be claimed by any tenant of land in such an estate. In the case before me neither the original grant nor even the title deed issued by the Inam Commission has been produced. It is therefore *prima facie* difficult to say that the grant has been expressed to be of a named village within the meaning of the Amending

Act. My attention has, no doubt, been drawn by Mr. Kotayya to the description in certain leases of the land comprised in this grant, with which we are concerned as land situate in Malkipuram Agraharam. That, however, cannot, in my opinion, be of any conclusive significance in favour of the contention for the respondent. In cases prior to the amending Act, it was held in a series of decisions that if there were in existence minor inams in a village exclusive of which a grant came to be made, the grant could not be regarded as of a village. It was to set right this view of the matter that the Amending Act came in. But then, the Amending Act, requires proof of the fact that the grant relied on as attracting the definition of "Estate" should be a grant expressed to be of a named village. The grant may be so expressed either in the original deed of grant or in the title deed of the Inam Commission, or the nature and scope of the grant may have to be inferred in a particular case from other evidence. But whatever the evidence may be, there is no doubt that what has to be established before the Act can be claimed to operate in favour of the tenant is that the grant must be expressed as of a named village—a matter which must be made out by some kind of evidence or other, direct or indirect."

This view of the matter then expressed by me applies to the present case. Here as well as there the original deed is not forthcoming, and the defendants have not, in my opinion, discharged the burden lying upon them of proving that the suit lands are part of an estate, and that the Civil Court has therefore no jurisdiction. It is true that the inam fair register, Exhibit P-1, gives us details of the original grant; but then, it does not throw any light upon the question whether when the agraharam was granted, it was a whole village or only a part of a village, and we *do* know that at the time of the Permanent Settlement sanad as well as at the time of the inam settlement it was and remained only a *sivar* or hamlet of Nidadavole. I am not satisfied that the agraharam has been proved to be an estate under the Madras Estates Land Act as it stands amended by Madras Act II of 1945. The unreported decision of Shahabuddin, J., is, in my opinion, erroneous, and does not assist the defendant-respondent.

There is also a decision of the Privy Council to which my attention has not been drawn by counsel but a copy of which happens to have been circulated to me in the ordinary course of business routine by the office of the High Court since reservation of judgment. That is Privy Council Appeal No. 11 of 1949 (*N. S. Krishnaswami Aiyangar and others* v. *Perumal Goundan, (since deceased and others)* in which Sir John Beaumont delivered the judgment on behalf of the Judicial Committee. The question in the case was whether certain lands in the village of Bairoji of the District of Salem were lands in which the respondents before the Board had occupancy rights under the Madras Estates Land Act of 1908. In upholding the claim of the respondents this is what His Lordship observes :

"The second question raised is whether the grant was one of a whole inam village. As already explained the inam had been granted in pre-British times but had been recognised by the British Government. In 1795 a small part of the village was resumed by the Government and granted in ryotwari tenure, but the rest of the village, by far the larger part, continued to be treated as an inam village. It is not necessary to consider the validity of the argument advanced by the appellants that after 1795 the inam village was only part of a whole inam village, since, when the Government resumed possession in 1891, the inam village became Government land and not subject to any particular tenure. In 1895 the Government granted in inam tenure (as their Lordships have held) the whole village, that is the whole village which for the past 100 years had been recognised as an inam village. In their Lordships' view it is irrelevant that the village so granted had once formed part of a larger village. *The important fact is that the grant of* 1895 *comprised the whole of what was then regarded as an inam village.* The evidence of the Revenue Inspector, Virapandi, Salem taluk, called on behalf of the respondents supports the view that the Bairoji agraharam is an inam village, and that the Bairoji village held on ryotwari tenure is separate. In the view of their Lordships therefore the subject-matter of the grant of 1895 falls within the definition of 'estate' contained in section 3 (2) (*d*) of the Madras Estates Land Act, 1908, as amended by the Act of 1936 . . . ."

It is true that there is no reference made in the judgment to section 3 (19) of the Madras Estates Land Act; but it is perfectly clear, especially from the sentence in the passage quoted which has been underlined (italicised) by me, that the crucial test adopted by their Lordships is whether or not at the time of the grant the subject-matter was of a whole village or only of a part of a village. It is true too that Act II of 1945 did not arise for consideration or reference before their Lordships. But as I have already indicated in my judgment in S.A. No. 2197 of 1946 from which I have quoted above, the Amending Act makes no difference to the requirement

of the definition in section 3 (2) (*d*) that the village of which the grant has been made, confirmed or recognised by the British Government must be an inam village and not a part of a village granted an inam. The explanation introduced by the Amending Act itself presupposes that a grant as an inam is expressed to be of a named village, *i.e.*, of a named village as a whole.

It follows from the foregoing that this second appeal, these Civil Miscellaneous Appeals and Civil Revision Petitions must be allowed with costs here and in the Courts or Court below as the case may be.

In the view that I have taken, it is not necessary to go into other questions involved in the C.M.As. Pursuant to this judgment decrees in ejectment and for future profits shall be prepared by the office of this Court in all these cases except in C. M. A. No. 553 of 1949. I also direct that the decrees shall provide for a remittal of the second appeal case and C. R. P. cases to the Lower Appellate Court and of the C.M.A. cases (which have been transferred to this Court from the District Court) to the learned District Munsif for determining other questions, if any, not already disposed of and for passing appropriate decrees or orders. The costs of the further proceedings before the lower appellate Court and the learned District Munsif shall be provided for by those Courts in their further decrees to be passed pursuant to the remittal directed by me in the foregoing.

No leave in the Second Appeal.

V.P.S. ——— *Appeals and Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Rao Bahadur A. Nathamooni Chetti .. *Petitioner**

v.

M. R. Viswanatha Sastry and another .. *Respondents.*

Practice—Prerogative writs—Delay in the application for issue of—Practice not to exercise the extraordinary powers.

Though there is no specific period of limitation, it has generally been the accepted practice of this Court not to exercise the extraordinary power by way of the issue of prerogative writs when there has been a long delay since the passing of the order sought to be quashed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for records in H. R. A. No. 957 of 1948 on the file of the Small Causes Court, Madras and quash the order made therein and restore the order of eviction passed by the Rent Controller, Madras, dated 5th May, 1948, in L. Dis. No. 7272 of 1947.

C. A. Vaidyalingam and *A. Duraiswami Ayyangar* for Petitioner.

V. Ramaswami Aiyar and *T. R. Ramachandran* for Respondents.

The Order of the Court was made by

The Chief Justice.—This is an application to quash the order of the Court of Small Causes passed in a House Rent Appeal. The order sought to be quashed is dated 21st October, 1948. No doubt the learned advocate for the petitioner is right in saying that there are circumstances which account for the delay. Though there is no specific period of limitation, it has generally been the accepted practice of this Court not to exercise the extraordinary power by way of the issue of prerogative writs when there has been a long delay since the passing of the order sought to be quashed. We therefore dismiss the application on this ground, but in the circumstances we make no order as to costs.

V.P.S. ——— *Petition dismissed.*

*C. M. P. No. 10279 of 1949. 19th July, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Varasuki & Co., through one of its partners, P. S. Subbaraman .. *Appellant**

v.

The Province of Madras, through the District Collector, Tirunelveli .. *Respondent.*

Madras General Sales Tax Act (IX of 1939)—Exemption of salt from sales tax—If extends to the sales and purchases of gunnies in which they are packed.

Any exemption of any article from sales tax must be strictly construed and confined to the exemption itself and not extended. Thus, if salt is exempted, the gunny bags in which it is packed and sold is not exempted and must be included in the definition of "turnover" under the rules. The question whether there was "profit" or "loss" in respect of the gunnies is irrelevant for purposes of sales tax. If a man is a "dealer" in "goods" he will be liable to pay sales tax on his "turnover" even if he has suffered a loss.

[The Government have, it is understood, since exempted the price of gunny bags in which salt is packed from sales tax.]

Appeal against the decree of the District Court, Tirunelveli, in O.S. No. 1 of 1947.

M. Subbaraya Aiyar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This is an appeal against the judgment and decree of the District Judge of Tirunelveli in O.S. No. 1 of 1947 and raises an interesting question of law. The appellant, who was the plaintiff, filed a suit against the Government for a declaration that the sales tax collected from him to the extent of Rs. 1,202-8-6 on the turnover calculated only on the price of the *gunny bags* containing the salt sold by him (excluding, of course, the price of the *salt*, which is exempted from sales tax) was illegally collected and ought to be refunded to him as salt could not be sold except after being put into gunny bags and he had merely purchased the gunny bags from dealers for the sake of filling them with salt and had included only the cost price of the gunny bags in the ultimate price charged by him for the salt bags. The learned District Judge held that only salt had been exempted from sales tax and not the gunny bags in which it had been packed and that the gunny bags could not be regarded as inevitably included in the exemption, and that anybody who buys and sells gunny bags, like the appellant, even though along with the salt, would be liable for sales tax as being a "dealer" of "goods" within the meaning of section 2 (*b*) of the General Sales Tax Act. So he dismissed the appellant's suit with costs.

We have perused the records and heard the learned counsel for the appellant and the learned Government Pleader *contra*. The learned counsel for the appellant relied on three main contentions. The first was that the appellant was not a "dealer" within the meaning of section 2 (*b*) as he was not carrying on the business of buying and selling gunny bags (which were admitted to be "goods"), but only the business of buying and selling *salt*. It appears to us that he was carrying on the business of buying and selling gunny bags also in addition to the business of buying and selling salt. It is admitted that he *bought* the gunny bags and *sold* them. It is obvious, and it is conceded by learned counsel for the appellant, that a man may carry on a number of businesses in different "goods", separately or jointly. His contention is that when any article is incapable of being sold without being packed in gunny bags, the gunny bags must be exempted from the sales tax when the article, *viz.*, salt, is also exempted, on the ground of "necessity". We cannot agree. It seems to us that this is a matter more for moving the Government to

* Appeal No. 811 of 1947. 13th July, 1950.

exempt the gunny bags, in which salt has to be packed for being sent to the customers, in addition to the salt itself, as "necessity" will be of no avail as the customers could have supplied the gunny bags or taken away the salt themselves. The Government, we understand, have been moved subsequently for the amendment of the rules and to exempt the price of *gunny bags also* from sales tax, and that they have conceded this demand. That itself shows that, originally, there was no such intention on the part of the Government to exempt the gunny bags, and this suit relates to the period when gunny bags were not exempted. On principle, it seems to us that any exemption of any article must be strictly construed and confined to the exemption itself and not extended. Thus, if salt is exempted, but not the gunny bags in which it is packed and sold, if we exempt the gunny bags without a special exemption to that effect, then gunny bags in which rice and other articles are packed, and drums and tins in which oil is packed, etc., will also claim exemption, and it is admitted that they have not been exempted and that they cannot be exempted because they will be included in the definition of " turnover " under the rules.

The next contention was that the appellant had not made any *profit* from the sale of the gunny bags, and that the contention of the Commercial Tax Officer that he had made a profit of eight pies on each gunny bag was not well founded as the appellant was proved to have sold salt in some cases for less than the controlled price and the profit of 6¼ per cent. allowed to him. We consider that the question of profit and loss is irrelevant for this purpose. If a man is a " dealer " in " goods ", he will be liable to pay sales tax on his " turnover " even if he has suffered a loss, and, in this case, there is also no need for any undue sympathy for the appellant as he had collected sales tax from the customers on the entire price including the price of gunnies admittedly included by him in his bills.

The last contention was that the appellant had acted only as " an agent of the customers " for purchasing the gunny bags and had only recovered their actual price from the customers, and that, as sales tax had been paid on the original sale by the dealers in gunny bags to him, a second sales tax should not be levied, in justice and equity, now. There is no evidence to show that he was acting as " an agent of the customers " in purchasing these gunny bags. No customer wrote to him any letter asking him to buy the gunny bags on his behalf, or sent him an advance for purchase of gunny bags ; nor were accounts for the gunny bags alone rendered by the appellant to his customers. The question of the second payment of sales tax is not material as in some cases sales tax has to be paid, under our rules, twice over not only on these articles but in the case of many others.

In the end, therefore, we see no reason to interfere with the judgment and decree of the lower Court. This appeal deserves to be and is hereby dismissed with costs.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

The Palghat Wariar Bank, Ltd. (in Liquidation) through its Official Liquidators .. *Appellants**

v.

Mundan Kandath Purakkal Ramaswamy's son Padmanabhan and another .. *Respondents.*

Companies Act (*VII of* 1913), *section* 171—*Company in winding up attaching property in execution of decree in its favour—Claim petition by third party—If other " legal proceeding " for proceeding with which leave of Court is essential.*

When a company in winding up attaches certain property in execution of a decree in its favour as that of its judgment-debtor any claim petition by a third party cannot be regarded as " other legal proceeding " within the meaning of section 171 of the Companies Act. Hence such claim petition can be proceeded with against the company without leave of the Court.

* S. A. No. 1187 of 1947. 4th April, 1950.

It will be most inequitable that a company in liquidation should institute execution proceedings and rely upon section 171, Companies Act, to debar persons from defending their property in those execution proceedings.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in A. S. No. 118 of 1945, preferred against the decree of the Court of the District Munsif, Palghat, in O.S. No. 288 of 1944.

D. A. Krishna Variar for Appellants.

C. Unikanda Menon for Respondents.

The Court delivered the following

JUDGMENT.—The interesting question of law debated before me in this second appeal is whether when a company in winding up attaches certain property in execution of a decree in its favour as that of its judgment-debtor, any claim petition by a third party is to be regarded as " other legal proceeding " within the meaning of section 171 of the Indian Companies Act which shall not be proceeded with or commenced against the company except by leave of the Court.

The appellant before me is the plaintiff in the original suit who sued to set aside an order on a claim petition filed by the first defendant on the basis of an assignment in his favour by the second defendant regarding the rents of certain properties which had been attached by the plaintiff. The claim succeeded in the execution Court, and the case of the plaintiff is that the assignment was a sham transaction unsupported by consideration which was entered into by the second defendant with a view to defeating the claim of the plaintiff in execution of its decree against the second defendant in O. S. No. 195 of 1936 on the file of the District Munsif's Court at Palghat. Both the Courts below have found against the case of the plaintiff in the attack made against the transaction on its merits, and the only question which arises for consideration is whether the claim proceeding started by the first defendant and the order made on it by the execution Court should be regarded as null and void on account of want of leave of the Court in the winding up under section 171 of the Indian Companies Act. On this latter question too the Courts below have concurrently held against the plaintiff.

The argument for the appellant is that the claim proceeding constitutes an independent legal proceeding which cannot be proceeded with or commenced against the company except by leave of the Court, while the contention for the respondents is that it is in the nature of a defensive proceeding in answer to the execution petition of the plaintiff, for which no leave is necessary under the Act. The learned counsel for the appellant says that as ruled by Kuppuswami Ayyar, J., in the *Calicut Bank, Ltd.* v. *Nekkat*[1], the word " proceeding " in the section of the Act applies to execution proceedings also and is not confined to original proceedings, and that the claim petition is itself a proceeding in execution which falls within the mischief of the section. But as the lower Court rightly puts the matter,

" In the present case no execution proceedings were started by the 1st defendant against the Warriar Bank (in liquidation). On the other hand, the Official Liquidators as representing the Warriar Bank (in liquidation) applied in I. A. No. 225 of 1943 for attachment of the mesne profits or of the rent payable by the 3rd defendant to the 2nd defendant and the claim petition was filed by the 1st defendant as E. A. No. 506 of 1943 only in the attachment proceedings started by the liquidators."

The decision in the *Calicut Bank, Ltd.* v. *Nekkat*[1] does not therefore apply to the present case where the first defendant only put forward a claim as a defence to the execution proceedings already started by the Official Liquidators.

It is observed in Palmer's Company Law, 19th Edn., by A. F. Topham, K.C., at page 404 :

"The object of the winding-up provisions of the Companies Act, 1862 " said Lindley, L.J., in Re *Oak Pitts Colliery Co.*[2], " is to put all unsecured creditors upon an equality and to pay them *pari passu*. To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended ; otherwise the winding up would resolve itself

1. (1943) 2 M.L.J. 448. 2. (1882) 21 Ch.D. 322, 329.

into a scramble for the assets. Accordingly the Act of 1862 gave the Court jurisdiction in various cases to restrain proceedings. Section 24 (5) of the Judicature Act, 1873, modified these provisions to some extent by providing that no proceeding in the High Court can be restrained by injunction; but this did not alter in substance the jurisdiction. Now by section 226 of the Act of 1948 the Court can, after presentation of the petition, restrain proceedings, and by sections 227 and 231, on a winding-up order being made, or a provisional liquidator appointed, proceedings are automatically stayed and cannot be proceeded with without leave of the Court. In this way creditors and others are compelled to come in and prove their claims in the winding-up and a rateable and just distribution of the company's assets is effected."

Judged from the standpoint of the object and purpose of the statutory provision it is clear to my mind that the proceeding by way of a claim petition with which the first defendant intervened in the course of the execution proceeding of the plaintiff does not fall within the purview of the section of the Act.

It may be that where the language of the statute is sufficiently wide to cover a case not within its professed or implied purpose and object the language must still be given effect to. But as pointed out in Rustomji's Company Law, 2nd edn., at page 396:

"When once an action by the company itself has been proceeded with, there is no necessity for the defendant in the action to obtain leave for any defensive proceeding on his behalf. Where a company in liquidation is plaintiff, the defendant may put in a counter-claim (against the company) in the nature of a defence without obtaining the leave of the Court."

Reference is made by the learned author in this connection to a case in *Humber & Co.* v. *John Griffiths Cycle & Co.*[1], and to a case in *Mersey Steel & Iron Co.* v. *Naylor*[2]. In the former case it was ruled by the House of Lords that,

"Where a company is being wound up under the direction of the Court, an appeal to the House of Lords in which the company is respondent, brought in an action in which the company was originally plaintiff, is not 'a proceeding against the company' within section 87 of the Companies Act, 1862."

In the latter case Jessell, M.R., observes in the course of the argument at page 656—and that appears as part and parcel of the head note—that a counter-claim is in the nature of a defence which if raised in answer to an action by a company for debt can be entertained without the leave of the Court. That case has been affirmed in the House of Lords in *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.*[3] An attachment proceeding like the one with which we are concerned in the present case started in the course of execution proceedings taken by the plaintiff, it is said, is not strictly in the nature of a defensive proceeding by a party to the execution petition but is in the nature of an independent proceeding by a stranger to the execution petition in vindication of his right to the property attached. True; but I am inclined to think on a careful consideration of the argument that the principle of the decisions above cited does apply to the present case of a claim petition which in substance is only incidental to the main proceeding in execution started by the plaintiff Bank itself.

It is urged for the appellant that had the claim petition failed and not succeeded and had a suit been filed by the present respondents that would obviously have been hit at by the requirement of leave of Court in the winding up, and that there is no reason why merely because the claimants succeeded, that should make any difference. The argument is, strictly speaking, beside the point, because what we have to consider is not so much the case of the suit under Order 21, rule 63, Civil Procedure Code, as the nature of the claim proceeding itself.

As put in the case in *Mt. Zamrut* v. *Peoples Bank*[4], which has been relied upon by the lower appellate Court in the present case, where the decree-holder it is who has set the law in motion, the position of a claimant who intervenes in execution is analogous to that of a defendant in a suit. I agree with Middleton, J., in that case when he observes:

1. 35 L.T. 141.
2. (1882) 9 Q.B.D. 648.
3. (1884) 9 A.C. 434.
4. A.I.R. 1936 Pesh. 185.

"It appears to me to be most inequitable that a company in liquidation should institute execution proceedings and rely upon section 171, Companies Act, to debar persons from defending their property in those execution proceedings."

I am satisfied that the point taken for the appellant in this case has no merits and must fail.

The second appeal is accordingly dismissed with costs.

(No leave).

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AIYAR.

S. N. T. Kumaraswami Chettiar and others .. *Appellants**

v.

M. S. M. Chinnathambi Chettiar and others .. *Respondents.*

Partnership—Association of more than 20 members—Suit for dissolution and partition by a member—If lies—Suit for return of subscription—When lies—Starting point of limitation.

A partnership of more than 20 persons formed for the purpose of carrying on a business that has for its object the acquisition of gain is an illegal association.

The beneficial ownership which the partners of an illegal partnership may have in the properties of the partnership cannot form the basis of an action for partition or other similar relief.

It is well established that a person who pays money to another to be used for an illegal purpose can recover the money before it has been actually used for such illegal purpose. But when the suit is laid not for the refund of any subscription and even if it so laid there was the circumstance that the illegal partnership had carried on the business for several years with the help of that money and the plaintiff and their predecessors had had the benefit of the profits from the business it would not be a case of an illegal purpose not having been carried out.

The starting point for computing limitation in a suit for the return of share money contributed by a person to an unregistered association of more than 20 members would be the date on which money was paid and there would be no recurring cause of action.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli, in A.S. No. 207 of 1944, preferred against the decree of the Court of the District Munsiff, Tiruchirapalli, in O.S. No. 298 of 1942.

K. Bhashyam for *T. V. Ramanatha Aiyar* for Appellants.

S. Amudachari and *M. R. Narayanaswami* for *S. Ramaswami Aiyangar* for Respondents.

(In pursuance of an order of reference, dated 14th July, 1949, by Govinda Menon, J., this appeal coming on for hearing, the Court delivered the following Judgment.)

The Judgment of the Court was delivered by

The Chief Justice.—This second appeal has been posted before a Bench, because Govinda Menon, J., considered that the points raised in it are of sufficient importance to be heard by a Bench.

The facts which led up to the suit filed by the appellants are stated clearly and fully in the judgment of the District Munsiff, Tiruchirapalli, who disposed of the case in the first instance. It is sufficient to mention only the material facts necessary for a discussion of the points of law which arise in this appeal. There were two partnership businesses caried on under the name and style of Sri Krishna & Co. (Boiler) and Krishna & Co. (Rice Mill). The former was started on 25th June, 1923, with 60 persons owning the business in 40 shares with a share capital of Rs. 600 per share. The latter was started on 6th September, 1923, and consisted of 37

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* S. A. No. 1165 of 1946. 14th April, 1950.

persons owning 20 shares with a share capital of Rs. 600 per share. Some of the persons had shares in both the partnerships. There were changes in the partners from time to time. Though the two concerns were distinct, it is common ground that the profits of both the businesses were pooled together and divided among the total number of shareholders. The first plaintiff and his paternal granduncle Narayanan Chettiar were members of an undivided Hindu family which contributed a total capital of Rs. 1,800 to the two businesses and owned three shares therein. The total number of shares was 59 out of which the joint family owned three. At a partition between the first plaintiff and his granduncle, the first plaintiff got 1½ shares and his granduncle got 1½ shares. The granduncle Narayanan Chetty died in 1935 leaving behind him three daughters plaintiffs 2 to 4 who became entitled to his shares. The plaintiffs' suit is based upon the ownership of three out of 59 shares in the two businesses. In 1929 one of the shareholders filed a suit for a dissolution of the partnerships and for an account, but it was dismissed on the 28th October, 1930, on the ground that the partnership was an illegal association and that the suit was not maintainable. Nevertheless, the business continued to be carried on till 1941 when on account of certain misunderstandings between the first plaintiff and the persons who were in management of the business, the first plaintiff filed a complaint on 26th February, 1941, under section 4, clause (5) of the Indian Companies Act. Though the complaint was filed in February 1941, the case was eventually taken up by the Magistrate and the trial commenced only on 14th October, 1941. Meanwhile, on 11th October, 1941, the shareholders resolved at a meeting to dissolve the two concerns. Simultaneously a private limited company was formed under the name and style of the Manachanallur Sri Krishna Rice Mills, Ltd. (the fourth defendant in the case) with a share capital of Rs. 5,000 divided into 200 shares of Rs. 25 each with the object of acquiring and taking over as a going concern the two businesses. The company was duly incorporated on 16th October, 1941. It was resolved at the meeting of the partners of the two businesses held on 11th October, 1941, that the properties of the partnerships shall be sold to the company which was being formed for a total consideration of Rs. 5,000 and two persons V. P. Marudayya Chettiar and P. M. Kumarswami Chettiar, were empowered to carry out the transaction. It was further resolved that the sale amount shall be divided among the partners according to their respective proportionate shares. There is evidence that 191 shares in the new company were actually allotted and some of the partners of the two dissolved partnerships took up shares in the new company while some others were paid the sums due to them for their capital. Some who were not members of the old partnership also took up shares in the new company. The criminal prosecution ended in a nominal sentence of a fine of one rupee or in default simple imprisonment for two days (*vide* order Exhibit P-21 dated 2nd December, 1941). There is also evidence of purchase by the new company of the machinery and superstructures of the old businesses from Marudayya and Kumaraswami abovementioned (Exhibits D-38, D-39, D-40 and D-41). The sales were in October and December, 1941. On 18th June, 1942, the plaintiffs filed a suit out of which this second appeal arises against the new limited company as the 4th defendant and against the 1st defendant one P. K. Narayanan Chetti and defendants 2 and 3 as the legal representatives of one Muthuveeran Chetti on the ground that the 1st defendant and Muthuveeran Chetti were the persons who managed the businesses from 1935 onwards. Pending the suit, the first defendant died and defendants 5 to 8 were added as his legal representatives. The suit was for the following reliefs :—

"(1) a declaration that the plaintiffs are entitled to three out of fifty-nine shares in the assets and properties of Sri Krishna & Co. (Boiler) and the Krishna & Co. (Rice Mill) now vesting in the fourth defendant and are entitled to a proportionate allotment of shares in the 4th defendant company,

(2) a permanent injunction directing the 4th defendant company to issue shares in favour of the plaintiffs in respect of 3/59 of its assets and account for the dividends accrued or accruing on such shares and if that be not possible directing payment on the market value of the 3/59ths share on the assets with interest thereon,

(3) a direction to defendants 2, 3 and 5 to 8 as legal representatives of Muthuveeran Chettiar to account for the plaintiffs' share in the company now incorporated as the 4th defendant company."

The suit was dismissed against all the defendants by both the District Munsiff of Tiruchirapalli and on appeal by the Subordinate Judge of Tiruchirapalli on the ground that the plaintiffs could have no remedy against the members of the old partnerships which were illegal under section 4 of the Indian Companies Act and the plaintiff had no cause of action against the 4th defendant company. The District Munsiff further held that the claim against defendants 2 and 3 and 5 to 8 was barred by limitation. The plaintiffs are the appellants.

It was conceded by Mr. K. Bhashyam Aiyangar who appeared for the appellants that the two partnerships started in 1923 fell within the mischief of section 4, sub-section (2) of the Indian Companies Act which runs thus :

"No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law or of Royal Charter or Letters Patent."

Sub-section (5) of the same section provides that any person who is a member of such a partnership formed in contravention of this section shall be punishable with fine not exceeding Rs. 1,000. It must therefore follow that the two partnerships were illegal. It was also conceded by the learned counsel that a member of an illegal partnership cannot sue for its dissolution or for the taking of its accounts. As the partnership is illegal *ab initio* there could be strictly speaking no question of its dissolution or taking of accounts. The Court will not assist a person who claims to be a partner of an illegal association to obtain a direction to have the accounts of the business taken so that he may have his share of its profits. One of the consequences of the illegality of a partnership is that its members cannot maintain an action in respect of any contract made by it, *e.g.*, a partnership for selling smuggled goods cannot recover the price of such goods which it may have sold. An illegal loan society could not recover money which it had lent.

It is well established that the consequence of the illegality of a partnership is that its members have no remedy against each other for contribution or apportionment in respect of partnership dealings and transactions. Lindley explains the reason of the rule thus (*vide* page 137 of the 10th edition) :—

"However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defence to a claim by that other, for an account and payment of his share of the profits made thereby, such a defence must be allowed to prevail in a Court of justice, were it not so, those who *ex hypothesi* have been guilty of a breach of the law, would obtain the aid of the law in enforcing demands arising out of that very breach ; and not only would all laws be infringed with impunity, but what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favour to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of the partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality."

It was however contended by Mr. Bhashyam Aiyangar, that in spite of this well-established rule, one of the partners can ask for a partition or similar relief in respect of the assets of such an illegal partnership. Of course, in obtaining that relief obviously there should be an account of the assets and liabilities of the partnership and it is only the net assets left after discharging all liabilities which could be partitioned. We see no real difference between the relief of dissolution and an account taking on such dissolution of a partnership and partition of the properties of a partnership left after discharging all its liabilities. It is a salutary legal principle that the Court will not permit what cannot be lawfully done directly to be done indirectly.

This argument of Mr. Bhashyam Aiyangar rests on the theory that though the partnership as such may be illegal and cannot be recognised by a Court, the property acquired by such a partnership belongs to the partners according to their shares and they have a beneficial co-ownership in such property. He relied on the deci-

sion in the *Queen* v. *Tankard*[1], in support of his argument. In that case a member of an association called the Bowling Feast Club was charged under 31 & 32 Vict., Ch. 116, section 1 with having embezzled certain money belonging to the club. The club was an illegal association within section 4 of the Companies Act, 1862, corresponding to section 4 of the Indian Companies Act. The plea in defence was that as the club was an unregistered association of more than 20 persons, and therefore illegal, there could not be a conviction. The section enacted that

> "If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money . . . . . . shall steal or embezzle such money . . . . . . every such person shall be liable to be . . . . tried, convicted, and punished for the same."

This plea was overruled and the accused was convicted. Lord Coleridge, C.J., observed :

> "It would almost seem as if the enactment was for the very purpose of sweeping away such an objection as has been taken here. There are a number of persons who join themselves together, not for any criminal purpose, but their joining together is not legalized. It is true that they have no legal existence as a company, association or co-partnership ; but they are nonetheless beneficial owners of property. It does not follow that, because the club had no legal existence as a company, association, or co-partnership, the members had no legal existence as beneficial owners of property. It is untrue to say that they are not beneficial owners in fact . . . . It would be a very strong thing to hold that an association not expressly sanctioned by law, yet not criminal is incapable of holding any property at all."

Mathew, J., was also of the same opinion that the members of the club were clearly beneficial owners within the meaning of the section.

There is another case which belongs to the same category as the *Queen* v. *Tankard*[1], though this case was not cited to us by Mr. Bhashyam Aiyangar, *viz.*, *Reg.* v. *Stainer*[2], in which it was held that a person could be convicted of stealing property belonging to an association in the nature of a trade union which was not legalised. These cases can take Mr. Bhashyam Aiyangar very little distance. It may be in this case if any one had committed a theft of the machinery or furniture belonging to the partnerships, he could have been convicted of theft. The question, however, remains whether the beneficial ownership which the partners of an illegal partnership may have in the properties of the partnership is such that it can form the basis of an action for partition or other similar relief. No case was cited to us in which such relief was granted on that basis. Prosecutions for offences stand on an entirely different footing.

Mr. Bhashyam Aiyangar also relied upon certain decisions of English Courts which deal altogether with a different aspect of the matter. It is well established that a person who pays money to another to be used for an illegal purpose can recover the money before it has been actually used for such illegal purpose. This principle may be extended to a case where a person subscribes for a share in an illegal partnership and sues to recover it before the illegal objects are carried out. In *Greenberg* v. *Coperstein*[3], the plaintiffs were three members of a club called the Pelham Club which was rendered illegal as being an unregistered association of more than 20 persons. They sued for an administration of the assets of the club and an accouut of the moneys received by the defendants (who were the Treasurer and Secretary of the club) from members of the club, an enquiry as to any property of the club in the defendants' custody available for the benefit of the members of the club and payment of the amount so ascertained. After coming to the conclusion that the club was an illegal association, Tomlin, J., considered what relief could be given in a case of that sort. He said :

> "I do not myself believe that the law is so powerless that when money is in the hands of persons who have received it for application for an illegal purpose it cannot protect the contributors or enable them to recover it before it has been applied for this illegal purpose."

Distinguishing cases where it was held that an illegal association could not recover money lent by it, he observed :

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1. (1894) 1 Q.B. 548.
2. 89 L.J. (M.C.) 54.
3. (1926) 1 Ch. 657.

"It is a different case where those who have subscribed money for an illegal purpose come requiring the agents in whose hands it is and who were to apply it for that purpose and have not done so, to return it to them. I am happy to think that the law is not so feeble that it cannot protect the subscribers by ordering an account."

The learned Judge was, however, not certain what relief could be actually given to the plaintiffs after the account had been taken. He guarded himself by saying that he expressed no opinion as to what will take place thereafter and by what means, if any, the defendants might discharge themselves of the money they had received.

The following remarks of Vice-Chancellor Wood in *Butt* v. *Wenteaux*[1] carry us no further :—

". . . . . it would be very difficult to persuade me that the members of such an association (unregistered), although they could not do more, or stir a step further without registration, were not sufficiently qualified to be called a company, to have back their money . . . . and the land and other things acquired with that money, and to have an account from the promoters, whose duty it was to register, on the footing as between them and the promoters of its being in truth a company, and upon the principle that a man could not aver any wrong or omission of his own as an answer to a bill seeking such relief."

Actually in the case before him the shareholders only prayed for a direction to have the partnership property properly secured. The law on this point is summed up thus in Halsbury's Laws of England, 2nd Edn., Vol. 5, at page 843.

"Persons subscribing to the formation of a company, the agreement to form which is illegal, may, however, recover the money before it is actually applied to the illegal purpose, and the Court will order any persons who have received the money subscribed to render an account but the question, even now, seems open whether the Courts will assist members of illegal companies to recover their subscriptions from the persons who have been the recipients of them, and, if so, by what means."

In *U Sein Po* v. *U Phyu*[2], such a right was recognised. In that case an association consisting of more than 20 members was formed for the purpose of carrying on a rice business, but it was not registered. The partnership bought lands, built and equipped a rice mill and was carrying on business. In 1926 three of the partners filed a suit to recover from the defendant whom they described as "the promoter" of the partnership and its manager the shares which they contributed to the partnership or so much as they might be entitled to recover in respect of those shares after converting the assets of the partnership into money and paying the debts incurred by the partnership. The learned Judges held that though the partners could not sue for an account of the dealings and transactions of the partnership and of its profits, they had a right to sue for the return of their subscriptions and if these had been converted into land or other things for the purpose of the company they can be re-converted into money for payment of the debts and and liabilities of the concern and then for repayment of the subscribers. The learned Judges reviewed the English authorities and found that there was no decided case exactly on all fours, but they thought that the observation in *Butt* v. *Monteaux*[1] was sufficient authority for their decision. They also relied on the following passage from Lindley on Partnership, 10th edn., page 141 :

"Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of the company and of the profits made thereby, they have a right to have their subscriptions returned and the necessary account taken ; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company the subscribers are entitled to have that land and these things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases no illegal contract is sought to be enforced ; on the contrary the continuance of what is illegal is sought to be prevented."

In *Mawaram* v. *Ramgopal*[3], the suit was in respect of a partnership concerned with the ginning factories. There were more than 20 partners and therefore the partnership was illegal. The plaintiff claiming an eighth share in the partnership brought a suit for a declaration that the partnership was invalid and prayed for a refund of the plaintiff's subscription out of the proceeds realised by an auction sale of the factories or in some other proper way or in the alternative for a division of the

1. (1854) 1 K. and J. 97 : 69 E.R. 385.
2. (1929) I.L.R. 7 Rang. 540.
3. (1926) I.L.R. 48 All. 735.

properties of the factories and, if proper, for an auction sale of the property and an award to the plaintiff of an one-eighth share in their sale proceeds. The case came up first before a Division Bench consisting of Sulaiman, J. (as he then was) and Mukherji, J. The learned Judges differed. Sulaiman, J., held that the prayer for a refund of the original subscription could not be granted because the plaintiff had been participating in the profits of the partnership for several years and it was no longer open to him to claim a refund of his original subscription after having received considerable sums of money from the partnership. But he held that the plaintiff was entitled to a partition of the properties of the factories and if a division of the property was not feasible he directed a sale of the properties and distribution of the proceeds. Mukherji, J., on the other hand held that the plaintiff was not entitled to any relief, because the partition would involve realisation of the assets of the company, payment of its just debts, sale of property and distribution among the members, the very things which would be done in a suit for dissolution of partnership or winding up of a company. The case was thereupon referred to Walsh, J., who agreed with Mukherji, J., that a decree for partition would be in substance a direction for winding up or a decree for dissulution and account. He added that when such a precedent was once established, there was nothing to prevent the formation of an unlimited number of such associations consisting of more than 20 persons carrying on trade for the purpose of gain, any one of the members of which could come to the Court and ask for relief in a suit in the nature of a winding up of the assets of the association. The result would be to give such associations under another guise the cloak of legality although the statute has forbidden it. In accordance with the opinion of the majority, the suit was dismissed as being barred by section 4 of the Companies Act.

In the case before us there is firstly no prayer for a refund of the subscriptions, if any, paid by the plaintiffs or their predecessor. Secondly, even if there had been such an averment and proof of it, there would still be the circumstance that the partnerships had carried on the business for several years with the help of that money and the plaintiffs and their predecessors had had the benefit of the profits from the business. This is not a case of an illegal purpose not having been carried out. Finally, the claim would be hopelessly barred by limitation. In *U Sein Ro* v. *U Phyu*[1], the claim was well within the time though time began to run from the inception of the partnership. We agree with the decision in *Ram Kumar* v. *Nem Chand*[2], that the starting point for computing limitation in a suit for the return of the share money contributed by a person to an unregistered association of more than 20 members would be the date on which the money was paid and there would be no recurring cause of action. As already mentioned, both the businesses were started in 1923 and the suit was brought in 1942. Treated as a suit for refund of share money, the suit was hopelessly barred.

There is no basis on which the claim of the plaintiffs to any of the reliefs which they prayed for can be sustained. Defendants, 2, 3 and 5 to 8 are sought to be made liable as the persons in management of the two businesses. But it is not alleged that they are in possession of any of the assets of the partnership. From the evidence it is clear that there had been a transfer of all the machinery and superstructure belonging to the partnerships to the fourth defendant. The sum realised was Rs. 5,000 and the District Munsif held that the valuation of the assets was not sham or nominal ; nor was it low or inadequate. If at all, the plaintiffs could only have asked for their proportionate share of this amount from the persons in whose hands it could be traced. The suit is not framed as one for recovery of the plaintiffs' share in the proceeds. A decree for account the plaintiffs undoubtedly cannot be entitled to.

We agree with the Courts below that the plaintiffs have no cause of action against the 4th defendant. It was an entirely different entity and the learned Subordinate Judge was not quite accurate in stating the first point for decision thus :

1. (1929) I.L.R. 7 Rang. 540. 2. (1921) 19 A.L.J.R. 836.

"Whether the partnership evidenced by the 4th defendant company is simply a continuation of the prior partnership businesses which were admittedly an unlawful association, or whether it was an independent concern."

It is not correct to say that a private limited company is a partnership. There could therefore be no legal foundation for any claim against the 4th defendant between whom and the plaintiffs there is no privity whatever. The plaintiffs cannot say that the assets belonging to the old partnerships are in the possession of the 4th defendant, unless they affirm the validity of the sale by and on behalf of the old concern. If the plaintiffs do affirm that transaction, then their only remedy can be in respect of the sale proceeds, namely, Rs. 5,000. But if the plaintiffs say that the assets have not been properly conveyed to the 4th defendant, then, it inevitably follows that the plaintiffs can have no cause of action against the 4th defendant.

The Courts below were right in dismissing the suit. The second appeal is dismissed with costs. Two sets, one set to respondents 1 and 2 another to respondent 3.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Sri Rajah Bommadevara Naganna Naidu Bahadur, Zamindar Garu represented by the guarantor and others .. *Appellants**

v.

Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur, Zamindar Garu (dead) and others .. *Respondents.*

Limitation Act (*IX of* 1908), *Article* 120—*Applicability—Recovery by a divided brother from third parties of partible family property together with mesne profits—Suit by the other brother for his share of the property and profits and for an account—Claim for an account—Maintainability—Limitation—Starting point.*

Sometime after a decree for partition between two brothers, one of them filed suits against a third party (to which the other brother was made a defendant) in respect of family property which was admittedly partible between the brothers but which owing to circumstances beyond their control could not be included in the suit for partition and there was a joint decree for possession with a direction for mesne profits being determined subsequently. Applications for ascertainment of mesne profis were duly made and decrees passed and the amounts were realised by the plaintiff in those suits. In a suit by the representatives of the other brother for partition by metes and bounds of the properties so recovered and for recovery of a half share therein and for an account of the moneys expended in connection with the later suits, and also for recovery of a half share of the mesne profits recovered in the later suits, it was contended that the relief in respect of accounts was not maintainable and that in any event the suit was barred by time.

Held: After the decree for partition the two brothers must be deemed to be in the position of tenants-in-common in respect of the lands recovered and the moneys collected by one of them represent the income of the lands and the brothers would be entitled to equal moieties of such income. The legal position is exactly similar to that in a case where one co-owner or tenant-in-common is in possession and enjoyment of the entire common property and has received the rents and profits from it. In such a case the other co-owner or tenant-in-common would be entitled to ask for an account from the other in possession and enjoyment and recover a half share of the net income, that is to say, the income realised less all legal and permissible deductions and allowances. It is only on taking account that the net income, if any, in which the co-sharers will each be entitled to a moiety can be ascertained. To a suit for such an account the proper article applicable is article 120 and limitation would start to run from the date of the earliest denial by the defendant of the plaintiff's title.

Appeal against the decree of the Court of the Subordinate Judge, Vijayawada, dated 30th August, 1945, in O.S. No. 70 of 1943.

P. Satyanarayana Raju for Appellants.

P. Somasundaram for Respondents.

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* Appeal No. 108 of 1946. 14th March, 1950.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal by the plaintiffs against the decree and judgment of the Subordinate Judge of Vijayawada in O.S. No. 70 of 1943 on the file of his Court in so far as it is against them. To understand and appreciate the contentions of the parties to this appeal, it is necessary to state the following facts which are either undisputed or well established. Raja Bommadevara Naganna Nayudu and the defendant who is the respondent before us are brothers and were members of an undivided Hindu family. The defendant filed a suit for partition of the joint family properties against his brother Naganna Nayudu in the Court of the Subordinate Judge of Eluru (O.S. No. 38 of 1919). A preliminary decree for partition was passed on 29th January, 1921 and eventually the final decree was passed on 30th November, 1929. Each of the brothers was allotted a half share in the family properties. The suit lands were accretions to the main land comprised in the joint family estate formed in the river Krishna. The Government entered on these lands in 1894 under the provisions of the River Conservancy Act. Both the brothers and their father filed a suit (O.S. No. 83 of 1916) on the file of the Court of the Subordinate Judge of Masulipatam against the Government and obtained a decree for recovery of a portion of the accretions which had become fit for cultivation. This decree was confirmed by the High Court in A.S. No. 372 of 1917. In the meantime there were other accretions of which a part was delivered over to the brothers by the Government. The Zamindar of South Vallur, a cousin of Naganna Nayudu and the defendant, filed O.S. No. 9 of 1921 in the Court of the Subordinate Judge of Vijayawada (tried subsequently as O.S. No. 50 of 1923 on the file of the Additional Subordinate Judge, Vijayawada) against the two brothers and the Government claiming that the accretions belonged to the South Vallur estate. That suit was decreed by the lower Court and in accordance with the decree the Government delivered to the plaintiff in that suit, the Zamindar of South Vallur, 96 acres 48 cents of such accretions. An appeal was preferred by the brothers against the said decree to the High Court (A. S. No. 327 of 1924) and this Court reversed the decision of the Court below and declared the right of the two brothers to the said accretions. In spite of this appellate decree, the Zamindar of South Vallur continued to be in the possession of the lands delivered to him by the Government and purported to divide the same with his son. So, the defendant in the present action filed two suits O.S. No. 9 of 1925 and O.S. No. 35 of 1925, in the Court of the Subordinate Judge of Vijayawada for recovery of possession of the said lands together with mesne profits. O.S. No. 9 of 1925 was filed for possession of that portion of the property in the possession of the senior Zamindar of South Vallur and others claiming through him, which fell to his share at the partition between him and his son. O.S. No. 35 of 1925 was filed against the junior Zamindar of South Vallur who was then a minor represented by the Court of Wards in respect of the portion which fell to his share. The Government was made a party to both the suits. In both the suits Naganna Nayudu was impleaded as the second defendant. After the declaration of the rights of the brothers in A. S. No. 327 of 1924 by this Court, the two suits were decreed on 30th November, 1929, in favour of the two brothers. The decree directed delivery of possession of the properties to the two brothers and left the question of mesne profits to be determined afterwards. On 4th December, 1930, the defendant filed two applications, I.A. Nos. 142 and 143 of 1931 in the two suits respectively for ascertaining the mesne profits as per the direction in the judgment and decree in the two suits. The Court ascertained and passed a decree in O.S. No. 9 of 1925 for certain amounts aggregating to Rs. 10,413-4-7 with interest against the property of the senior zamindar of South Vallur in the hands of the Official Receiver of Krishna and for Rs. 3,081-11-1 against one Rani Inuganti Saraswati Devi Amma one of the defendants in that suit. And in O.S. No. 35 of 1925 a similar decree was passed for Rs. 518-6-9 with interest. The Court further directed that future profits till delivery of possession shall be ascertained in future proceedings. The defendant-respondent obtained delivery of possession of the property and also collected amounts from time to time in respect of the decrees for mesne profits.

Naganna Nayudu was adjudged insolvent on 27th January, 1941 in I.P. No. 8 of 1937. The Official Receiver of West Godavari representing his estate instituted the suit out of which the appeal arises on the 6th September, 1943, for a decree for partition by metes and bounds of the properties which the defendant had taken delivery in pursuance of the decrees in O.S. Nos. 9 and 35 of 1925 and for recovery of a half share therein and for an account of the moneys collected and expended by the defendant in connection with O.S. Nos. 9 and 35 of 1925 and for recovery of a half share of the sum ascertained in pursuance of the taking of the account with interest at six per cent. per annum and for an account of the income which the defendant ought to have realised from the lands taken possession of by him in pursuance of the aforesaid decrees in O.S. Nos. 9 and 35 of 1925. Subsequently the Official Receiver was removed in pursuance of a composition scheme which was accepted by the Court and in his place was substituted Sri Raja Bommadevara Lakshmichayadevamma as the first plaintiff and Raja Bommadevara Venkata Narasimha Rao being minor represented by his mother the first plaintiff was added as the second plaintiff. The first plaintiff was the guarantor under the composition scheme and the second plaintiff is the son of the insolvent. In this judgment Naganna Nayudu and his representatives at different times will be referred to as the plaintiff.

There was really no objection on the part of the defendants for a partition and delivery to the plaintiff of a half share in the suit properties. The only contention on his behalf was that the plaintiff was not entitled to costs as the partition could not be effected solely on account of the recalcitrant attitude of the plaintiff himself. The learned Judge passed a decree for partition and held that the defendant was not liable for costs in respect of the relief of partition because of the laches on the part of the plaintiff. The main contest was in respect of the claim for a share of the amounts collected as mesne profits in execution of the decree in I.A. Nos. 142 and 143 of 1931. The defendant pleaded that the suit for this relief was not maintainable and in any event the suit was barred by time. The learned Judge held that the suit was maintainable, that a suit for an account of the mesne profits realised by the defendant in O.S. Nos. 9 and 35 of 1925 did not lie, but the plaintiff could recover a moiety of the amounts realised as mesne profits within three years of the institution of the suit. He further held that the defendant was not liable to render any account in respect of the income from the lands from fasli 1343 when the lands were relinquished by the judgment-debtors in O.S. Nos. 9 and 35 of 1925 till fasli 1351 in which year admittedly the lands were leased out by the two brothers in two equal shares, because the defendant was not in possession of the lands during that period. In the result, besides the preliminary decree for partition, the learned Judge passed a decree directing the defendant to pay to the plaintiff Rs. 194-3-4 together with interest thereon at six per cent. per annum from the date of suit till realisation.

The plaintiff's appeal relates to three items (1) the costs disallowed in respect of the relief of partition, (2) the mesne profits collected by the defendant in O.S. Nos. 9 and 35 of 1925 in so far as they were disallowed, and (3) an account of the income of the lands from 1933. * * * * *

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We are left with the claim for an account of the mesne profits collected by the defendant in O.S. Nos. 9 and 35 of 1925. As already stated the lower Court held that the suit was maintainable but the respondent has challenged the correctness of that finding before us. * * * * * *

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We agree with the learned Subordinate Judge that the suit is maintainable.

The question of limitation is not free from difficulty. According to the respondent, the proper article to be applied is article 62, while the appellant contends

that Article 120 should be applied. Another article which was occasionally mentioned was Article 89 but we did not understand either side to rely on its application. Decided cases on more or less similar facts are legion, and it is not easy to reconcile all the observations made by the different Judges dealing with different sets of facts. Before we deal with the decisions cited to us, it will be useful to analyse the relationship between the parties and the nature of the relief sought by the appellant. Undoubtedly, from the date of the preliminary decree in any event, if not from an earlier date the brothers must be deemed to be divided members of the family. By the date of the decrees in O.S. Nos. 9 and 35 of 1925, the final decree had also been passed in the partition suit between them. But it cannot be seriously disputed that the subject-matter of the two suits O.S. Nos. 9 and 35 of 1925 was also family property which was partible between the brothers but which owing to circumstances beyond their control could not be included in the suit for partition. It is because both the appellant and the respondent were jointly entitled to the lands in dispute in the two suits that a joint decree was prayed for and granted for possession. In law the two brothers must be deemed to be in the position of tenants-in-common in respect of these lands. The moneys collected by the respondent represent the income of the lands and presumably the brothers would be entitled to equal moieties of such income. In our opinion, the legal position is exactly similar to that in a case where one co-owner or one tenant-in-common is in possession and enjoyment of the entire common property and has received the rents and profits from it. In such a case it is well established that the other co-owner or tenant-in-common would be entitled to ask for an account from the co-owner or tenant-in-common for possession and enjoyment and recover a half share of the net income; that is to say, the income realised less all legal and permissible deductions and allowances. In such a case it cannot be said that in every pie that is realised by the co-owner in possession the other co-owner is entitled to a half. Cases can be conceived in which the outgoings may be in excess of realisations. It is only on taking an account that the net amount, if any, in which co-sharers will each be entitled to a moiety can be ascertained.

If the above be the correct legal position, we think the appellant was right in claiming an account. The preponderance of authority is also in favour of holding that to a suit for such account the proper article applicable would be Article 120. Such a suit, however, must be distinguished from a suit based on different facts such as, *e.g.*, a suit for the recovery of a definite sum of money paid by a common debtor to one of two joint creditors. There would be no scope for the taking of an account as the plaintiff would be entitled exactly to a half of the amount received by the defendant. If this distinction between the two types of cases is borne in mind, we can reconcile the several decisions relied upon by both sides before us.

So far as this Court is concerned, the leading decision on the subject is that the Full Bench in *Yerukola* v. *Yerukola*[1]. Before we deal at some length with the observations made by the learned Judges in that case, it will be instructive to refer to some of the earlier cases relied upon by either side before us and which are discussed by the learned Judges who formed the Full Bench. The earliest of the Madras cases is to be found in *Arunachala* v. *Ramasamya Pillai*[2]. In that case the plaintiff had brought a suit against his father and his brother the second defendant for partition and obtained a decree which *inter alia* declared that as to the outstandings due to the family the plaintiff was entitled to and to collect one-third share thereof. Among the outstandings was one item of Rs. 200 due by a debtor to the family. The debtor paid the entire amount to the plaintiff's father on the 12th May, 1878. The plaintiff then sued the first defendant, the debtor and the second defendant his brother for his one-third share of the debt, the father being dead by the time. The suit was dismissed against the first defendant the debtor as he had duly paid the debt to the plaintiff's father. But both the lower Courts found that the second defendant was liable to pay the plaintiff's one-third share.

1. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648 (F.B.).
2. (1883) I.L.R. 6 Mad. 402.

The suit was filed on 18th July, 1881, more than three years after the payment by the first defendant to the plaintiff's father. In the second appeal the learned Judges held that the plaintiff's share received by his father was money received to the plaintiff's use on the 12th May, 1878 and the plaintiff's claim would be barred under article 62 of the Schedule II of the Limitation Act. It will be seen from the facts narrated that there could be no necessity for an account. The debtor paid the money to one of the joint creditors. The prior decree for partition had declared that each of the coparceners was entitled to and to collect one-third share of the debt. Therefore, when the plaintiff's father received the amount representing the plaintiff's share, he must be deemed to have received it to the use of the plaintiff. In *Tellis* v. *Saldanha*[1], article 62 was applied to a claim for a share of the rent to which the plaintiff was entitled from coparceners to whom the rent had been paid. The parties were Native Christians, descendants of Brahmins, who were living in coparcenary. It was decided that the rule of survivorship would not be applicable to them, because of the passing of the Indian Succession Act and the case was decided on the footing that they were joint owners. In *Lakshmi Narasimha* v. *Lakshmamma*[2], the suit was to recover a half share of the plaintiffs in the mortgage amount due to the family collected by one of the members before the partition and not brought into account at the family partition. It was found that the predecessor of the defendant representing one of two co-mortgagees had released the entire mortgage debt on receipt of Rs. 1,000. Article 62 was applied to the suit. Obviously, the claim was to the share of a definite sum of money received by the defendant's predecessor and there was no claim for an account nor could there be. *Subba Rao* v. *Rama Rao*[3], arose on facts slightly different from the facts in the above three cases. The plaintiff and the defendant were co-owners in a jagir. The defendant had been appointed by the Government as its manager and the suit was to recover the plaintiff's half share of the profits on the jagir by taking an account. The learned Judges held that it was undoubtedly a suit for an account. The defendant was entitled to receive the money and he was bound to pay over what was due to the plaintiff only after the deduction of the legitimate expenses and outgoings. One of the cases cited to them was distinguished on the ground that in that case the defendant had no right to receive the money and there was no question of rendering an account; whereas in the case before them the defendant was entitled to receive the money and it was not a claim for a definite sum which in law belonged to the plaintiff when it was received by the defendant. They following the ruling in *Muhammad Habibullah Khan* v. *Safdar Hussain Khan*[4], where a person who was jointly entitled with the defendant sued to recover his share of the money in the hands of the defendant after an account being taken of what was received by the defendant and what he lawfully spent and article 120 was applied. Srinivasa Ayyangar, J., observed thus :

"Both of them are beneficially interested and are owners beneficially of a certain jagir. But the defendant is the person who is constituted the manager. As manager he is entitled to collect rents and revenue of the jagir and bound to account finally for the collections and disbursements. The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so-called * * * The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The article of limitation governing the suit is not therefore article 62. There is no other article suggested and the suit must fall within article 120 ".

It will now be convenient to refer to the Full Bench decision in *Yerukola* v. *Yerukola*[5]. Actually the facts of that case were peculiar. Three brothers who were members of a joint Hindu family became separated. Arbitrators were appointed who divided some of the family properties, but owing to disputes, the partition was not completed and the plaintiff brought the suit for the division of the remaining properties which during the interval had been enjoyed by one or other of the parties under a tenancy in common. The different members of the family had collected out-

1. (1886) I.L.R. 10 Mad. 69.
2. (1913) 25 M.L.J. 531.
3. (1916) 30 M.L.J. 341 : I.L.R. 40 Mad. 291.
4. (1885) I.L.R. 7 All. 25.
5. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648 (F.B.).

standings from debtors and rents from tenants. The plaintiff claimed an account of the amounts so collected. It was held that the article of the Limitation Act governing the claim for an account and share of the moneys and the rents and profits collected was not article 109 or 127, nor article 62, but the article applicable was 120 unless from the facts, it could be inferred that the person receiving the moneys and rents and profits acted as the agent of the others in which case article 89 would apply. Article 62 was not applicable, because the appropriate remedy in the case was an action for an account and not a suit for money had and received. Of the five learned Judges who formed the Bench, three delivered separate judgments agreeing in the final conclusion that the proper article was article 120. Schwabe, C.J., pointed out that in England an action for money received by the defendant for the plaintiff's use would not lie by one tenant-in-common against another who has received more than his share. The Statute 4 Anne, Chapter 16. Section 27 permitted an action for an account in such a case. The learned Chief Justice referred to the case of *Thomas* v. *Thomas*[1] in which Parke, B., gave his reasons for holding that an action for money had and received would not lie by one tenant-in-common against another, namely, that the rents remained undivided and no one tenant-in-common was entitled to any specific part and further, the collecting tenant-in-common would be entitled to all just allowances which could not be given in an action for money had and received, but could be given in an action for an account. The learned Chief Justice approved of the decision in *Subba Rao* v. *Rama Rao*[2], and the line of cases which decided that article 62 did not apply to a suit for an account between tenants-in-common. He specially distinguished the case in *Arunachala* v. *Ramasamya Pillai*[3] on the ground that in that case a debt had been collected by one of two brothers, each of whom was entitled to a third of the debt and the collecting brother had no authority or right to collect his brother's one-third share and it was a specific sum which the brother was alone entitled to and for which an action for money had and received would properly lie. He was also inclined to apply article 89 in case it could be inferred that one of the tenants-in-common was making a collection of common debts acting as agent for the other tenants-in-common and not merely on his own account. Kumaraswami Sastri, J., in an exhaustive review of the decided cases approved the principles laid down in *Subba Rao* v. *Rama Rao*[2] that article 62 would only apply where there was no question of rendering an account. Much of the discussion turned on the peculiar facts of the case where several properties including outstandings had been left undivided, but the *ratio decidendi* which emerges from the judgment of the learned Judge on the whole is that where the circumstances are such that an account is necessary for ascertaining the amount payable to the plaintiff, article 62 would have no application. Very much to the same effect are the observations of Devadoss, J., in dealing with some of the decided cases. Mr. P. Somasundaram the learned counsel for the respondent relied considerably on the illustration given by the learned Judge at page 701 of the report, namely, that where *A* and *B* were jointly entitled to a specific sum, if *A* collects the whole without being *B's* agent, implied or express, there is a presumption that he does so for *B's* use and article 62 would apply. But obviously this illustration has reference to a case like that of *Arunachala* v. *Ramasamya Pillai*[3] and not to a case where there is no specific sum, but a sum has to be ascertained. The learned Judge immediately thereafter says that in the case of the income of the immoveable property, the proper article to be applied is article 120. In our opinion, though the facts in *Yerukola* v. *Yerukola*[4], are not identical with the facts of the present case, the principle of the decision would govern the present case, namely, that article 62 would have no application to a case in which an account is the proper relief to be claimed.

The decision in *Yerukola* v. *Yerukola*[4], was followed in other High Courts in India. In *Abu Shabid* v. *Abdul Hoque Dobash*[5], article 120 was applied to a suit by one joint

1. (1850) 5 Ex. 26.
2. (1916) 30 M.L.J. 341 : I.L.R. 40 Mad. 291.
3. (1883) I.L.R. 6 Mad. 402.
4. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648 (F.B.).
5. I.L.R. (1940) 1 Cal. 110.

owner of a property against another for accounts when the defendant was alleged to have received rents and profits of such property in excess of his share in such rents and profits. Mukherjea, J., observed that the co-sharer is only entitled to accounts, which means that the defendant is entitled to all just allowances and all the rights and indemnities of a Receiver, whereas if it was an action for money had and received, the defendant's liability would be absolute.

In *Sitaram* v. *Narayan*[1], Broomfield and Macklin, JJ., held that article 120 was the proper article to apply to a suit for accounts by one co-owner against another who had received more than his share of the income of the joint property. In the opinion of the learned Judges, the basis of the decision in *Yerukola* v. *Yerukola*[2], was the reasoning of Parke, B., in the English case of *Thomas* v. *Thomas*[3], to which reference has been already made earlier in our judgment. Though the case before them related to the administration of the estate of a deceased Muhammadan the Judicial Committee in *Muhammad Ali Thebally* v. *Shafiabai*[4], appear to have taken *Yerukola* v. *Yerukola*[2], as laying down correct law. Their Lordships say :

> "Upon the proper application of article 120 as between tenants-in-common it will be sufficient to refer to *Bolo* v. *Koklan*[5], and *Yerukola* v. *Yerukola*[2]."

Mr. Somasundaram for the respondent placed some reliance on the ruling of this Court in *Mir Hussain Ali* v. *Mir Baquir Ali*[6]. The facts of that case, however, clearly demonstrate the impossibility of a claim for an account being made. The sale proceeds of a property belonging to several co-heirs were handed over to the defendant to be distributed amongst the co-heirs. One of the co-heirs was not paid his share and he filed a suit for the recovery of his share of the money. It was held that the suit was barred by limitation under article 62 of the Limitation Act. The defendant was not obviously entitled to any allowance or deduction from the amount in his hands. The only other case cited by Mr. Somasundaram was *Mohamed Wahib* v. *Mohamed Amir*[7]. Here again, there was no question of the plaintiff claiming an account. Two mortgage deeds were executed in favour of the first defendant by the second defendant. The plaintiff had a share in the sums advanced under the two mortgages. The first defendant (mortgagee) received from the mortgagor the whole of the two sums due under the deeds. The plaintiff sued for recovery of his share of the mortgage money. Article 62 was applied.

The evidence in this case confirms our view that the proper relief to which the appellant is entitled is an account. On 3rd April, 1941, the Official Receiver, West Godavari, on behalf of the appellant wrote to the respondent demanding a half share of the amount received by the respondent in respect of mesne profits under the two decrees (Exhibit P-4). To this the respondent replied on 30th April, 1941 (Exhibit P-5). He referred to the fact that he had himself conducted the suit proceedings as plaintiff bearing the entire costs and under these circumstances the respondent had no right whatever to claim one half share in the amounts received from the Court. Further he added that there were amounts which he (the respondent) had to realise from the appellant in accordance with the partition agreement entered into between them and a proper account should be taken in respect of all these amounts. He stated that the appellant had no right without having an account settled to claim payment of half the amount, because it was only after settling the account it would be possible to know how much had to be paid and by whom. The prayer in the present plaint was that an account be taken of the moneys collected and expended by the defendant in connection with O. S. Nos. 9 and 35 of 1925 and that a decree be passed in favour of the plaintiff for a half share of the sum so ascertained. In the written statement *inter alia* the defendant pleaded that he had spent large sums of money in the litigation involved in O. S.

1. A.I.R. 1943 Bom. 216.
2. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648 (F.B.).
3. (1850) 5 Ex. 28.
4. I.L.R. (1941) Bom. 8.
5. (1930) 59 M.L.J. 621 : L.R. 57 I.A. 325 I.L.R. 11 Lah. 657 (P.C.).
6. (1945) 2 M.L.J. 422 : I.L.R. 1946 Mad. 423.
7. (1905) I.L.R. 32 Cal. 527.

Nos. 9 and 35 of 1925 and there were other large sums of money due to him from the plaintiff and if any account had to be rendered by him, all these amounts had to be duly taken into account. Before the amounts were realised, the respondent had to file several execution applications and we find that the costs of some such applications were not allowed by the Court. Nevertheless, he would be entitled to the moneys expended on them and it is only after all just deductions that the amount due to the appellant can be finally ascertained.

If article 120 is applicable, the suit was certainly in time. The earliest denial by the defendant of the plaintiff's right was on 27th January, 1939, when his advocate addressed the latter Exhibit D-7 to the Sub-Collector in charge of South Vallur (Part I) Estate that the appellant had no claim under the decrees in O. S. Nos. 9 and 35 of 1925 to the mesne profits realised by him. The suit was filed on 6th September, 1943, well within six years of this letter.

The appeal is therefore allowed in part and the decree of the lower Court in so far as it concerned the mesne profits realised by the defendant is set aside. There will instead be a preliminary decree for an account of the moneys collected and expended by the defendant in connection with O. S. Nos. 9 and 35 of 1925, Sub-Court, Vijayawada. The appellant will be entitled to a half share of the net amount ascertained on taking of an account, with interest thereon at six per cent. per annum from the date of suit. As the appellant has partly succeeded and partly failed, there will be no order as to costs in the appeal. In the lower Court the appellant would be entitled to his costs in respect of his prayer for an account which will be provided in the final decree. In other respects the direction of the lower Court as regards costs will stand.

This appeal having been set down to be mentioned this day, the Court delivered the following

JUDGMENT.—Mr. Somasundaram, the learned counsel for the respondents, desires that it may be made clear that in the taking of the account the loss which the defendant might have sustained on account of the conduct and inaction of the plaintiff may be debited against the plaintiff. Without pronouncing on the merits of the claim in this behalf, we direct that the defendant will be at liberty to make the plaintiff liable for such loss, if any, incurred by the defendant. We however wish to make one thing clear, namely, that the conduct and inaction abovementioned must be in connection with the subject-matter of O. S. Nos. 9 of 1925 and 35 of 1925.

V.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kavuru Venkatappayya .. *Appellant**

v.

Kavuru Raghavayya .. *Respondent.*

Hindu Law—Property obtained by gift from father—If ancestral or self-acquired—Gift by coparcener—Right to challenge—If limited to other coparceners only.

Any words in a document of gift or bequest by a Hindu father in favour of his son which empower the donee or the legatee to give or will away the property as he likes would necessarily indicate an intention on the part of the donor or testator that the property should be taken by the donee or the legatee otherwise than as ancestral property.

Sesyali Achari v. *Doraiswami Achari*, (1947) 2 M.L.J. 49, followed.

It cannot be said that the validity of a gift by a coparcener is not a matter for challenge at the instance of the very coparcener who executed the deed. The maxim that a man shall not derogate from his own grant is not applicable to a case in which the personal law of the parties renders altogether void a grant by him which must therefore be treated in the eye of law as altogether *non est*. There being no rights created by a void transaction of that kind there is no estoppel or any other kind of personal bar akin thereto which precludes the executant of such gift from asserting his right to recover the property and have a declaration that the gift is void.

*S.A. No. 562 of 1947. 15th March, 1950.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, in A. S. No. 14 of 1946, preferred against the decree of the Court of the District Munsif, Tenali, in O.S. No. 10 of 1945.

M. S. Ramachandra Rao for Appellant.

T. K. Subramania Pillai for *A. C. Sampath Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The material facts of this case lie in a short and narrow compass. The father of the plaintiff and of the defendant in the suit, out of which this second appeal arises, made a gift of his separate property to the plaintiff under Exhibit P-1, dated 5th September, 1943, wherein he says after reciting certain preliminary facts which it is unnecessary to set out :

"I have conveyed to you (as Dhakal) the property of the value of Rs. 400 mentioned in the schedule below, and myself and my wife shall live therein for the lifetime of both of us. After the lifetime of both of us, you shall take possession of the schedule property, and may enjoy the same as you please with absolute powers of disposition by way of gift, sale, etc., and I, my heirs and claimants through me shall never raise any dispute whatsoever against you, your heirs and claimants through you."

The plaintiff for himself and his minor son, since dead, thereafter executed Exhibit D-1, dated 6th April, 1944, in favour of the defendant conveying to him the property acquired by him under Exhibit P-1. Thereafter there were certain proceedings for compulsory registration of Exhibit D-1 at the instance of the defendant which ended in his favour. The present suit was filed by the plaintiff on 30th December, 1944, impeaching Exhibit D-1 as a spurious document and also alleging that, in any event, it was a gift of joint family property and therefore void, and asking for a declaration that the gift was not true, and even if true was not valid in law and enforceable.

That the document is not spurious has been found by both the Courts below, and that is a finding of fact which cannot be and has not been assailed in this Court. The Courts below decreed the suit however on the alternative ground of the invalidity of the document as one in the nature of gift of joint family property which conveyed no title whatsoever to the defendant.

In this second appeal the defendant's learned counsel puts his point in two ways. First, it is said that the property conveyed to the plaintiff by Exhibit P-1 is not ancestral property in his hands with reference to his son but his self-acquired property. Secondly it is urged that the validity of the gift is a matter for challenge at the instance only of other coparceners and not of the very coparcener, who executed the deed. The son of the plaintiff who was alive at the time of the gift and who was himself a party thereto by the plaintiff as his father having died by the date of suit without having impeached it, the plaintiff who was himself an executant cannot attack it.

The question whether the self-acquired property of the father which has been the subject of gift or bequest by him to his son is ancestral property in the latter's hands has given rise to considerable difference of opinion in the Indian High Courts which has been referred to at very great length but left unresolved by the Judicial Committee of the Privy Council in *Lalram Singh* v. *Deputy Commissioner of Partabgarh*[1]. The Madras view laid down as long ago as 1901 is *Nagalingam Pillai* v. *Ramachandra Tevar*[2], has been consistently followed in this Province in a whole catena of decisions ending with *Seeyali Achari* v. *Doraiswami Achari*[3]. That view is that

"it was open to a father to determine whether the property bequeathed or given by him to his son shall be ancestral or self-acquired, but unless he expressed his wish that it should be deemed to be self-acquired, it was ancestral."

It is contended for the appellant on the basis of this last decision that the clause of Exhibit P-1 authorising the plaintiff to enjoy the property as he pleased with absolute

1. (1923) 47 M.L.J. 260 : L.R. 50 I.A. 265 : I.L.R. 45 All. 596 (P.C.).
2. (1901) 11 M.L.J. 210: I.L.R. 24 Mad. 429.
3. (1947) 2 M.L.J. 49.

powers of disposition by way of gift, sale, etc., is sufficient expression by his father of his wish that the property should be deemed to be self-acquired within the meaning of the rule as above stated. There is a decision of a single Judge of this Court (Pandrang Row, J.) in *Visweswara Rao* v. *Varahanarasimham*[1], holding that these are the usual words of conveyancing employed in order to indicate that the entire ownership is to pass and that they do not show any intention on the part of the donor or testator as to whether the donee or the legatee is to take the property as self-acquired property or as joint family property with reference to his sons. That mode of interpreting such words has however been dissented from by Wadsworth and Govindarajachari, JJ., who decided *Seeyali Achari* v. *Doraiswami Achari*[2]. The learned Judges point out that they very much doubt whether the attention of the learned Judge was pointedly drawn to a certain passage which they quote from the judgment of the Privy Council in *Lalram Singh* v. *Deputy Commissioner of Partabgarh*[3]. They regarded the passage in question as conclusive of the error of the view of Pandrang Row, J. The passage runs in these terms :

> "If the criterion were to be the intention of the father when he makes the gift, there is nothing to indicate that Hanwant Singh desired to make the estate ancestral property in the hands of Lachman. His expression of opinion or desire, whichever it may be, that the property should still be governed by the Act, 1869, would indicate the contrary view; because under the Act each holder of the estate has a power to give it or will it away."

Relying upon the last words of this passage the learned Judges conclude that any words in a document of gift or bequest by the father in favour of his son which empower the donee or the legatee to give or will away the property as he likes would necessarily indicate an intention on the part of the donor or testator that the property should be taken by the donee or the legatee otherwise then as ancestral property. I very much doubt whether this analogical reasoning is sound. It may be that a clause in a will that certain property shall stand governed by a certain Act by force of which each holder of the property has a power to give it or will it away stands on a higher footing than an ordinary clause of conveyancing in a document authorising the taker under it to enjoy the property with a power of sale, gift, etc. In the latter case the question may well still remain whether the usual terms of conveyancing were used by the maker of the document to indicate of themselves and conclusively an intention on his part that the property should be held by the taker as his separate, as distinct from, his ancestral property. The Bench has however held such words to be indicative of such an intention, and I do not feel myself at liberty to go behind its ruling to that effect.

It has however been argued for the respondent on the basis of an unreported decision, that of Subba Rao and Somasundaram, JJ., in A.S. No. 529 of 1946, that I can get away from the ruling reported in *Seeyali Achari* v. *Doraiswami Achari*[2]. I have looked into the unreported decision and do not find myself in a position to agree with the contention based upon it. There are no words in Exhibit P-1 and no other circumstances here such as existed in the unreported case and helped the learned Judges there to refuse to give effect to the ruling reported in *Seeyali Achari* v. *Doraiswami Achari*[2]. A principle of interpretation based upon a certain passage in the Privy Council decision in *Lalram Singh* v. *Deputy Commissioner of Partabgarh*[3] is laid down in *Seeyali Achari* v. *Doraiswami Achari*[2], with reference to the meaning of certain words of conveyance which occurred in the document before Pandrang Row, J., in the case in *Visweswara Rao* v. *Varahanarasimham*[1], as well as in the document before the Bench which decided *Seeyali Achari* v. *Doraiswami Achari*[2], even as they occur in the document before me. That principle of interpretation, as pointed out by the learned Judges who decided *Seeyali Achari* v. *Doraiswami Achari*[2], was not taken note of by Pandrang Row, J., in *Visweswara Rao* v. *Varahanarasimham*[1] as it ought to have been, and must, as I am inclined to think, *prima facie* be taken note of by me. I quite agree, as pointed out in the judgment in the unreported case, that no decision of any Bench on the construction of any particular document can

1. (1937) M.W.N. 296.
2. (1947) 2 M.L.J. 49.
3. (1923) 47 M.L.J. 260 : L.R. 50 I.A. 265 : I.L.R. 45 All. 596 (P.C.).

be binding authority for the construction of another document. As pointed out in Halsbury's Laws of England, Vol. 19, page 255,

"A decision of a Court of Appeal on a matter of fact is not binding on any other court except as between the parties; but when the decision is that from certain facts certain legal consequences follow, it would seem that the decision of the Court of Appeal is binding on that Court in any case raising substantially similar facts."

Likewise, it seems to me that where the decision of a Bench lays down a principle of interpretation of certain words on the basis of a decision of higher authority which enters into the construction of any document containing such words, which comes up before the Court in any other given case, that principle of interpretation must, in my opinion, be treated as binding on the Court in such other case, unless on other relevant facts and circumstances the principle is to be denied the effect, which it must otherwise have. That being the true legal position for me to bear in mind in this connection, I consider myself bound to hold in favour of the appellant on the argument advanced on the basis of the ruling in *Seeyali Achari* v. *Doraiswami Achari*[1].

On the alternative ground urged before me for the appellant I am of opinion that although words like "the right of prohibition" and "the power of interdiction" as on the part of other coparceners have been used in *Baba* v. *Timma*[2] and *Ramanna* v. *Venkata*[3] to indicate the ground of invalidity of a gift of family property, the ruling in the latter case makes it perfectly clear that any such gift is absolutely void and can convey no title whatsoever to the donee irrespective of the exercise of such right or power by the other coparceners. The learned District Munsif in the present case has, in my opinion, appreciated this ruling quite correctly. I may well adopt his statement of the effect of the decision which is in the following terms:

"In the last mentioned case, there was a suit already instituted by the father to set aside the gift, and when that had failed, the subsequent suit by the son disputing the gift was instituted. It was the latter suit that came up for decision before the High Court. It was argued before their Lordships that in allowing this suit, the father will be enabled to recover through his son what he could not recover himself and that he would be estopped from recovering by a suit instituted in his own right. In answer to this contention their Lordships stated: 'There is no doubt this is an apparent anomaly, but the real question is whether the property in question continues to vest in the joint family'.

Lower down they held:

'. . . . . the decision must depend not on the question whether the father or the son may happen to die in coparcenary, but whether the gift was valid at the time when it was made and whether it operated to transfer the property in the subject of the gift from the family to the donee either in part or in whole.'

The last mentioned observations clearly show that the test would always be whether on the date the gift deed was executed, it was valid and whether it operated to transfer the property in the subject of the gift from the family to the donee."

As pointed out in Mayne on Hindu Law and Usage, 11th edition, at page 484:

"It is now (equally) well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid. . . . A coparcener cannot make a gift of his undivided interest in the family property, moveable or immoveable, either to a stranger or to a relative except for purposes warranted by special texts."

In the footnote to the passage just cited there is a reference made to a Full Bench decision of this Court reported in *Rottala Ranganatham Chetti* v. *Pulicat Ramaswami Chetti*[4], and the following observation of the Full Bench at page 166 of the Report has been extracted, which I may well quote here:

"It has now been definitely settled by judicial decisions that it is incompetent to an undivided member of a Hindu family to alienate by way of gift his undivided share or any portion thereof, and that such alienation is void *in toto*, and this principle cannot be evaded by the undivided member professing to make an alienation for value, when such value is manifestly inadequate and inequitable. In such a case, the transaction can be upheld against the family, in respect of the alienor's interest in the joint family property, only to the extent of the value received."

1. (1947) 2 M.L.J. 49.
2. (1883) I.L.R. 7 Mad. 357 (F.B.).
3. (1888) I.L.R. 11 Mad. 246.
4. (1903) I.L.R. 27 Mad. 162.

It is however contended for the appellant that section 8 of the Transfer of Property Act which renders any rule of Hindu law to the contrary unavailing after the amendment of section 2 of the Act by the removal of the word "Hindu" from its last paragraph concludes the present case against the decision of the Courts below. The section no doubt says :

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof."

The answer to the argument is, in my opinion, furnished by the following observation of the learned District Munsif in paragraph 12 of his judgment which I consider to be correct :

". . . . . It is not the case of the plaintiff that on the construction of the gift deed, the Court should presume that the plaintiff has conveyed anything less than what is expressed in the document. As already shown, his case is, that under the personal law by which he is governed, whatever he gets from his father either by gift or by inheritance, he would have no right to alienate the same except under certain circumstances."

It is also urged for the appellant that the well-recognised common law maxim that a man shall not derogate from his own grant must preclude the present plaintiff from seeking to recover the property conveyed by him to the defendant. The maxim has, however, in my opinion, no application to a case in which the personal law of the parties renders altogether void a grant by him which must therefore be treated in the eye of law as altogether *non est*. There being no rights created by a void transaction of that kind there is no estoppel or any other kind of personal bar akin thereto which precludes the plaintiff from asserting his right to recover. The property has always remained the property of the family and has never gone out of it. The declaration that the plaintiff therefore seeks is thoroughly justified and the second contention for the appellant must accordingly be repelled.

In the result, and for the reason that I have accepted the first line of argument for the appellant in the foregoing, this second appeal prevails. The suit therefore must stand dismissed but in the circumstances without costs either here or in the Courts below.

No leave.

K. S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Sivasubramania Pillai .. *Appellant**

v.

Abisheka Kattalai Sri Thiagarajaswami Devasthanam, Tiruvarur, represented by its Executive Officer, R. Krishnaswamy Pillai and another .. *Respondents.*

Madras Estates Land Act (I of 1908), section 6 (1)—Scope—Land which originally formed a village by itself amalgamated in another village and ceasing to be an estate before 1908—If "ryoti" land in which tenant is entitled to occupancy rights.

A small extent of land (four acres) which was originally an entire inam village by itself known as Settikulam, was subsequently amalgamated in the village of Tiruvarur Vadakusethi of the Nagapattinam taluk and ceased to be an estate long before 1908 when the Madras Estates Land Act came into force, cannot be regarded as ryoti land situated in an estate for the purposes of section 6 of the Madras Estates Land Act. The tenant thus having no occupancy rights cannot resist the landlord's suit for recovery of the property with past rents and future damages for use and occupation.

Appeal against the decree of the Subordinate Judge of Mayuram in A. S. No. 61 of 1945, preferred against the decree of the Court of the District Munsif of Tiruvarur in O.S. No. 182 of 1944.

K. S. Desikan for Appellant.

N. Arunachalam for 1st Respondent.

* S.A. No. 409 of 1946. 24th July, 1950.

The Court delivered the following

JUDGMENT.—The facts of this case lie in a short and narrow compass. The suit property consists of 4 acres of land in the village of Tiruvarur Vadakusethi. It was originally a village by itself known as Settikulam. A title deed (Exhibit P-5, dated 26th April, 1865) was granted to the plaintiff by the Inam Commissioner as appears from Exhibit D-5, an extract from the register of inams of 13th August, 1864. Under column 21 in that document the following appears :

> "This is entered and recognised in the district accounts as an entire inam village though small in extent. It may have been originally part of another village, but it is not known now whether it was so."

In later documents beginning with Exhibit P-9 of 1896, a descriptive memoir of Tiruvarur Vadakusethi of the Nagapattinam taluk, the suit property appears as part of this latter village. The plaintiff temple sued the defendants in the present case for recovery of the plaint property with past rent and future damages for use and occupation on the footing that it was the absolute owner thereof, and that the order of the prior executive officer of the temple fixing the rent of Rs. 2-4-0 per year permanently was not binding on it. The defendant maintained the validity of that order and claimed a permanent right of occupancy under the Madras Estates Land Act, in answer to the action. The Courts below have held that the suit land is not ryoti land situated in an " estate " within the meaning of the Act, and that consequently the defendants have no right to remain in possession of the property against the plaintiff's claim.

The decree in favour of the plaintiff temple is challenged by the learned advocate for the defendants appellants on the ground that it must be shown by the plaintiff seeking ejectment that there is a subsisting right in him to claim ejectment at the date of suit, and that there is no such right in the plaintiff in the present case having regard to the original character of the property as by itself a separate village constituting an estate within section 3 (2) (*d*) of the Act. His point is that the subsequent amalgamation of the suit property in a different village is immaterial to the question of occupancy right raised by him with reference to section 6 of the Madras Estates Land Act.

Section 6 (1) of the Act runs as follows :

> "Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding."

Explanation (2) thereto is in the following terms :

> "In relation to any inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act or in relation to any land in an inam village which ceased to be part of an estate before the commencement of that Act, the expression 'now' and 'commencement of this Act' in this sub-section and Explanation (1) shall be construed as meaning the thirtieth day of June, 1934, and the expression 'hereafter' in the sub-section shall be construed as meaning the period after the thirtieth day of June, 1934."

It is fairly clear on the language of these provisions of the statute that the occupancy right conferred by the statute cannot operate except in favour of a ryot " now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder ". It is also clear that Explanation (2) can have no application to the present case, because it is not as if there was an inam village as such which could be postulated for consideration under the Explanation as not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, which however became an estate by virtue of that Act so that the expressions " now " and " commencement of this Act " can be construed as meaning 30th June, 1934 and the expression " hereafter " can be construed as meaning the period after the 30th June, 1934. What has really to be considered therefore is whether the suit land can be regarded as ryoti land in the possession of the defendant situated in the estate of the landholder on the date of the passing of the Act of 1908. On that date it is common ground that the suit property having many many years before become amalgamated in

the village of Tiruvarur Vadakusethi was not an estate, because it lost its integrity as such, which was no doubt its characteristic feature at the inception of the tenure created by the original grant as referred to in Exhibit D-5. That being so, it follows that the land in question cannot be regarded as ryoti land situated in an estate for the purposes of section 6 of the Act.

The view of the Courts below must accordingly be accepted and this second appeal must be dismissed with costs.

No leave.

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

A. S. Subramaniam Chettiar .. *Petitioner**

v.

M. K. Srinivasa Ayyar .. *Respondent.*

Civil Procedure Code (V of 1908), section 44—Decree passed by Munsif's Court in Travancore State—Transfer to Presidency Small Cause Court, Madras, for execution—Jurisdiction of Small Cause Court to execute.

Section 44, Civil Procedure Code, is not one of the sections included in section 8, Civil Procedure Code, nor has section 44, Civil Procedure Code, been made applicable to the Presidency Small Cause Court. As section 44 empowering British Indian Courts to execute the decree of notified Indian States has not been made applicable to the Presidency Small Cause Court that Court has no jurisdiction to execute a decree passed by a Munsif's Court in Travancore and transferred to the Presidency Small Cause Court for execution.

Srinivasa Aiyangar v. *Narayana Aiyangar*, (1917) 33 M.L.J. 539, *obiter*, not followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, dated 31st August, 1946, in M.P. No. 2440 of 1946, in E.P. No. 1304 of 1946, in O.S. No. 561 of 1946 (M.E.), District Munsif Court, Padmanabhapuram, Travancore State.

N. Sivaramakrishna Aiyar and *V. S. Mayilerumperumal* for Petitioner.

M. S. Varadacharya for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in a certain suit on the file of the District Munsif's Court of Padmanabhapuram, Travancore State, is the petitioner here. After obtaining decree in the suit he got it transferred to the Court of Small Causes here, and sought a warrant of attachment for moveables belonging to the second defendant in the suit. The second defendant thereupon filed the petition out of which this Civil Revision Petition arises asking for stay of execution of the warrant of attachment issued on three grounds : (1) that the Court of Small Causes had no jurisdiction to execute the decree of a foreign Court ; (2) that the Travancore Court had no jurisdiction to pass any decree against him *ex parte*, because he was not a resident of the State at the date of suit and he never submitted to the jurisdiction of that Court ; and (3) that the suit and the application on their face were barred by limitation. The three objections were upheld by the Court below which consequently dismissed the execution petition. The decree-holder seeks to have the order revised.

Learned counsel for the petitioner urges before me in regard to the first of the objections taken by the second defendant that there are observations in *Srinivasa Aiyangar* v. *Narayana Aiyangar*[1], in favour of the petitioner which the Court below has disregarded. Dealing with this objection what the Court below has said is this :

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* C.R.P. No. 105 of 1947. 4th August, 1950.

1. (1917) 33 M.L.J. 539.

"The first contention appears to me to be well founded as I see that section 44, Civil Procedure Code, which empowers the British Indian Courts to execute the decrees of notified Indian States has not been made applicable to this Court. It is no doubt true that in *Srinivasa Aiyangar* v. *Narayana Aiyangar*[1], His Lordship Mr. Justice Seshagiri Aiyar, J., observes thus :

'Section 8, Civil Procedure Code, does not prescribe by implication the entertainment of applications for executions in respect of the decrees of foreign Courts by the Small Cause Court. I am therefore of the opinion that if the decree had been put in motion by a Judge of the Small Cause Court, there would have been no objection to its execution.'

These observations are *obiter dicta*."

The case in *Srinivasa Aiyangar* v. *Narayana Aiyangar*[1] was one in which the Registrar of the Presidency Court of Small Causes was moved to execute the decree of a foreign Court but was held not to have the power so to execute. Whether the Judge of the Small Cause Court would or would not have the power to put in motion such a decree by way of execution is not a matter which directly arose for decision in that case. The Court below in the present case is therefore right in its view that the observations of the learned Judge in that case with regard to this question are only *obiter*. Those observations are to this effect :

"Under section 44, Civil Procedure Code, the decree passed by the Courts of a Native Prince or State in alliance with His Majesty may be executed in British India as if they had been passed by the Courts of British India. Under Order 21, rule 4, if a decree is passed outside the ordinary original civil jurisdiction of the High Court, the execution of that decree within the City of Madras must be by the Presidency Court of Small Causes. It was argued before me that that provision applies only to the decrees of British Courts. But the language of section 44 makes it clear that no distinction is drawn in this respect between the decrees of British Courts and the decrees of foreign Courts. My attention was drawn to section 8, Civil Procedure Code, and it was contended that as section 44 of the Code is not included among the provisions made applicable to the Presidency Small Cause Court, that Court has no jurisdiction to receive applications for execution from foreign Courts. Section 8 is intended to be supplementary to the rules of procedure provided by the Small Cause Courts Act and the rules framed thereunder. Section 8 does not prescribe by implication the entertainment of applications for execution in respect of the decrees of foreign Courts by the Small Cause Court."

The learned Judge, in my opinion, is in error in making these observations. Section 44, Civil Procedure Code, is not one of the sections included in section 8, Civil Procedure Code, nor has section 44, Civil Procedure Code, been made applicable to the Court of Small Causes. I agree with the Court below with regard to this point and overrule the argument for the petitioner.

On the second objection upheld by the Court below this is what it says :

"It is apparent from the very judgment of the Travancore Court that the decision was given *ex parte* against a person who was not resident in the State. There is ample authority for the proposition that in a personal action a decree pronounced by a Court of foreign State *in absentum*, the defendant not having submitted himself to its authority, is by international law, a nullity. See *Gurdayal Singh* v. *Raja of Faridkote*[2], *Thirunavukkarasu* v. *Parasurama Aiyar*[3] and *Vittal Bai Shivbai Patel* v. *Lalbhai Bhibai*[4]."

Mr. Sivaramakrishna Aiyar urges that even though there might have been no submission to the jurisdiction of the foreign Court on the part of the second defendant the fact was that he actually carried on business in the Travancore State at the time the suit there was laid. That would give sufficient jurisdiction, according to learned counsel, to that Court to pass a decree against him. There is no evidence here, however, that the second defendant was at the time of suit actually carrying on business or residing within the territorial jurisdiction of the Travancore Court. There is no error about the law applied by the Court below on this point, and its view must accordingly be accepted.

Argument has not been seriously advanced against the view taken by the Court below on the third of the objections raised by the second defendant, and it is unnecessary for me to deal with that aspect of the matter.

The Civil Revision Petition must therefore be dismissed with costs.

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1. (1917) 33 M.L.J. 539.
2. (1894) L.R. 21 I.A. 171 : I.L.R. 22 Cal. 222 (P.C.).
3. (1936) 71 M.L.J. 838.
4. I.L.R. (1942) Bom. 688.

Mr. Sivaramakrishna Aiyar desires me to say in dismissing this petition that this shall not prejudice any proceedings that may hereafter be taken by the plaintiff in execution of his decree on the basis that the Travancore State is not a foreign State, and that the decree in question is not a foreign judgment under the present Constitution of India. It is hardly necessary for me to say so, because it is always open to the petitioner to pursue whatever remedies he may have in law.

No question of interpretation of the Constitution arises at present and I refuse leave for appeal to the Supreme Court.

K. S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Popuri Chinna Venkataswami .. *Petitioner.**

Court-Fees Act (*VII of* 1870), *Article* 5—*Application for review of decree—Computation of* 89 *days for making—Time when Court is closed if to be excluded—Section* 14—*Delay in making application due to accident of Court being closed on last day of period allowed and not due to laches—Right to certificate under section* 14.

In computing the period of 89 days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee payable on the plaint or memorandum of appeal, the time during which the Court is closed for vacation cannot be excluded. Where the 89th day happened to be a Sunday it cannot be contended that Article 5 applied where the application for review was filed on the next day.

In re *Kota*, (1885) I.L.R. 9 Mad. 134, followed.

As however the applicant cannot be said to be guilty of laches in not being able to comply with Article 5 of the Court-Fees Act a certificate can be issued to the petitioner under section 14 of the Court-Fees Act, enabling him to obtain refund of half of the full Court-fee paid by him under Article 4 of the court-Fees Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a certificate enabling the petitioner to apply to the Collector of Madras for the refund of the excess court-fee paid in C.M.P. Nos. 4275 and 4276 of 1950, presented to the High Court for review of the judgments of the High Court in Appeal Nos. 351 of 1945 and 78 of 1946.

T. Lakshmiah and *K. Srinivasamurthi* for Petitioner.

The Order of the Court was made by

Subba Rao, J.—These two applications are filed for review of a judgment and decree in A. S. No. 351 of 1945 and A.S. No. 78 of 1946. The judgment was delivered on 12th April, 1949. These applications were filed on 11th July, 1949, *i.e.*, on the 90th day from the date of judgment. The relevant articles of the Court-Fees Act read thus :

"*Article* 4 :—Application for review of judgment, if presented on or after the ninetieth day from the date of decree.	The fee leviable on the plaint or memorandum of appeal.
"*Article* 5 :—Application for review of judgment if presented before the ninetieth day from the date of the decree.	One-half of the fee leviable on the plaint or memorandum of appeal."

As the 89th day happened to be a Sunday, and therefore a holiday, the petitioner contended that Article 5 applied, and that, he need only pay one-half of the fee leviable on the memorandum of appeal. The Master rejected that contention relying upon the decision in In re *Kota*[1]. The learned Judges in that case held that in computing the period of 89 days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee payable on the plaint or memorandum of appeal, the time during which the Court is closed for vacation cannot be excluded. This decision was given in the year 1885, and it has stood the test of time ; though the learned counsel contended that the judgment is not sound, we are not inclined to take a different view. Even so, it is argued that the applicant should be given a certificate authorising him to

* C.M.Ps. Nos. 4278 and 4279 of 1950. 10th August, 1950.

1. (1885) I.L.R. 9 Mad. 134.

receive back from the Collector so much of the fees paid on the application as exceeds the fee which would be payable had it been presented before such date under the provisions of section 14 of the Court-Fees Act. Under that section,

"Where an application for a review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the appellant's laches, may, in its direction, grant him a certificate 'like the one required'."

The only question, therefore, is whether the applicant can be said, in the circumstances of the case, to be guilty of laches. If the 89th day happened to be a working day, the applicant would have paid half the court-fee and Article 5 of Schedule I would have applied. But unfortunately, as that day happened to be a holiday, he was not able to comply with the provisions of Article 5. The default is not because of his laches but because of an accident, namely, the last day happening to be a holiday.

We, therefore, hold the petitioner is not guilty of any laches, and we direct a certificate to be issued in the manner prescribed under section 14 of the Court-Fees Act in both the review applications.

K. S. *Certificates directed to be issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Dr. Savitri Bai Nagan Goud and others .. *Petitioners**

v.

Gutti Thotappa .. *Respondent.*

Madras Co-operative Societies Act (VI of 1932), section 51—Applicability—Suit for declaration that resolution of the managing body removing the plaintiff from presidentship of the society and appointing another as president was ultra vires *and illegal—If one "touching business" of the society—Suit, if barred.*

Plaintiff sued for a declaration that the resolution of the managing body removing the plaintiff from the presidentship of a co-operative society and appointing the first defendant as president is illegal, unconstitutional and *ultra vires* the powers of the directors and consequently for a permanent injunction restraining the first defendant from taking charge as president. The defence was that the suit is not maintainable in a Civil Court because the subject-matter of the suit is one of domestic concern relating to the business and management of the society and therefore the suit is barred under section 51 of the Co-operative Societies Act, as well as the bye-laws of the Society.

Held : The dispute in the present case being one relating to the dismissal of the plaintiff from the office of presidentship, it cannot be said that "it is a matter touching the business of the society" and as such falls outside the scope of the jurisdiction of a Civil Court.

Case-law discussed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Bellary, dated 8th April, 1950, and made in O.S. No. 2 of 1950.

B. V. Ramanarasu for Petitioners.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioners herein are defendants 1 to 5 and 7 in O. S. No. 2 of 1950 on the file of the Sub-Court of Bellary and they seek to revise the finding given by the lower Court on issues 1 and 2, *viz.*, that the suit is not barred by section 51 of the Co-operative Societies Act and that the lower Court has jurisdiction to try the suit.

The first six defendants in the lower Court, as well as the plaintiff, constituted the managing body of the Hospet Co-operative Stores, Ltd., registered under the Co-operative Societies Act and the Society was the seventh defendant in the suit. The respondent-plaintiff sued for a declaration that the resolution of the managing body dated 30th October, 1949, purported to have been passed by defendants 1 to 5 removing the plaintiff from the presidentship of the Society and appointing the

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*C.R.P. No. 671 of 1950. 25th August, 1950.

first defendant as President of the Hospet Co-operative Stores is illegal, unconstitutional and *ultra vires* of the powers of the directors and consequently for a permanent injunction restraining the first defendant from taking charge as president. The defence was that the suit is not maintainable in a Civil Court because the subject-matter of the suit is one of domestic concern relating to the business and management of the society and therefore the suit is barred under section 51 of the Co-operative Societies Act as well as the bye-laws of the Society. The learned Subordinate Judge tried the first and second issues as preliminary ones and held that as the matter is not a dispute *touching the business* of the society the suit as framed is maintainable. He directed that the further trial of the suit will go on.

The relevant portions of section 51 of the Madras Co-operative Societies Act (VI of 1932) run as follows:

"If any dispute touching the business of a registered society (other than a dispute regarding disciplinary action taken by the society or its committee against a paid servant of the society) arises—

(a) among members, past members and persons claiming through members, past members and deceased members . . . . . such dispute shall be referred to the Registrar for decision."

It is therefore argued that without referring the dispute to the Registrar for decision and abiding by his decision the plaintiff cannot approach the Civil Court for the redress of any grievance that he may have. The language of section 51 of the Madras Co-operative Societies Act is similar to paragraph 22 of the rules made by the Government of Bengal under section 43 of the Co-operative Societies Act (II of 1912) and sub-section (1) of that paragraph reads as follows:

"Any dispute touching the business of a registered society between members or past members of the society, or persons claiming through a member or past member, or between a member or past member or persons so claiming and the committee or any officer, shall be referred in writing to the Registrar."

The learned Subordinate Judge, on the authority of *Hara Dayal Nag* v. *Chandpur Central Co-operative Bank, Limited*[1], where Mukherjea, J., has interpreted paragraph 22 of the rules made by the Bengal Government, has come to the conclusion that the suit is maintainable. What happened in the Calcutta case was that some preference shareholders of a Co-operative Bank sued for a declaration that a resolution passed at an extraordinary general meeting of the shareholders rescinding a previous resolution for payment passed at the annual general meeting was *ultra vires* and as a consequential relief prayed for payment of a dividend and in such a suit it was held by the Calcutta High Court that rule 22 framed under section 43 of the Co-operative Societies Act was not a bar. At page 148, the learned Judge, observes as follows:

"It is argued that payment of dividend on preference shares is a matter touching the business of a registered society and dispute having arisen between the plaintiff, who is a member of the society, on the one hand and the committee of management on the other, it was incumbent upon the plaintiff to make a reference to the Registrar.

This contention does not appear to me to be sound. The payment of dividend may be a part of the business of the board of directors. But that is a mere consequential relief which the plaintiff has prayed for in this case. He wants among others a declaration that the constitution of the board itself was illegal, that it had no authority to function or to call an extraordinary general meeting of the shareholders, and that the resolution passed at the meeting thus convened was itself *ultra vires*. I am unable to say that this is a dispute between a member and the committee touching the business of the society. The duties of the board of directors are set out in bye-law 31, and none of its clauses can, by any stretch of imagination, cover a matter of this character. This view is supported by two recent pronouncements of this Court, which are to be found in *Ramendranath Mukherji* v. *Balurghat Central Co-operative Bank, Ltd.*[2] and *Barisal Co-operative Central Bank, Ltd.* v. *Benoybhushan Gupta*[3], Dr. Sen Gupta has relied upon a decision of S. K. Ghose, J., in *Ram Krishna Sen Gupta* v. *Haripur Co-operative Bank*[4]. The point decided in that case was totally different. The dispute there was as regards the amount of loan which a past member had taken from a co-operative society and it was held by my learned brother, and in my opinion rightly, that it came within the purview of rule 22, and the mere fact that the dispute was described to be one between a past member and the society itself was really immaterial and did not affect the validity of the reference.

1. I.L.R. (1938) 2 Cal. 144.
2. (1932) I.L.R. 59 Cal. 1165.
3. (1933) 38 C.W.N. 459.
4. (1935) 39 C.W.N. 1301.

In the present case the dispute relates to the constitution of the board of management itself and its powers to convene an extraordinary general meeting of the shareholders. In my opinion, this is not a matter which is withdrawn from the Court by rule 22. The first contention therefore fails.".

On the other hand the learned counsel for the petitioners in this case relies upon a decision in *Gopi Nath* v. *Ram Nath*[1], where Ryves and Daniels, JJ., came to a conclusion that no suit will lie in Civil Court for the puspose of determining the validity of the election of directors of a Co-operative Society governed by the Co-operative Societies Act, 1912. At page 376, the learned Judges observe as follows :

"It has been contended before us, as it was contended in the Courts below, that the word 'business' in the Act and in these rules is confined to money business such as the giving of loans to members and the settlement of money claims. Having regard to the very wide form in which section 43 and the rules made under it are couched, we think that the word 'business' was not intended to be understood in any such restricted sense. The election of its officers was certainly a part of the business of the society and we think that the intention of the Act was that this and any dispute of a similar character should be referred for the decision of the Registrar, or the arbitrators appointed by him in accordance with the rules made under section 43, and not to the Civil Court."

The decisions referred to by Mukherjea J., in *Hara Dayal Nag* v. *Chandpur Central Co-operative Bank, Ltd.*[2] are *Barisal Co-operative Central Bank, Ltd.* v. *Benoy Bhusan Gupta*[3] and *Ramendra Nath Mukherji* v. *Balurghat Central Co-operative Bank, Ltd.*[4] In the latter case Rankin, C.J. and C. C. Ghose, J., have held that the disputes which must be submitted to the Registrar under Bengal rule 22 of the rules framed under section 43, clause (1) of the Co-operative Societies Act do not include disputes about the Constitution of the registered society or as to whether a person is, or is not, a shareholder and the rule does not prohibit the jurisdiction of the ordinary courts to decide such questions. The learned Chief Justice relies upon the provisions of various English Acts such as the Industrial and Provident Societies Act, 1893, section 49, the Friendly Societies Act, 1896, section 68, National Insurance Act, 1911, section 67. The other decision referred to by Mukherjea, J., is not of much help in the consideration of the point for decision. In that case the question of the interpretation of the words "touching the business of the society" did not arise for consideration and therefore we need not make any further reference to that decision.

The plaintiff's chief argument is based upon the supposition that the business of the society does not include the election of the office bearers, or their removal or retirement. What is meant by the term "touching the business" is that the expression should be limited in its application to such matters as transactions regarding the buying and the selling of commodities, entering into contracts and businesses of such kind. It cannot be said that when the very foundation of the society is being questioned or when its constitution is itself challenged, that could be said to be a matter touching the business of the society. While, on the other hand the contesting defendants say that every matter relating to the society, whether it deals with its commercial transactions or its constitution, are matters "touching the business" of the society. In fact the defendants practically adopt the reasoning of the learned Judge in *Gopi Nath* v. *Ram Nath*[1].

My attention was drawn by the defendants' learned advocate Mr. Ramanarasu to the bye-laws of the society in question, especially to bye-law Nos. 20 to 23 which deal with management and the last sentence in bye-law 20 which is to the following effect :

"Any member or members of the Board of Directors may at any time be removed by a resolution of the general body"

is relied upon to show that bye-law No. 20 which relates to the management providing for the removal of a member of the board of directors should be understood as applying to a matter touching the business of the society and therefore in this case since the plaintiff was removed from his post as president by a resolution of the managing committee it is a matter *which* came within the bye-laws and therefore

1. (1924) I.L.R. 47 All. 374.
2. I.L.R. (1938) 2 Cal. 144.
3. (1933) 38 C.W.N. 459.
4. (1932) I.L.R. 59 Cal. 1165.

should be referred to the Registrar for his decision. Reliance was also placed by him on rule 15 framed in 1947 under the Co-operative Societies Act. The respondent's contention, as has already been stated, rests upon the circumstances that the removal by a resolution of the committee of management of the President from his office is not a matter touching the business of the society. It is argued by Mr. Bhujanga Rao that the rules provide for the removal of a member or members of the board of directors at any time by a resolution of the general body. But there is no provision for the removal of a President from his office by a resolution of the managing committee. If that were so, it is open, at any time, for a majority of members of the managing committee to unseat the President if they have some ill-feeling against him. That could not have been the intention when the bye-laws were framed, because if it were so, specific provision would have been made to that effect. Therefore, according to the learned counsel, the action of the managing committee by a majority resolution in removing the president is an act in contravention of the bye-laws and according to certain English decisions to which reference will be made later on, the president who was unseated has got a remedy in an ordinary Civil Court. Even granting that bye-law 20 refers to the election of the board of management and therefore any matter relating to such election may be considered to be one touching the business of the society, still there is no bye-law which envisages or contemplates the removal of a President during his term of office, by a majority resolution of the board of management. In any event, even if the removal of the President is vested in any "body" it can only mean the "general body" and not the directorate and since the board of management has acted in contravention of the bye-laws, it is a matter affecting the civil rights of the President and as such he is entitled to seek remedy in a Civil Court. The action of the directors does not amount to removing the respondent from the board of directors because obviously they have no power to do so. He is removed only from the presidentship for which there is no provision in the bye-law. Under the English Friendly Societies Act disputes which are to be decided in the manner directed by the rules are enumerated in 15 Halsbury's Laws of England, Hailsham Edn., at pages 376 and 377, paragraph 698. It is stated therein that disputes must have relation to the membership of the member; as for example, disputes relating to the distribution of a fund in the hands of trustees of a friendly society, claim for sick pay, construction of rules, the propriety of convening a special meeting for the purpose of amending the rules, the right of a person to be or to continue to be a member, as to the conduct of an officer involving expulsion, or the repayment of money deposited by a member and such matters. In *Wayman* v. *Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Society*[1], a Division Bench consisting of Lush, J., and Bailhache, J., had to consider the question regarding section 68 of the Friendly Societies Act, 1896, which provided that every dispute between a member of a friendly society and the society, including any dispute arising on the question whether a member or person aggrieved is entitled to be or to continue to be a member, or to be re-instated as a member, shall be decided in a manner directed by the rules of the society, and the decision so given shall be binding and conclusive on all parties without appeal. In that particular case, one member was expelled by the committee of management and the question was whether an action brought by him in a County Court for a declaration that the resolution expelling him was *ultra vires*, is prohibited by section 68 of the Friendly Societies Act, 1896. The County Court Judge held that the action was maintainable and the same was confirmed by the Division Court of the King's Bench Division. The learned Judges held that if the committee of management did act in direct opposition to the rules which required that the dispute shall be left to arbitration, then the County Court Judge had jurisdiction to declare the resolution to be a nullity. Reliance was placed upon *Andrews* v. *Mitchell*[2]. In an earlier case Ex parte *Wooldridge*[3], the questions as to the jurisdiction of the County Court in similar matters was considered. By the rules of a Friendly Society, any member in the receipt of gifts of the society being found

1. (1917) 1 K.B. 677.
2. (1905) A.C. 78.
3. (1862) 1 B. & S. 844: 121 E.R. 927.

imposing on the society must be expelled. A member of the society in the receipt of pay was charged with receiving full pay when he was only entitled to half pay, and, the matter being referred to a committee, he was expelled, but without being heard before the committee. Upon an application by him for a mandamus to reinstate him as a member of the society, it was held by Crompton, Blackburn and Mellor, JJ., Cockburn, C.J., dissenting that the County Court had jurisdiction to order him to be reinstated if he had been improperly expelled. It is not necessary to advert at any length to the decision of the learned Judges because the point in dispute is sufficiently clear from what has been stated above. In *Palliser* v. *Dale and others*[1], a similar question arose. A dispute between a friendly society, and a member who had been expelled, as to the legality of the expulsion is not a dispute which must be decided in the manner provided by the rules of the Society. Therefore the jurisdiction of the Court was not ousted with regard to such disputes by the enactments. There is quite a large body of case-law under the Friendly Societies Act, wherein similar questions have been considered.

In view of the principles decided in the aforesaid cases, even if rule 15 framed in 1947, as well as bye-law No. 20 have to be considered, still the dispute in the present case being one relating to the dismissal of the respondent from the office of presidentship, it cannot be said that it is a matter touching the business of the society and as such falls outside the scope of the jurisdiction of a Civil Court. On the merits something has been said but as the revision petition relates solely to the question of jurisdiction, I do not wish to express any opinion on the merits at all.

The civil revision petition is therefore dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

The Electro Mechanical Industries, Limited, Madras .. *Petitioners**

v.

The Industrial Tribunal No. 2 for Engineering Firms and Type Foundaries, Fort Saint George, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 7 and 10—Tribunal set up under—Jurisdiction and powers—Power to order management to refund wages deducted under section 9 (2) of Payment of Wages Act (IV of 1936)—Dearness allowance —Fixing of—Tribunal if entitled to rely on data otherwise than from evidence adduced—Conclusions of Tribunal—Merits of—If can be gone into in certiorari *proceedings.*

The Industrial Tribunal having held that the management was entitled to punish the men who went on strike on a particular day (holding that the strike was not legal), however considered that the cut of eight days' wages was too severe a punishment and that justice would be met if a punishment of one day's cut of wage and dearness allowance is imposed instead. The Tribunal accordingly directed the difference to be refunded to the workers. In an application by the management for issue of a writ of *certiorari* to quash the award, it was contended that (1) the Tribunal had no jurisdiction to order the refund once it has found that the strike was not justified and (2) that as the Payment of Wages Act provided for adequate remedy in respect of claims arising out of deduction from wages, the Industrial Tribunal had no jurisdiction to order refund for any period.

Held : (i) As the dispute regarding the deduction was referred to the Tribunal for decision, it was open to it to hold that the wages for a lesser number of days than claimed by the workers should be returned.

(ii) The jurisdiction of the Industrial Tribunal set up under the Industrial Disputes Act is not excluded by the provisions of the Payment of Wages Act providing other remedy. The Tribunal contemplated by section 15 of the Payment of Wages Act is not, one which could affect the jurisdiction of the Tribunal set up under section 7 of the Industrial Disputes Act. The Tribunal set up under the Industrial Disputes Act has a much wider jurisdiction.

(iii) Quasi-judicial Tribunals like the Industrial Tribunal, not hampered by the rules of evidence applicable to proceedings in a Court of law, would be entitled to rely on data available to it otherwise than from evidence adduced on behalf of the parties and it is not open to the Court in an application

1. (1897) 1 Q.B. 257 (C.A.).

* C.M.P. No. 9473 of 1949. 8th July, 1950.

for issue of writ of *certiorari* to go into the merits of the conclusion of the Tribunal as to the rate of dearness allowance awarded.

Petition under clauses 2 and 7 of Letters Patent praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Industrial Dispute No. 14 of 1949 before the Industrial Tribunal II, Madras and quash the award dated 5th November, 1949.

T. L. Venkatarama Ayyar and *M. Ramachandran* for Petitioners.

K. Veerasami for the Government Pleader (*K. Kuttikrishna Menon*) for 1st Respondent.

I. A. Salam for 2nd Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This application arises out of a reference dated the 27th June, 1949, made by the workers of the Electro Mechanical Industries, Limited, in respect of certain disputes between themselves represented by the Workers' Union and management. There were sixteen items of dispute and the Industrial Tribunal, Madras, after due inquiry made an award on the 5th November, 1949. The management seeks from this Court a writ of *certiorari* to quash the award in respect of two of the items of dispute.

The first item relates to the deduction of eight days' wages from the employees as per the notice of the management, dated the 19th April, 1949. The workers claim a return of the wages deducted. The deduction was made by the management because of a strike by the workmen on the 18th April, 1949. The Tribunal came to the conclusion that the strike was not legal and therefore the management was not wrong in punishing the men who went on strike. The provision which enables the management to make a deduction of wages in a case of this kind is contained in section 9 of the Payment of Wages Act. Sub-section (2) of that section contains the following proviso which is material :—

"Provided that, subject to any rules made in this behalf by the (Provincial Government), if ten or more employed persons acting in concert absent themselves without due notice (that is to say, without giving the notice which is required under the terms of their contracts of employment) and without reasonable cause, such deduction from any such person may include such amount not exceeding his wages for eight days as may by any such terms be due to the employer in lieu of due notice."

The Tribunal having held that the management was entitled to punish the men who went on strike, however, considered that the cut of eight days' wages was too severe a punishment and that justice would be met if a punishment of one day's cut of wage and dearness allowance is imposed instead. He accordingly directed the difference to be refunded to the workers.

Mr. T. L. Venkatarama Iyer, learned counsel for the management, contended that the Tribunal, having held that the strike was not justified, had no jurisdiction to direct a refund of the pay for seven days. As the workers claimed the refund on the ground that the strike was justified, the only question which the Tribunal was called upon to decide was whether the strike was justified. If it was, there could be no deduction of wages. If it was not, then the deduction made by the management was justified. So his argument ran. He conceded that it was open to the Tribunal to decide the question as to the legality of the strike. In our opinion the Tribunal was competent to direct a refund of the wages for seven days. It is true that the workers demanded the return of the wages for the entire period of eight days. The management, on the other hand, claimed that the workers were not entitled to any refund at all. In these circumstances, as the dispute regarding the deduction was referred to the Tribunal for decision, it was open to it to hold that the wages for a less number of days than claimed by the workers should be returned.

Mr. Venkatarama Iyer next contended that though the Tribunal was competent to decide the question of the legality of the strike, the proper forum to decide

any dispute as regards the deduction of the wages was not the Industrial Tribunal but the officer appointed by the Government under section 15 of the Payment of Wages Act. His contention was that the said Act provided for adequate remedy in respect of claims arising out of deduction from wages. Section 17 of that Act provided also an appeal against any direction which might be made under section 15 and section 22 prevented a Court from entertaining any suit for recovery of wages or of any deduction from wages. The Industrial Tribunal had therefore no jurisdiction to direct a return of the wages for any period. There appears to us to be considerable force in this contention and if the matter had been *res integra*, we would have spent more thought over it. But our attention has been drawn to the decision of the Federal Court in *Shamnugger Jute Factory Company, Limited* v. *S. M. Modak*[1], on the authority of which we must overrule this contention of Mr. Venkatarama Iyer. In the case before the Federal Court, the question was whether the validity of a lock-out and the claim of the workmen to payment of wages during the period of the lock-out were industrial disputes which could be adjudicated upon by the Industrial Tribunal. The learned Chief Justice of India, delivering the judgment of the Full Court, said :

"It seems to us clear that the question whether the employers were justified in locking out their workmen would be an industrial dispute covered by the words 'dispute which is connected with the employment or non-employment and with the terms of employment of such workmen'.

The payment of wages during the period of such lock-out would also be clearly an industrial dispute."

The argument addressed to us based upon the provisions of the Payment of Wages Act was also addressed to the Federal Court; but the argument was repelled as being unsound. The learned Chief Justice observed thus in negativing the contention :

"The Tribunal contemplated by section 15 of the Payment of Wages Act is not, in our opinion, one which could affect the jurisdiction of the Tribunal set up under section 7 of the Industrial Disputes Act to which a reference could be made under section 10 of that Act. The Tribunal set up under the Industrial Disputes Act has a much wider jurisdiction. In our opinion the two Acts are not in *pari materia* and the contention that the jurisdiction of the Tribunal set up under the Industrial Disputes Act is excluded by the provisions of the Payment of Wages Act is unwarranted."

These observations apply to the case before us. Here, instead of lock-out, there is a strike and the claim is for the return of the wages deducted on account of the strike. We must therefore uphold the award in this matter.

The next objection to the award was in respect of the rate of dearness allowance. The workers claimed dearness allowance calculated on the basis of three annas per point rise in the cost of living index over 100. The management was not willing to pay more than two annas. The Tribunal considered that the rate of dearness allowance should be enhanced from two annas to 2¼ annas per point and directed that the enhanced rate should come into force from the date the first wage is drawn after the publication of the award. The complaint of the management is that there was no evidence adduced before the Tribunal by either side to warrant this conclusion On behalf of the workers it was stated in the counter-affidavit that there was evidence adduced by both parties. We have perused the record but we are unable to find any definite evidence adduced on this point. The Tribunal arrived at a finding on the point after taking into consideration certain facts which apparently were within its personal knowledge having been culled from other awards and similar data. The Tribunal says that there were several engineering firms in Madras City paying dearness allowance at the rate of 2¼ annas a point. It refused to adopt the rate of three annas which firms like the Beach Engineering Works and Richardson and Cruddas were paying because the firm in question was started only recently and their affairs had not been particularly happy. Though a Court of law is not generally entitled to arrive at a finding in any matter except on the evidence adduced before it, quasi-judicial tribunals like the Industrial Tribunal not hampered by the rules of evidence applicable to proceedings in a Court

1. (1949) 12 F.L.J. 370 (F.C.).

of law, would be entitled to rely on data available to it otherwise than from evidence adduced on behalf of the parties. On an application like this it is not open to us to go into the merits of the conclusion. The only question is whether we can hold that the Tribunal acted without jurisdiction in fixing the rate of 2½ annas. That question must be answered in the negative.

As no other ground was pressed before us, this application must be dismissed.

K. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BALAKRISHNA AYYAR.

K. Nagabhushana Reddy, minor by guardian, K. V. Srinivasa Reddy .. *Appellant**

v.

Reddivari Narasamma .. *Respondent.*

Civil Procedure Code (V of 1908), section 151 *and Order* 39, *rule* 1—*Inherent power of High Court to grant interim injunction in its appellate jurisdiction.*

In the exercise of the appellate jurisdiction of the High Court over moffusil proceedings, the High Court has no inherent power to pass an order of interim injunction outside the scope of Order 39 of the Civil Procedure Code. Such an order cannot be passed merely because it is in accordance with equity and good conscience, when Order 39 of the Code does not apply to the facts of the case.

Case-law discussed.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Panchapakesa Ayyar, dated 6th January, 1950, in C.M.P. No. 8923 of 1949 in A.A.O. No. 599 of 1949, High Court, Madras, preferred against the order of the District Court, Anantapur, dated 9th August, 1949, in I.A. No. 156 of 1949 in O.S. No. 29 of 1949.

O. Chinnappa Reddi for Appellant.

Ch. Suryanarayana Rao for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—The appellant filed a suit for partition. It was opposed by the second defendant (respondent) on the ground that the appellant had no right to the property, because the person from whom the property was obtained, *i.e.*, the first defendant, was not the adopted son of the second defendant. The suit was decreed ; and the appeal to the District Court and the second appeal to this Court by the present respondent were unsuccessful. The respondent thereupon filed a suit in the District Court, Anantapur, which is still pending, for a declaration that the decree passed in the former suit was obtained by fraud and was therefore not binding on her. With the plaint she filed an application for a temporary injunction to restrain the Court from passing a final decree in the partition suit. The District Judge dismissed the application, whereupon the respondent filed C.M.A. No. 599 of 1949 to this Court, which is pending. With the appeal the respondent filed an application for an interim injunction to have effect during the pendency of C.M.A. No. 599 of 1949. The learned Judge who heard this application refused to consider the main question which arose in the appeal, *i.e.*, whether an injunction should or could have been granted by the District Judge, and passed an order which he thought a just and convenient one pending the disposal of the appeal, by issuing an interim injunction upon terms restraining the appellant from applying for the passing of the final decree. It is against this order of the learned Judge that this Letters Patent Appeal has been filed.

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* L. P. Appeal No. 1 of 1950. 10th March, 1950.

It has been argued by the learned advocate for the respondent in support of the order passed that the learned Judge was right in refusing to pass an order which would prejudice the hearing of the Civil Miscellaneous Appeal and that the only consideration in an application for an interim order is what is just and convenient. This argument however overlooks the fact that the learned Judge could pass an order of interim injunction only under Order 39, rule 1, and that it was therefore incumbent on him, if he contemplated passing such an order, to consider whether Order 39 applied to the facts of the case. He had no jurisdiction to pass an order of injunction merely because he considered it to be in accordance with equity and good conscience; for in the exercise of the appellate jurisdiction of this Court over moffussil proceedings he had no inherent power to pass such an order.

The learned advocate for the respondent relies on a decision of the Calcutta High Court in *Gunabala Chowdhurani* v. *Hem Nalini Chowdhurani*[1]; but the learned Judges in that case do not say a word about Order 39; nor does their judgment suggest that they considered whether that Order had any applicability to the fact before them. It is not quite clear that an order under Order 39, rule 1 would not have been applicable to the facts of that case, which were not quite the same as those before us, although there, too, the suit was one to set aside a decree on the ground of fraud. All that the learned Judges said which is at all material to the matter before us was:

"It was pointed out that having regard to the fact that the suit was for a permanent injunction the denial of a temporary injunction would be to defeat the object of this suit . . . The learned Judge has found that if a temporary injunction be refused, then 'it will have', to use his own words 'the unfortunate effect of a denial of justice to a helpless widow'."

The learned Judges thereupon dismissed the appeal without further discussion. It would appear from Mulla that the Calcutta High Court holds the view that the powers of a Chartered High Court in the matter of issuing injunctions are not circumscribed by the provisions of this section (Order 39), but the Madras High Court has held that the High Court has no inherent power to grant an injunction in cases not governed by Order 39. That the High Court has no power in the exercise of its appellate jurisdiction from orders and decrees passed in moffussil courts to issue injunctions apart from the provisions of Order 39 was laid down by Bardswell, J., in *Karuppayya* v. *Ponnuswami*[2], in very clear language; and Varadachariar, J., said very much the same in *Murugesa Mudaliar* v. *Angamuthu Mudaliar*[3]. One of us followed that decision in *Kuppammal* v. *Seetharama Aiyar*[4], which was taken in Letters Patent Appeal and considered in *Subramanian* v. *Seetharama*[5], in which it was held that this Court had no powers to grant interim injunctions in the exercise of its appellate jurisdiction outside the provisions of Order 39. In *Sankara Aiyar* v. *Muhammad Ganni Rowther*[6], decided by Beasley, C.J. and Stodart, J., the learned Chief Justice said:

"I very strongly take the view that, when a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction whatever . . . . . to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution . . . . Whilst the decree remains unreversed, it is a good decree and all steps in execution of it are perfectly legal."

With great respect, we entirely agree.

As already stated, the appellant has obtained a preliminary decree for partition; and he is entitled to continue the proceedings in that suit, to obtain a final decree, and to execute it. The suit does not relate at all to property although possession of suit property by the appellant may result in due course on the passing of a final decree in his favour. There is no question of any property in dispute in the suit being in danger of being wasted, damaged, or alienated, or of being *wrongfully* sold in execution of a decree. It follows that the learned Judge had no

1. (1917) 43 I.C. 24.
2. (1932) 64 M.L.J. 112 : I.L.R. 56 Mad. 563.
3. (1937) 2 M.L.J. 888.
4. (1948) 1 M.L.J. 355.
5. (1948) 2 M.L.J. 188.
6. (1935) 70 M.L.J. 257 : I.L.R. 59 Mad. 744.

jurisdiction to pass the order he did. It was necessary for him to consider whether Order 39 had any applicability to the facts before him, even though in doing so he would have decided the very question which arose in the Civil Miscellaneous Appeal itself.

The appeal is therefore allowed with costs in this Court and before the learned Admission Judge, his order set aside, and C.M.P. No. 8923 of 1949 dismissed. The respondent is at liberty to withdraw the amount deposited by her in Court in fulfilment of the directions of the learned Judge.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

S. Devaraja Aiyar .. *Petitioner**

v.

Dr. N. Srinivasan and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 20 (b) and section 115—Meaning of expression 'voluntarily resides' in section 20 (b).

The expression 'voluntarily resides' in section 20 (*b*) of the Code does not mean permanent residence and temporary residence will confer jurisdiction on the Court.

Where the finding of fact is arrived at by the application of a wrong principle of law or is manifestly at variance with the evidence on record the High Court will interfere in revision.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tirunelveli, dated 14th August, 1948, in I.A. No. 35 of 1948 in unregistered O.S. General No. 15 of 1948.

T. M. Krishnaswami Aiyar for *A. Balasubramaniam* for Petitioner.

N. R. Sesha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. He alleged that the first defendant had borrowed from him a large sum of money to meet the expenses of his education and that the second defendant who is the father-in-law of the first defendant, was a surety for the repayment of this amount. The first defendant, it appears, is now employed in Kapurthala. The second defendant is a retired Inspector of Schools, Travancore, who it was alleged in the plaint was then residing at Vadakku Valliyur, Nanguneri taluk. In view of the fact that the first defendant lives in Kapurthala, the plaintiff applied under section 20 (*b*) of the Civil Procedure Code for leave of the Sub-Court at Tinnevelly to institute the suit against the first defendant in that Court also. The second defendant did not seriously contest that application ; but the first defendant did. He alleged that he and his wife were not living together, hat since they separated he and his father-in-law were on bad terms, and that his father-in-law had set up the plaintiff to institute the suit against him, and that the residence attributed to the second defendant in Vadakku Valliyur was not *bona fide* for the reason that the second defendant had "assumed a residence at Vadakku Valliyur to give a semblance of jurisdiction to this Court", and that "he is living permanently in his substantial house at Nagarcoil even to-day."

The Village Munsif of Vadakku Valliyur was the only person called to give evidence on this question of the residence of the second defendant in Valliyur. He deposed that "D. 2 lives in Valliyur since the last one year and more. He lives in West Street. D. 2's daughter and servant lived with him. He lives there for the sake of his health". In cross-examination he admitted that the second defendant is a native of Nagarcoil, that he has a house and other properties in Nagarcoil, that his eldest son is employed as an Inspector of Schools at Nagarcoil, that his wife died at Nagarcoil, and that she never went to Valliyur. He however stood by his statement "Since the last one year he lives here and goes to Nagarcoil"—

*C. R. P. No. 442 of 1949. 31st July, 1950.

apparently meaning that he used to make frequent visits to Nagarcoil. An explanation of such visits was furnished by him later on in the course of the evidence, "People go to Nagarcoil because there is a good hospital there."

The learned Subordinate Judge considered that the expression "voluntarily resides" occurring in section 20 (*b*), Civil Procedure Code, means "permanent residence" and not "temporary residence". He felt that this matter was concluded by the decision in *Nusserwanjee Wadia* v. *Eleonora Wadia*[1]. Examining the evidence in the light of this decision he came to the conclusion that it was clear from the answers of P.W. in cross-examination that the second defendant could not have been living at Valliyur even temporarily, let alone permanently.

The view of the learned Subordinate Judge that the residence required by section 20 (*b*), Civil Procedure Code, is "permanent residence" does not appear to be correct. So far as the Bombay case is concerned it must be stated that that decision was given under the Divorce Act. As Tyabji, J., explained in an earlier case,

> "The word 'reside' and 'dwell' have a narrow and more extended meaning according to the intention of the Legislature in the various Acts in which they occur. For the purpose of jurisdiction I think the authorities establish that, if a person has no permanent residence he may be said to dwell wherever he may be found."

I think we should proceed carefully before we apply the meaning appropriate to one enactment to another.

So far as this Court is concerned there is a very scholarly discussion of the matter in the decision in *Srinivasamurthi* v. *Venkatavarada Aiyangar*[2]. That decision makes it perfectly plain that even temporary residence is sufficient to confer jurisdiction. That decision was affirmed in *Srinivasamurthi* v. *Venkatavarada Aiyangar*[3]. The question of law is in fact so clear that Mr. Sesha Aiyar, the learned advocate for the respondents, did not controvert the position that temporary residence would confer jurisdiction. He however strenuously argued that in the present case the learned Subordinate Judge has found as a matter of actual fact that the second defendant was not even a temporary resident, and that such a finding of fact should not be disturbed in revision. One difficulty in the way of this argument however is that it is perfectly clear that the learned Subordinate Judge came to a wrong conclusion of fact by applying a wrong principle of law. Besides, the conclusion of fact he has come to is manifestly at variance with the evidence on record. If the learned Subordinate Judge had stated that he did not believe P.W. 1, the village munsif, the position would have been different; but that he does not say. He deduces from the answers the witness gave in cross-examination that the second defendant could not have been living at Vadakku Valliyur even temporarily even though the answers given do not support the conclusion. The evidence of the village munsif leaves no room for doubt that for about one year before the institution of the suit the second defendant had been living in Vadakku Valliyur. Such residence is sufficient to give the Court jurisdiction. I also think that regard being had to the circumstances of the case leave should have been given to institute the suit against the first defendant also. To refuse leave would in effect be to deprive the plaintiff of any effective legal relief.

Mr. Sesha Aiyar for the respondents argued that after his petition was dismissed the plaintiff applied for refund of the court-fee, and that by this application he must be deemed to have acquiesced in the order that had been passed against him. I do not consider that this inference necessarily or even properly follows, because within the time allowed to him by law he has come up to this Court with a revision petition challenging the correctness of the order that had been made against him by the learned Subordinate Judge.

In the circumstances the revision petition is allowed with costs here and in the Court below.

V. P. S. ——— *Petition allowed.*

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1. (1913) I.L.R. 38 Bom. 125.
2. (1905) 16 M.L.J. 238 : I.L.R. 29 Mad. 239.
3. (1911) 21 M.L.J. 669 : L.R. 38 I.A. 129 : I.L.R. 34 Mad. 257 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

The Rajanagaram Village Co-operative Society by its Secretary, Parthasarathi Pillai .. *Appellant**

v.

P. Veerasami Mudaly .. *Respondent.*

Contract—Sale by auction—Acceptance of bid—Conditional acceptance—Communication of final acceptance—Necessity.

In the case of a sale by auction, if there is no further condition of an approval or confirmation, ordinarily if the bid is knocked down, the acceptance is communicated by the acceptance of the bid in the presence of the bidder and no further communication would be necessary. If, however, the acceptance was conditional, the condition being that it is subject to the approval or confirmation by some other person, the acceptance is conditional acceptance and that has to be communicated and when once that conditional acceptance is communicated, there is no need or necessity for a further communication of the fulfilment of the condition. The communication of the acceptance twice is not needed.

A conditional acceptance has the effect of binding the highest bidder to the contract if finally there is the approval or confirmation by the superior person indicated in the terms of the sale. He cannot resile from the contract. It is not open to him to withdraw the offer as in the case of provisional acceptance and if there is approval the contract becomes concluded and becomes enforceable.

The terms of an auction sale contained these words : 'the sale will be knocked down in favour of the highest bidder subject to the approval of the Mahasabha and the District Bank'. The sale did take place and the plaintiff became the highest bidder in auction and deposited the necessary price money, and later on the bank took up the matter for consideration at its meeting and approved of the sale, but it was not communicated to the plaintiff and no sale deed was executed.

On a question whether there was a concluded contract of sale,

Held, that the communication of the approval of the Bank for the sale was not needed and that in the circumstances there was a concluded contract in the case.

Appeal against the decree of the Court of the Subordinate Judge, Chittoor, in A. S. No. 142 of 1946 (A. S. No. 202 of 1945, District Court, Chittoor, preferred against the decree of the Court of the District Munsif, Sholinghur, in O.S. No. 35 of 1944).

S. A. Seshadri Aiyangar and *G. Ramalinga Reddi* for Appellant.

Ch. Suryanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—This appeal by the defendant, the Rajanagaram Co-operative Society, is against the decree for specific performance of a contract of sale granted in favour of the plaintiff by the lower appellate Court. The only question that has to be considered is whether there was a concluded contract in favour of the plaintiff for the sale of the property by the defendant to the plaintiff.

The property in dispute was purchased on the 29th May, 1941, by the defendant-society at an auction sale for a sum of Rs. 300 *vide* Exhibit P-1. In 1943 the defendant wanted to dispose of this property by public auction The terms of the auction sale are contained in Exhibit D-1, dated 17th June, 1943. Under clause 1 it is stated " the sale will be knocked down in favour of the highest bidder subject to the approval of the Mahasabha (the defendant) and the Chittoor District Bank. There were also other conditions which have been laid down but it is unnecessary to refer to them as nothing turns on those conditions. The sale took place on the 23rd June, 1943, and the plaintiff became the highest bidder of the property for a sum of Rs. 700. He deposited Rs. 175 on the date of sale with the sale officer and the balance of the price of Rs. 525 was deposited by him with the defendant on the 29th June, 1943. The Chittoor District Central Bank took up the matter

* S. A. No. 2357 of 1946. 3rd March, 1950.

for consideration at the meeting of its executive committee on the 29th July, 1943 and approved the sale (*vide* Exhibit P-4). This resolution however was not communicated to the plaintiff and no sale deed was executed by the bank in favour of the plaintiff. The plaintiff, by his notice dated the 14th December, 1943, Exhibit P-3, called upon the defendant to execute a conveyance in his favour. Thereupon the Bank cancelled its previous resolution and directed a resale of the property by its proceedings of 15th December, 1943. The plaintiff instituted the suit therefore for enforcing the sale on the basis that there was a concluded contract in his favour. This was denied by the defendant in the written statement.

The main contention urged on behalf of the defendant was that the contract did not become final and complete as the approval of the Chittoor District Central Bank was not communicated to the defendant. Under section 4 of the Contract Act it is claimed that even the approval should have been communicated like acceptance as according to the contention of the defendant that constitutes a final acceptance of the contract. This position was accepted by the trial Court and the suit was dismissed. On appeal the decision of the District Munsif was reversed and the appellate Court granted a decree for specific performance of the contract in favour of the plaintiff.

In this second appeal the same question has been strenuously argued on behalf of the defendant appellant by Mr. Somasundaram. His contention is that the approval constitutes acceptance of the offer by the defendant and unless that was communicated to the plaintiff there was no concluded contract. The question is whether this contention is sound.

The defendant appointed a sale officer who, under the terms of Exhibit D-1 was authorised to knock down in favour of the highest bidder the property subject of course to the approval of the Mahasabha and the Chittoor District Central Bank. No point was raised in the Courts below, and indeed it could not be raised before me, that this sale officer had no authority to accept any bid on behalf of the defendant. Further there was also no plea anywhere that there was no approval of the sale by the Mahasabha, that is the defendant. The defendant should have known if there was no such approval and should have put that matter in the forefront of the case if really there is any substance in that contention which is sought to be raised for the first time though faintly in the second appeal. The matter therefore for consideration is whether the sale officer, in knocking down the bid subject to the approval of the Bank, had or had not, accepted the offer of the plaintiff subject to the condition of approval; ever since the well-known decision of *Payne* v. *Cave*[1], it has been established that the position of an auctioneer is that of an agent of the vendor and that until the bid is knocked down, there is no concluded contract in favour of the bidder and the bidder was at liberty to withdraw his offer before it was accepted. To a similar effect is also the decision in *Cooke* v. *Oxley*[2]. If there is no further condition of an approval or confirmation, ordinarily if the bid is knocked down, the acceptance is communicated by the acceptance of the bid in the presence of the bidder and no further communication would be necessary. If however the acceptance was conditional, the condition being that it is subject to the approval or confirmation by some other person, what is the position? The acceptance in such circumstances, in my opinion, is conditional acceptance and that has to be communicated. Nobody suggest that in order to make the contract enforceable it is not necessary to have the approval of the person indicated in the conditions of the auction sale. The question is whether the approval also in such circumstances should be communicated to the bidder in order to conclude the contract. In my opinion the acceptance contemplated may be absolute or may be conditional and when once that conditional acceptance is communicated, there is no need or necessity for a further communication of the fulfilment of the condition where the acceptance is a conditional acceptance. The

1. (1789) 3 Term Rep. 148 : 100 E.R. 502. 2. (1790) 3 Term Rep. 653: 100 E.R. 785.

communication of the acceptance twice is not needed. That is once when the conditional acceptance is made and again when the condition is fulfilled. That is the difference, in my opinion, between the line of cases of which *Chitibobu Adenna* v. *Garimalla Jaggarayudu*[1] is an example and cases where the acceptance itself is postponed or is entrusted to some other person than the one who receives the bids, the receiver of the bids having no authority to accept the bids and knock down the sale. The latter category of cases are illustrated by the decisions in *Muthu Pillai* v. *Secretary of State for India*[2] and *Somasundaram Pillai* v. *Provincial Government of Madras*[3]. In *Chitibobu Adenna* v. *Garimalla Jaggarayudu*[1], the bid was accepted subject to the approval and orders of the special agent. It was found that the auctioneer had full authority to accept the bids. The contention urged by Mr. S. Srinivasa Aiyangar for the respondent was that there was no concluded contract as there was no communication of the acceptance by the superior officer as required by section 4 of the Contract Act. The acceptance therein by the sale officer of the highest bid subject to the approval of the orders of the special agent was construed as an acceptance subject to a condition and that if that condition was fulfilled, there was a contract; but that no further communication of the subsequent approval of the special agent was needed. On the other hand, in *Muthu Pillai* v. *Secretary of State for India*[2], the confirmation of the sale and the acceptance of the bid were postponed till the receipt of the Collector's order on confirmation, the Tahsildar who conducted the sale having no authority to accept the bids. It was therefore held that as there was no confirmation or cancellation of the bid by the Collector there was no concluded contract on the date of the auction and that the offer by the bid made by the defendant was never accepted. The decision in *Chitibobu Adenna* v. *Garimalla Jaggarayudu*[1] was referred to and was distinguished at page 69 where it is observed as follows :

"The facts of that case, are however, somewhat different to the present one. for when the sale was held there would appear to have been no prior stipulations as to what was going to happen, and finally the Amin who conducted the sale recorded as follows : '1st defendant bid the last bid for Rs. 150 and as no other bid for more than that it (the sale) has been confirmed in the name of the highest bidder, subject to the approval and orders of the Special Agent'. Subsequently apparently the sale was approved by the Special Agent. Here we see that there was a distinct statement that the sale had been confirmed and was merely subject to a subsequent approval by the Special Agent and in these circumstances, it was held that there was as acceptance by the principal of the offer and, therefore, the contract was concluded. In the present case, however, there has been no such communication to the 1st defendant and he was distinctly informed that the sale would not be confirmed until the orders of the Collector had been received ; so that the order of the Tahsildar saying that the auction had been concluded in 1st defendant's favour cannot have the effect of altering that condition, namely, that the sale would not be confirmed until the orders of the Collector were obtained. In the present case no such orders were obtained and the sale was not confirmed. No doubt there was a very great delay on the part of the Collector in making up his mind whether the sale should be confirmed or not and it would probably have been open to the 1st defendant, after waiting for a reasonable time to refuse to be bound by the contract."

In *Somasundaram Pillai* v. *Provincial Government of Madras*[3], which also related to an auction sale, the Sub-Collector who conducted the sale did not accept the bids and could not as he had no power to accept the same. Under the terms of the sale which were approved by the Board of Revenue, he could only signify a kind of provisional acceptance whatever that expression might mean ; but the final and actual acceptance rested with the Collector. The appellant who was the highest bidder in that case did not thereby acquire any rights under the sale as there was no concluded contract in his favour. The difference between provisional acceptance, conditional acceptance and absolute acceptance by the sale officer has been clearly pointed out by the learned Chief Justice at page 126. An absolute acceptance is where the sale officer, or the auctioneer as the case may be, is given full authority to accept a bid unconditionally. A provisional acceptance means that the auctioneer had only a right to receive the bids and pass them on to his superior who is the final authority to confirm and conclude the contract. In that

1. (1913) 28 M.L.J. 617.
2. (1923) 45 M.L.J. 67.
3. (1947) 1 M.L.J. 123.

case the auctioneer acts merely as a sort of conduit pipe to convey the highest bid to the superior. Conditional acceptance has the effect of binding the highest bidder to the contract if finally there is the approval or confirmation by the superior person indicated in the terms of sale. He cannot resile from the contract. It is not open to him to withdraw the offer as in the case of a provisional acceptance and if there is approval the contract becomes concluded and becomes enforceable. No further communication of the approval is needed as there is already a conditional acceptance when the bid was accepted. While referring to the decision in *Chitibobu Adenna* v. *Garimalla*[1] at page 127 this is what the learned Chief Justice says :

"The learned Advocate-General has suggested that the decision of this court in *Chitibobu Adenna* v. *Garimella Jaggarayudu*[1] recognises that there can be in law a conditional acceptance which will constitute a contract. We have already indicated that where there is a conditional acceptance and the condition is subsequently fulfilled there is a contract and that was all that was said in that case. Certain occupancy rights in *jeroyiti* lands had been put for sale by public auction by the Amin of the Maharaja of Vizianagaram. The amin accepted a bid subjece to the approval of the Special Agent. The Special Agent gave his approval whereupon the sale became irrevocable."

From what has been stated above it follows that the view of the lower appellate Court that there was a concluded contract in the present case and that the communication of the approval by the Central Bank was not needed, is in my opinion, perfectly correct. The decision of the lower appellate Court is therefore confirmed and this second appeal is dismissed with costs.

(Leave to appeal is refused).

V. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE BALAKRISHNA AYYAR.

S. Venkataratnam .. *Petitioner* *

v.

G. Lalluram .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *S.* 7 (1) *and* (2)—*Right to evict during period of tenancy*

The opening words of S. 7 (1) of the Madras Buildings (Lease and Rent Control) Act makes it clear that even during the continuance of the tenancy a tenant may be evicted. It follows that provided any of the conditions laid down in S. 7 (2) of the Act is satisfied the landlord will be entitled to an order evicting the tenant even if the period of the lease had not expired.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of Certiorari calling for the records in Mis. App. No. 56 of 1949, Subordinate Judge's Court, Vijayawada preferred against the order of the Rent Controller, Vijayawada in H.R.C. No. 51 of 1949 and quash the proceedings therein.

M. S. Ramachandra Rao for the Petitioner.

D. P. Narayana Rao for Respondent.

The Order of the Court was delivered by

The Chief Justice.—The petitioner is the landlord and the contesting respondent is the tenant in whose favour a lease deed was executed on 16th July, 1943, by the predecessor-in-interest of the petitioner for a period of ten years on a rental of Rs. 16 per mensem. There is no dispute that there was default in the payment of rent on the date of the application for eviction, but the appellate authority has dismissed the application on the ground that as the period of the lease had not expired, the terms of section 7 (2) of Madras Act XV of 1946 cannot apply. The appellate authority was clearly in error in so holding. The opening words of

1. (1913) 28 M.L.J. 617.

* C. M. P. No. 1091 of 1950. 25th April, 1950.

section 7, sub-section (1) makes it abundantly clear that even during the termination of the tenancy a tenant may be evicted in accordance with the provisions of that section. It has been held by this Court that it is not necessary to terminate the tenancy in accordance with the provisions of the Transfer of Property Act before an application for eviction can be filed under section 7 of Madras Act XV of 1946. It follows that provided any of the conditions laid down in section 7, sub-section (2) of that Act is satisfied, the landlord will be entitled to an order evicting the tenant. This case is not governed by the principle of the decision in *Raju Chetti* v. *Jagannathdas Govindas*[1], which dealt with the case of a composite lease of a cinema theatre executed after the commencement of Madras Act XV of 1946 and which contained special provisions as regards payment of rent and made a special provision for re-entry in case of default.

As the order of the appellate authority is vitiated by an error of law apparent on the face of the order it must be quashed. The application for eviction is therefore granted. The petitioner will have his costs of this application.

(Memo of costs will follow).

V. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

S. Ramaswami Chetty and another .. *Appellants* *

v.

B. Venkatarama Reddi .. *Respondent.*

Execution court—Powers of—Right to interest provided in decree—No rate of interest fixed by the decree—Power of the executing court to fix a rate and allow interest.

Where a final decree directs that the decree-holder be paid a sum of money with a charge on the property and that interest will be realisable under O. 34, r. 11, Civil Procedure Code but no rate is fixed in the decree, it is not open to the executing Court to fix any reasonable rate of interest and direct the payment of that interest to the decree-holder.

Pankunni Menon v. *Raman Menon*, (1931) I.L.R. 54 Mad. 955 : 61 M.L.J. 596, Followed.

Appeal against the order of the Court of the Subordinate Judge, Chittoor, dated 12th July, 1947 in E.P. No. 3 of 1947 in O.S. No. 51 of 1940.

S. A. Seshadri Aiyangar for Appellants.

C. A. Vaidyalingam and *K. Ramachandra Rao* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal against the order of the Subordinate Judge of Chittoor in E.P. No 3 of 1947 in O.S. No. 51 of 1940 on the file of that Court. The preliminary decree in O.S. No. 51, directed the payment of a sum of money as maintenance to one Venkatarangamma who was the plaintiff in that suit with a charge on certain items of property which are now sought to be sold. The judgment-debtors in that suit are the contesting respondents now. The preliminary decree came up in appeal to this Court in A. S. No. 178 of 1943 and Leach, C.J. and Shahabuddin, J., modified the same by enhancing the rate of maintenance from Rs. 75 a month to Rs. 100 a month. The charge allowed on certain properties was left intact. Since the judgment-debtor did not act according to the preliminary decree, a final decree was passed for sale of the properties on 6th July, 1946. It has to be mentioned that before the final decree was passed Venkatarangamma assigned her rights to Venkatarama Reddi, the present contesting respondent, and he it was who applied for getting the final decree and got it on 6th July, 1946.

E. P. No. 3 of 1947 was an application by the assignee decree-holder who got the final decree in his favour, under Order XXI, rule 16, Civil Procedure Code

1. (1949) 2 M.L.J. 694.

* A.A. O. No. 64 of 1948. 10th August, 1950.

praying that the schedule properties may be sold for the realisation of the amount due under the decree. The application was resisted by the judgment-debtors on the ground that though the final decree stated that the decree-holder was entitled to subsequent interest as may be payable, under rule 11, of Order 34, Civil Procedure Code on the decretal amount, there was no rate of interest fixed and therefore the claim of the assignee decree-holder for interest on the decree amount is not sustainable. Order 34, rule 11 only allows the award of interest but does not fix any rate of interest and it is left to the Court to fix the reasonable interest or the contract rate between the parties and since the final decree also does not mention any rate of interest, it was contended for the judgment-debtors before the lower Court that no interest could be awarded in favour of the assignee decree-holder. The learned Subordinate Judge did not accept this contention but held that the plaintiff can claim interest on the amount claimed by him from the date of the final decree. The learned Judge did not give any authority for his view but held that the decree-holder was entitled to interest. Aggrieved by this decision of the learned Judge, the judgment-debtors have preferred this appeal.

The only question that need be considered is whether, if a decree directs the payment of interest but does not stipulate the rate of interest payable, it is open to the executing Court to fix any reasonable rate of interest and direct the payment of that interest to the decree-holder. Learned counsel for the appellants contends that the executing Court cannot add to the decree by fixing a rate of interest and he relies on the observations at page 962, 966 and 968 of the decision in *Pankunni Menon* v. *Raman Menon*[1]. In that case four Judges forming the majority of a Full Bench of five were of opinion that where a decree allows the payment of mesne profits but does not fix the rate of interest on the profits realised by the persons in wrongful possession then it is not open to the executing Court to award any interest at all or fix any reasonable rate as that Court may deem fit. At page 962 of the report Anantakrishna Ayyar, J., with whom the three other learned Judges, Beasley, C.J., Ramesam, J. and Sundaram Chetti, J., agreed, observes as follows :

> "As already mentioned, it is a question of the construction of the final decree in each case, whether the same either specifically or by necessary reference to the document referred to by it, awards, and fixes the rate of interest; but, when the final decree does not award interest in that manner, it is clear that it is not open to the executing Court to fix the rate of interest and then to execute the decree allowing interest".

At page 966 the learned Judge observed as follows :

> "Such a decree is open to appeal in the manner provided by the Code; but unless appealed against, at the stage when the excution of the same is sought, the executing Court could not award interest or fix the rate of interest when the final decree is silent on those matters."

Again at page 968 the following passage occurs :

> "It is clear that the executing Court would not be warranted in fixing the rate of interest, when the Court which passed the decree fixing the amount did not do so".

Mr. Ramachandra Rao for the respondent contends that this decision is not applicable to the facts of the present case because what was decided there was that when no interest is fixed for mesne profits it is not open to the executing Court to fix the interest. The definition of mesne profits in section 2, clause (12), Civil Procedure Code is to the effect that it includes profits when the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom together with interest on such profits etc. *i.e*, when the words "mesne profits" are used, the expression connotes not only the profits which the person in wrongful possession realised or obtained but it includes interest on that sum during the period the wrongful possessor had the use of the profits. Therefore when the final decree in that case said mesne profits would be allowed it is tantamount to saying that the profits realised by the wrongful possessor along with interest thereon will be paid over to the successful claimant. The proper interpretation to be put upon it is that the final decree provided for the payment of a sum of money

1. (1931) 61 M.L.J. 596 : I.L.R. 54 Mad. 955 (F.B.).

as the profits realised together with interest thereon. There was an absence of any direction regarding the rate of interest to be fixed. We are unable to find any distinction between the facts of that case and the facts of the present case. As already stated, in the present case the final decree directed that the decreeholder be paid a sum of money with a charge on the property and that interest will be realisable under Order 34, rule 11 but no rate was fixed.

Learned counsel for the respondent invited our attention to a decision of the Allahabad High Court in *Collector of Moradabad* v. *Kanhayalal*[1], where it is stated that in a case where the decree is silent as to interest, but the Court executing the decree is the same which passed the decree, it is open to the Court to allow interest in execution proceedings for the period during which proceedings remained stayed on the application of the judgment-debtor pending appeal from the decree. The attention of the learned Judges of the Allahabad High Court was invited to the decision in *Pankunni Menon* v. *Raman Menon*[2], and the learned Judges said that they agreed with the decision of the Madras High Court. But on the facts of the particular case they were of opinion that since the judgment-debtor by means of obtaining the stay order prevented the decree-holder from having the use of the property, it is open to the latter to claim the amount of interest principally by way of damages. The learned Judges have not cited any authority for the view which they have expressed. We do not think any useful guidance can be obtained from the decision in *Collector of Moradabad* v. *Kanhayalal*[1] for a correct conclusion of the present case. The Full Bench of the Madras High Court, as we have already stated, covers the point here and we are bound by it. We therefore are of opinion that the learned Subordinate Judge was not right in allowing interest on the decretal amount since no rate of interest was fixed in the final decree. The appeal is therefore allowed with costs.

In passing, we may mention that the non-fixation of the rate of interest should be deemed to have been a mistake committed by the officer who was responsible for drafting the decree and it is open to the transferee decree-holder even now to apply to the Court which passed the decree to have that decree amended and brought into conformity with the intention as gatherable from the passing of the final decree and if the Sub-Court amends the decree by allowing a reasonable rate of interest it is then open to the assignee decree-holder to execute the same against the charged properties.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

H. S. Vodayar .. *Petitioner* *

v.

The Vijaya Bank, Ltd., by its Secretary B. Mahabala Shetty and another .. *Respondents.*

Civil Procedure Code (V of 1908), Sections 94 (e) and 151 and Order 21, rule 58 (2)—Power of Court in claim suit to stay sale in execution of decree in a suit against third party.

A Court can under Section 94 (e), Order 21, rule 58 (2), and section 151, Civil Procedure Code stay a sale in execution of a decree in a suit against a third party pending the disposal of a suit filed under Order 21, rule 63, Civil Procedure Code by a claimant to the properties brought to sale against the claim order.

[Order for stay made on condition of the petitioner giving adequate security for possible loss to the decree-holder.]

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Mangalore, dated 17th March, 1949, in R.I.A. No. 468 of 1949 in O.S. No. 84 of 1949, etc.

1. I.L.R. 1944 All. 379. (F.B.).
2. (1931) 61 M.L.J. 596 : I.L.R. 54 Mad. 955

* C.R.P. No. 753 of 1949 and C.M.P. Nos. 3805 and 4693 of 1949. 14th August, 1950.

B. Pocker and *A. Achuthan Nambiar* for Petitioner.

S. Ramayya Nayak for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition raises an interesting question of law, namely, whether a mofussil Court can, under section 94 (*e*), Civil Procedure Code or Order 21, rule 58 (2), Civil Procedure Code or section 151, Civil Procedure Code stay a sale in execution of a decree in a suit against a third party pending the disposal of a suit filed under Order 21, rule 63, Civil Procedure Code by a claimant to the properties brought to sale against the claim order.

The petitioner, Vodayar, claimed one machine of a printing press attached by the Vijaya Bank, respondent 1, as belonging to the 2nd respondent, the Badavara Bandlu Press, the judgment-debtor in O.S. No. 371 of 1948 on the file of the District Munsif, Mangalore, to be his and filed a claim petition, R.I.A. No. 1256 of 1948, under Order 21, rule 58, Civil Procedure Code. That petition was dismissed. Thereupon he filed a claim suit (O.S. No. 84 of 1949) under Order 21, rule 63, Civil Procedure Code for staying the sale of the printing machinery attached under the decree in O.S. No. 371 of 1948 pending the disposal of O.S. No. 84 of 1949 on such terms as the lower Court deemed fit. The lower Court considered that it had no jurisdiction to stay the execution of the decree or sale under section 94 (*e*) or section 151, Civil Procedure Code or Order 21, rule 58 (2), Civil Procedure Code and dismissed the application. Hence this revision petition. Rajagopalan, J. granted interim stay of all further proceedings in execution of the decree in O.S. No. 371 of 1948 on 31st May, 1949 in C. M. P. No. 3805 of 1949, filed by the petitioner, Vodayar. C.M.P. No. 4693 of 1949 is filed by the Vijaya Bank to vacate the interim stay.

I have perused the entire records and heard the learned counsel on both sides. The learned Counsel for the petitioner urged before me that a claim has been held in *Krishnappa Chetti* v. *Abdul Khader Sahib*[1], to be only a continuation of a claim petition, and that a stay of sale can be granted, under Order 21, rule 58 (2), Civil Procedure Code and sections 94 (*e*) and 151, Civil Procedure Code on suitable terms not only in a claim petition but also in its continuation in a claim suit, as the sale is only postponed "pending the investigation of the claim or objection" in detail in the claim suit. I agree. Even if Order 21, rule 58 (2), Civil Procedure Code and section 94 (*e*), Civil Procedure Code do not apply, I think that the Court will have ample power under section 151, Civil Procedure Code in cases like these, to grant a stay of execution or sale on terms calculated not to injure the interests of the decree-holders. The lower Court was, in my opinion, wrong in saying,

"The execution of a decree cannot be stayed under section 151, Civil Procedure Code."

The rulings in *Ankalu Reddi* v. *Chinna Ankalu Reddi*[2], *Ahmed Abdul Sukkoor* v. *Vallabhadas Kanji Firm*[3], *Galstaun* v. *Dinsha*[4], *Fitzholmes* v. *Waryam*[5]. *Sardarni* v. *Harnam*[6] and *Hirambho Nath Banerji* v. *Sarojini*[7], show that the Court has got a power to order stay of execution, though within narrow limits, under section 151, Civil Procedure Code also. The ruling in *Ahmed Abdul Sukkoor* v. *Vallabhadas Kanji Firm*[3], shows that this power extends also to *the mofussil Courts*, and I too agree. *Varadacharyulu* v. *Narasimhacharyulu*[8], relied on by the learned counsel for the respondent, cannot be preferred, in my opinion, to these rulings, especially when we are concerned with a prayer for stay of sale in a claim petition which is a continuation of the suit, and Order 21, rule 58 (2), Civil Procedure Code and section 94 (*e*), Civil Procedure Code also will apply. A court of justice, equity and good conscience must have powers to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court, under section 151, Civil Procedure Code. If,

1. (1913) 26 M.L.J. 449.
2. (1943) 2 M.L.J. 557.
3. (1949) 2 M.L.J. 645.
4. (1927) 31 C.W.N. 653.
5. A.I.R. 1923 Lah. 514.
6. 149 P.L.R. 1910.
7. A.I.R. 1932 All. 655.
8. (1925) 23 L.W. 85.

for instance, an attached family heirloom, or elephant or gem or painting, having a great sentimental value for the claimant, is to be sold while his claim suit against a claim order is pending, it may become impossible for the claimant to recover it, and there will be great injustice caused to the claimant, if he eventually succeeds in his suit. That will apply also to many other cases. After all, the decree-holder is concerned, as the learned counsel for the decree-holder frankly admitted in this case, only with safeguarding his own interests. The learned counsel for the respondent decree-holder said that the printing machinery in question will deteriorate and come down in value, if not sold at once, and that if stay of sale is granted, there must be provision made not only for the continuation of the attachment of this machinery but also for providing immovable property security for Rs. 1,500 (the decree is for some thousands) in order to safeguard his interests againt depreciation etc. I consider this request to be proper.

I, therefore, set aside the order of the lower Court refusing stay of this sale, and pass a conditional order of stay of sale, under Order 21, rule 58 (2), Civil Procedure Code and sections 94 (2) and 151, Civil Procedure Code. In case the petitioner furnishes immoveable property security for Rs. 1,500 to the satisfaction of the learned District Munsif, Mangalore, by 3 p.m. on 15th October, 1950, to provide for possible injury to the decree-holder by staying the sale, the petition will be allowed without costs, and stay of sale will issue, and the attachment of the machinery will continue ; but, if the petitioner fails to furnish the said security by the sale date, this petition will stand dismissed with costs. C.M.P. No. 4693 of 1949, is dismissed without costs. No orders are necessary in C.M.P. No. 3805 of 1949 which is closed without any orders as to costs.

V. S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Ali Kutty .. *Petitioner**

v.

Parappil Madhava Menon and another .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), Section 3 (w) (1) and (x) and Madras Tenants and Ryots Protection Act (XVII of 1946)—Verumpattamdar in possession of dry lands where Modan *paddy is grown If a "tenant" entitled to apply for stay under Madras Act XVII of 1946.*

The word 'paddy' in the definition of "wet land" in the Malabar Tenancy Act must be confined to that kind of grain which is understood by the people of the locality as paddy in the ordinary sense of the term. From the mere fact that in some portions a kind of crop which is described as *Modan* paddy is grown, it cannot be held that the land is adapted for the cultivation of paddy.

A verumpattamdar in possession of dry lands wherein *Modan* paddy is grown in different portions in different years is not in possession of land adapted for the cultivation of paddy and is not a tenant within the meaning of the Malabar Tenancy Act, and so not entitled to apply for stay under Madras Act XVII of 1946.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Parapanangadi, dated 18th October, 1948 in I. A. No. 584 of 1948 in O.S. No. 60 of 1948.

N. R. Sesha Aiyar for Petitioner.

S. Venkatachala Sastri for Respondents.

The Court delivered the following

JUDGMENT :—The only question that arises in this revision is whether the petitioner is a tenant within the meaning of Madras Act XIV of 1930. The learned District Munsiff held that he was not a tenant and therefore dismissed the application for stay under Madras Act XVII of 1946. The petitioner is in possession of certain dry lands wherein ginger, millets, gingelly, *Modan* paddy are grown in different portions of the land in different years. He came into possession of the

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* C.R.P. No. 155 of 1949. 14th July, 1950.

suit lands under a verumpattam chit dated 21st December, 1920. In section 3 (*w*) (1) of the Malabar Tenancy Act "verumpattamdar" is defined as follows:

> "Verumpattamdar" means a tenant other than a kanamdar of Kuzhikanamdar of a holding, for agricultural purposes, which includes wet lands, and may or may not include other lands."

"Wet land" is defined to mean "land which is adapted for the cultivation of paddy" The learned District Munisiff after a consideration of the various circumstances, having regard to the nature of the land and the crops raised on the land, held that the land was not adapted for the cultivation of paddy.

Mr. Sesha Aiyar, the learned counsel for the petitioner contends that the said finding is contrary to the admitted facts of the case and also to the other findings of the learned District Munsiff. No doubt the learned District Munsiff observes at one stage of the judgment that *Modan* paddy is inferior in quality to the ordinary paddy and is grown in dry lands as a dry crop. But having regard to the definition of "verumpattam" and "wet land" I am also inclined to agree with the learned District Munsiff that the definition "wet land" is not intended to cover a land wherein only *Modan* paddy, a species of dry crop is raised. It may safely be assumed that the authors of this Act knew that *Modan* paddy though described as paddy was really a kind of crop raised on dry lands. The word "paddy" in the definition of "wet land" must therefore be confined to that kind of grain which is understood by the people of the locality as paddy in the ordinary sense of the term. From the mere fact that in some portions a kind of crop which is described as *Modan* crop is grown, it cannot be held that the land is adapted for the cultivation of paddy.

Agreeing with the lower court, I dismiss the revision petition with costs.

V. S. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

R. M. Kandaswami Mudaliar .. *Petitioner.**

Provincial Small Cause Courts Act (IX of 1887), section 25—Small cause suit tried along with original suit—Common evidence and joint decree given—Appeals—Revision under the Small Cause Courts Act in respect of decree in the small cause suit—Competency.

A small cause suit loses its character as such immediately it is withdrawn to the original side and tried along with an original suit.

Where three small cause suits filed by the plaintiff against three different defendants were by consent taken and tried along with an original suit filed by the same plaintiff and there were common defences and they were tried on common evidence and a joint decree against four separate main defendants was also given, on the question whether pending a regular appeal by plaintiff a revision filed under section 25 of the Provincial Small Cause Courts Act against the decree in the small cause suit would be proper.

Held: that a small cause suit could not continue in the category of small causes once it was taken on to the original side and disposed of along with an original suit. Hence the revision petitions should be returned to be re-presented as appeals on which an *ad valorem* fee should be paid.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decrees of the Court of the Principal Small Cause Judge, Vellore, in S. C. S. Nos. 856, 1046 and 1073 of 1948, respectively.

B. V. Viswanatha Aiyar for Petitioner.

The Court delivered the following

JUDGMENT.—I do not think there is any need to issue notice on these three civil revision petitions. They arise out of three small causes suits filed by the plaintiff to recover moneys from three different defendants. These suits were by consent taken on to the original side, filed and tried along with O. S. No. 474 of 1948, by the District Munsiff of Vellore, a suit filed by the same plaintiff to recover a larger sum from another defendant. There were common defences and defendants

* C.R.P. Nos. 855 to 857 of 1950. 8th July, 1950.

2 to 6 were impleaded on a contention that they were partners along with the plaintiff who claimed to be the sole proprietor of a business to whom these defendants were indebted. The learned District Munsiff tried all the four suits together on common evidence and gave the plaintiff and defendants 2 to 6 a joint decree against the four separate main defendants. Plaintiff has filed a regular appeal in O. S. No. 474 of 1948 in the District Court, Vellore, and he has come by way of revision under section 25 of the Principal Small Cause Courts Act to this court to revise the judgment so far as it relates to the decrees passed in the small cause suits.

It would be manifestly inconvenient if not absurd for this Court to revise this very judgment which is pending regular appeal before the District Court. Technically the learned advocate who filed these petitions here in time may be correct, as if he filed regular appeals from decrees which on their face purport to be small cause decrees they may be liable to summary rejection on admission.

It is obviously desirable that from one judgment there should be either an appeal or a revision. The confusion has arisen by the District Munsiff, when he decided to try small cause suits along with an original suit by consent of parties, not giving the small cause suits original side numbers and trying them all as original suits. A small cause suit loses its character as such immediately it is withdrawn to the original side and tried along with an original suit. Nor can I see anything in the Provincial Small Cause Courts Act which is against this commonsense and practical view. The learned advocate for the petitioner is quite agreeable to the return of these civil revision petitions to him for presentation before the District Court, Vellore, as appeals on which the ordinary *ad valorem* Court-fee should be paid. They have been filed in this Court in time and it cannot be said that the petitioner has chosen, in view of confusion in existing practice, a wrong remedy or forum. I am quite unable to see how a small cause suit can continue in this category once it is taken on to the original side and disposed of along with an original suit. When this is done the small cause suit should be re-numbered as an original suit. The District Court is directed to admit these civil revision petitions if presented properly stamped and give them a disposal along with the connected appeal pending on its file. In these petitions three separate typed copies of the lower court judgment each covering 63 pages of copy stamped paper have been filed. This has involved a wholly unnecessary wastage of paper and expense. In filing appeals against a common judgment such as this in my opinion it would have been quite sufficient if the plaintiff had filed only one copy of the judgment for the four appeals with of course separate decree copies. The leave of the Court in a case of this kind could quite easily be obtained to file only one copy of the judgment for appeals arising out of it One month's time is given from this date to present these petitions as appeals in the District Court. The papers will be returned to the advocate and a copy of this order also sent direct to the District Court, Vellore.

K.C. ——— *Petition ordered to be returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Ratnasami Pillai .. *Appellant**

v.

Kathija Bivi Ammal .. *Respondent.*

Will—Construction—Principles—Absolute rights granted to daughter—Power to alienate only in case of debts—Whether cuts down the absolute estate—Further disposition regarding devolution of property after daughter's death—Effect.

The cardinal principle which governs the true construction of a will is to find out from the words used what exactly was the intention of the testator, whether there are clear and unambiguous dispositive

* S.A. No. 484 of 1947. 26th April, 1950.

words and if they are attempted to be controlled or qualified by any general expression of intention. It is also necessary to see whether any technical word or words of known legal import have been used. and if so legal effect must be given to it.

A will after setting out the properties of the testator and the debts proceeded as follows: "After my lifetime my daughter *K* shall take all my immoveable and moveable properties with absolute rights" (சர்வசுதந்திரத்துடன் அடையவேண்டியது) and also added "if there be any debt after my lifetime *K* (my daughter) shall sell the land only to discharge the debt and she should not alienate the same for any other purpose" and "my daughter *K* shall get these properties after my lifetime with absolute rights. After her lifetime her grandson Ratnaswami shall get the properties".

Held: That by the use of the words "சர்வசுதந்திரத்துடன் அடையவேண்டியது" the testator gave an absolute estate to his daughter and the recital regarding the restriction on alienation was invalid and it did not cut the absolute estate given to her in the earlier dispositive words of the will.

Held further, that as regards the recital pertaining to the grandson taking after the daughter, it was at best a provision for devolution of the property after the death of the daughter and was not intended to limit the character of the estate given earlier to the daughter.

Appeal against the decree of the Court of the Subordinate Judge, Mayuram in A. S. No. 44 of 1946, preferred against the decree of the District Munsiff's Court, Mayuram, in O. S. No. 291 of 1945.

S. Swaminathan for Appellant.

G. R. Jagadisan for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in the above second appeal. The question involved in the appeal is one of construction of the will, Ex. P-1, in the case. It was executed by one Vithilingam Pillai on 5th May, 1915. The donee under the will was his daughter, Kathayi, and the plaintiff is the grandson of the said Kathayi. The will, after setting out the properties he had and the debts, proceeds to state as follows:

"After my lifetime my daughter Kathayi shall take all my immoveable and moveable properties with absolute rights (சர்வசுதந்திரத்துடன் அடையவேண்டியது). If the said mortgage debt is not discharged during my lifetime the said debt shall be discharged by Kathayi. My obsequies shall be performed by Ratnaswami, grandson of my daughter, Kathayi and son of Maria Pillai of East Tanjore. These arrangements shall take effect after my lifetime. My daughter Kathayi shall get these properties after my lifetime with absolute rights. After her lifetime, her grandson Ratnaswami shall get the properties."

It may be mentioned here that the testator signed the will on the first page which ends with the portion relating to description of properties, and after the signature of the testator, the following recital:

"If there be any debt after my lifetime Kathayi shall sell the land only for the discharge of that debt and she should not alienate the same for any other purpose"

was added. Similarly, the recital already mentioned, *viz.*:

"my daughter Kathayi shall get these properties after my lifetime with absolute rights. After her lifetime her grandson Ratnaswami shall get the properties,"

was added on the next page after the will was signed and attested. The question now is what was the estate that was conferred on Kathayi, whether it was only a life estate or an absolute one. Both the Courts below have held that it was an absolute estate that was conferred on Kathayi and dismissed the plaintiff's suit.

In appeal it was contended by Mr. M. S. Venkatarama Aiyar for the appellant that the recital which was subsequently added on the first page prohibiting the donee from selling the land except for the discharge of the debt clearly indicates that the testator intended to give only a life estate. He further contends that the gift over to the grandson, Ratnaswami Pillai, the plaintiff herein, is another indication that the testator wanted that the properties should pass on to him and that he should perform the obsequies. His contention is that if there be two conflicting clauses, *viz.*, granting of an absolute estate earlier and restriction as to alienation later, the latter clause must prevail and therefore the estate that was conferred in this case was only a life estate. The contention of learned counsel for the respondent is that the dispositive words used by the testator are சர்வ சுதந்திரத்துடன் clearly indicating an absolute estate and any other clause must be construed to be

repugnant and therefore the clause restricting alienation is invalid. In any event, it should not be taken more than as a mere direction to the donee. The question now is which of the two constructions is correct.

It is a well settled principle that in the matter of construction of a will, the will of one testator cannot be construed by reference to that of another. As observed by Joyce, J., in *Sanford* v. *Sanford*[1], the true way to construe a will is to form an opinion apart from the decided cases and then to see whether these decisions require any modification of that opinion ; nor to begin by considering how far the will in question resembles other wills upon which decision has been given.

As pointed out by Venkataramana Rao, J., in *Ananthasayanam Naidu* v. *Kondappa Naidu*[2] :

"It is better to remember the rule so often laid down that each will must be construed by itself and all the light that can be got from the decisions serves only to show in what manner the principle of reasonable construction have by Judges of high authority been applied to cases more or less similar—vide the observations of Lord Chancellor Selborne in *Waits* v. *Littlewood*[3]. Therefore without reference to cases it is the duty of the Court to ascertain what is the expressed intention of the testator and whether there is anything in law to preclude effect being given to the said intention. The intention has to be collected from the words used in the will having regard to the facts and circumstances respecting persons to which the will relates."

It has also been held by the Privy Council in *Raghunath Prasad Singh* v. *The Deputy Commissioner, Partabgarh*[4] :

"Attempts on the part of the testator in India to restrict devolution of properties which he bequeaths to a legatee absolutely and to prevent alienations of such properties are quite common, and wills containing such provisions have often come up for decision before the Board. The question for determination has always been whether there are dispositive words creating an estate of inheritance, in the first instance ; and if so, whether the subsequent restrictive clauses are sufficient to displace the effect of such dispositive words or whether such subsequent clauses are merely repugnant to the absolute estate."

Their Lordships quote the following observations of the Board in *Mussammat Sasiman Chowdhurain* v. *Shibnarain Chowdry*[5] :

"It is always dangerous to construe words of one will by the construction of more or less similar words in a different will which was adopted by a Court in another case".

The cardinal principle therefore which governs the true construction of a will is to find out from the words used what exactly was the intention of the testator, whether there are clear and unambiguous dispositive words and if they are attempted to be controlled or qualified by any general expression of intention. It is also necessary to see whether any technical words or words of known legal import have been used and if so we must give legal effect to it. In this case it is quite clear from the words used in more than one place, that Kathayi should take the properties with absolute rights ஸர்வ சுதந்திரத்துடன். These are clear dispositive words conferring an absolute right on the legatee. This is mentioned not only in the first instance but later on also in the recital that was added, we get the same words that she shall get these properties after his lifetime with absolute rights. There can be no doubt therefore that the intention of the testator was to give it to her absolutely and the legal effect of the words ஸர்வ சுதந்திரத்துடன் is that the donee takes it absolutely. The question therefore is how far the words restricting Kathayi from selling the lands for any purpose other than for discharging the debt cuts down the absolute interest already conferred on her. Following the principle laid down in *Lalit Mohan Singh Roy* v. *Chukkum Lal Roy*[6] which is followed in *Pethaperumal Pillai* v. *Thangathammal*[7], I hold that the subsequent restrictive clause is repugnant and is therefore invalid.

As regards the recital that after her lifetime, her grandson should get the properties, it is at best a provision for devolution of the property after her death

1. (1901) 1 Ch. 939.
2. (1940) 1 M.L.J. 212 at 215.
3. (1872) 8 Ch. Ap. 70 at 73.
4. (1929) 58 M.L.J. 1 : L.R. 56 I.A. 372 : I.L.R. 4 Luck. 483 (P.C.).
5. (1922) 42 M.L.J. 492 : L.R. 49 I.A. 25 : I.L.R. 1 Pat. 305 (P.C.).
6. (1897) L.R. 24 I.A. 76 : 24 Cal. 834 (P.C.).
7. (1949) 1 M.L.J. 389.

and is not intended to limit the character of the estate given by the earlier bequest in favour of his daughter. On a reading of the will as a whole I hold that the intention of the testator was to give an absolute estate to his daughter and the recital regarding the restriction on alienation is invalid and it does not cut the absolute estate given to her earlier.

From the facts set out in the judgments of the Courts below it is clear that the appellant participated in transactions with regard to the property involved in the suit and an issue was raised whether the plaintiff was estopped from claiming this property. The first Court held against the defendant that there was no estoppel and the respondent argued the point before me. But in the view I have taken, I consider it unnecessary to deal with that question.

I agree with the conclusions arrived at by the Courts below and dismiss the second appeal with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

T. V. Sundaram Ayyangar & Sons, Ltd., Mathurai, through its Managing Director, T. S. Rajam and others .. *Petitioners**

v.

The Province of Madras, through the District Collector of Mathurai and another .. *Respondents.*

Court-Fees Act (VII of 1870), Section 17—Suits against Government and an agent by owner of cars for recovery of amounts paid as licence fees twice over—Court-fee if to be paid twice.

The plaintiff firm owning a fleet of motor cars obtained licences on payment of licence fees to the Government through its agent defendant 2, but again had to pay the licence fees in respect of the same vehicles to Government the first defendant who threatened to prosecute them if it was not paid. So the plaintiff firm instituted suits against Government and against the agent for recovery of the amounts alleged to have been paid by the plaintiff twice over. On the question of the proper court-fee under section 17 of the Court-Fees Act,

Held : That in the present case the suits could not be said to have embraced two or more distinct subjects within the meaning of section 17 of the Court-Fees Act.

If two suits were to be filed, an anamolous result will follow in that there may be contradictory findings in the two suits. It is to avoid this anomalous result that Order 1, rule 7, Civil Procedure Code permits the joinder of the defendants against whom relief is claimed in the alternative in order that the question as to which of the defendants is liable and to what extent may be determined not only as between the plaintiff on the one hand and the defendants on the other, but as between defendants *inter se.*

Hence no additional court-fee need be paid.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Mathurai, dated 27th November, 1948, in O. S. No. 62 of 1947 and 96 and 97 of 1948, respectively.

N. R. Govindachari for Petitioners.

The Government Pleader (*K. Kutti Krishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—The question raised in these civil revision petitions relates to the proper Court-fee payable by the plaintiff on the plaints in three suits filed in the Court of the Subordinate Judge of Mathurai. The plaintiff is a company which owns a fleet of motor vehicles. The plaintiff's case is that it entrusted the sums necessary for the payment of license fees and the obtaining of licenses for its vehicles to its agent, the second defendant, with a direction that the money should be paid to the first defendant, the Government, and licenses should be obtained. Receipts for the payment of the fees as well as the licenses in respect of the vehicles purporting to be issued by the duly authorised officer of the Government were

* C.R.P. Nos. 1819 to 1821 of 1948. 22nd February, 1950.

handed over to the plaintiff by the agent. The plaintiff's further case is that the Government, the first defendant, under threat of prosecution for non-payment or deficient payment of the licence fees again collected considerable sums of money from the plaintiff. The suits have been laid for the recovery of these amounts alleged to have been paid by the plaintiff twice over, once through its agent, the second defendant, and once directly by the plaintiff in pursuance of a demand made by the first defendant. The Subordinate Judge observes that there has been some malpractice on the part of the plaintiff's agent or the servants of the Government, or both. No objection as regards the deficiency of the Court-fee paid was taken in the written statement filed by the Government but the learned Subordinate Judge on his own initiative, raised an issue as regards the sufficieny of the Court-fee paid and directed the plaintiff to pay *ad valorem* Court-fee on the amount sought to be recovered from the first defendant, the Government, and again another *ad valorm* Court-fee on the same amount in so far as it was sought to be recovered alternatively from the second defendant. The plaintiff contends that the order of the Court below is erroneous and the direction calling upon him to amend his plaint and pay *ad valoren* Court-fee twice over on the single sum for which a decree is sought is illegal.

The question turns on the correct interpretation of section 17 of the Court-Fees Act which runs thus :

> "Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memorandum of appeal in suits embracing separately each of such subjects would be liable under this Act."

Now the words " two or more distinct subjects " in section 17 do not admit of a precise definition applicable to all cases. Where reliefs are claimed in the alternative with reference to the same facts and in respect of the same sum of money against two defendants, the suit cannot be said to embrace two or more distinct subjects. The relief claimed is one and the same, namely, the recovery of the money of which the plaintiff had been wrongfully deprived and the amount for which a decree is sought is one and the same though the claim is sought to be made out on alternative grounds against one or the other of the two defendants. If the first defendant is found liable, then on that very finding, the second defendant has to be exonerated. Alternatively, if it is proved that the money alleged to have been paid to the second defendant was in fact paid by the plaintiff but was not transmitted to the first defendant and the first defendant is exonerated from liability, then on that very ground the second defendant must be made liable to repay the money paid to him and not duly accounted for. The causes of action against the first and the second defendants are different, but, as observed by the Full Bench in *In re Parameswara Pattar*[1], the test under section 17 is not whether the causes of action are distinct. Nor is it a conclusive test to apply that different suits could have been brought separately against each of the defendants in respect of the relief claimed in this suit. The decision of the learned Chief Justice in *Ramasami* v. *Krishnayya*[2], does no more than point out that the fact that the causes of action are different and different suits could be filed in respect of them, though not conclusive, is relevant to a consideration of the question whether a suit embraces two or more different subjects, see also *Raja of Vizianagaram* v. *The Government*[3]. It was clearly necessary for the plaintiff to get an adjudication as regards his right to a return of the sum claimed by it either from the first defendant or from the second defendant in the presence of both the defendants. It is for cases like the present that Order 1, rule 7, Civil Procedure Code, enacts that,

> "Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

Otherwise if a separate suit were brought against each of the defendants the finding in one suit may not conclude the issue in the other suit and there might possibly

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1. (1930) 59 M.L.J. 469 : I.L.R. 54 Mad. 1 (F.B.).
2. (1948) 2 M.L.J. 104.
3. (1932) 63 M.L.J. 73.

be contradictory findings of the same Court on the same issue in two different suits. It is to avoid this anomalous result that Order 1, rule 7, permits the joinder of two defendants against whom relief is claimed in the alternative in order that the question as to which of the defendants is liable and to what extent, may be determined not only as between the plaintiff on the one hand and the defendants on the other, but as between the defendants *inter se*. Further under the illustration to Order 41, rule 33, Civil Procedure Code, where the plaintiff sues *A* and *B* and claims relief in the alternative against *A* or *B* and the Court passes a decree against *A* who takes the matter in appeal impleading the plaintiff and *B*, it is open to the appellate Court to exonerate *A*, the appellant, and pass a decree in favour of the plaintiff against *B*, the co-respondent. Only one Court-fee is paid on the memorandum of appeal and the plaintiff gets a decree gainst *A* or *B*, whoever is ultimately found liable to him.

I consider, therefore, that it cannot be said in the present case that the suits in the Court below embraced two or more distinct subjects within the meaning of section 17, Court-Fees Act. I set aside the order of the learned Subordinate Judge in the three suits, directing payment of additional court-fee. The civil revision petitions will therefore be allowed but having regard to the fact that the Government did not take any objection on the score of deficient court-fee, there will be no order as to costs.

K. C. —— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO, AND MR. JUSTICE VISWANATHA SASTRI.

Cheria Veetil Madhavan Variar (died) and others .. *Appellants* *

v.

Chathu Nambiar of Memenda Amsom Kizhal Desam and others .. *Respondents.*

Civil Procedure Code (V of 1908) sections 11 and 47—Scope of.

Where the title put forward by a plaintiff is totally different and wholly independent of the title put forward in an earlier suit, the bar of *res judicata* does not apply. Explanation 4 of section 11 of the Civil Procedure Code requires that the matter not only "might" but "ought" to have been made a ground which implies that the plaintiff was bound to include the present claim also in the earlier suit. But, where the present claim of the plaintiff is his individual right which he was not bound to include in the earlier suit which was filed by the plaintiff as karnavan of the tarwad wherein he was bound to include only all the available title of the tarwad, Explanation 4 would have no application.

Section 47 of the Code does not apply where the parties are different.

Case-law discussed.

Appeal against the decree of the District Court of North Malabar in A.S. No. 463 of 1945, preferred against the decree of the Court of the District Munsif, Badagara in O.S. No. 816 of 1943.

N. R. Sesha Ayyar for Appellants.

S. Venkatachala Sastri for Respondents.

The Court delivered the following

JUDGMENTS : *Satyanarayana Rao, J.*—The plaintiff obtained in the District Court the decree for rent claimed by him for the years 1932 to 1942 but that decree was reversed on appeal by the learned District Judge on the ground that his title to the suit property became extinguished by reason of a prior decree in O.S. No. 183 of 1931 on the file of the Badagara Additional District Munsif's Court.

The suit out of which this second appeal arises was instituted for recovery of rent due under a registered marupat, dated 27th December, 1909, executed by

*S. A. No. 101 of 1947. 25th February, 1950.

the first defendant's brother, one Krishnan Nambiar, since deceased to the plaintiff's brother, deceased Govinda Variar. The second defendant in the suit is alleged to be the tenant under the first defendant and defendants 3 to 13 and 15 were subsequently impleaded as parties interested in the property under the will of Krishnan Nambiar, the executant of the marupat. The 14th defendant is a member of the tarwad of the plaintiff and he was impleaded to protect the interests of the members of the tarwad. The first defendant disclaimed interest in the property by his written statement and the second defendant and the other defendants were the main contesting defendants. The principal defence to the action was that the suit was barred by reason of the decree in O.S. No. 183 of 1931 on the file of the Badagara Additional District Munsif's Court and that the plaintiff had no title to the property. The title claimed by the plaintiff to the suit property is based on the compromise decree in O.S. No. 419 of 1892 on the file of the District Munsif's Court, Badagara, in pursuance of which a kanam document, Exhibit P-2 was executed in respect of three items of property of which the suit property is one. This kanam deed states that the property was given as putravakasam property to be enjoyed by the children of Kunhunni Variar, and the plaintiff is the only surviving son of the said Kunhunni Variar entitled to the entire rights in the property as the sole surviving member of the putravakasam tavazhi. The plaintiff sues now to recover the rent due under the marupat. There is no dispute now that if otherwise the title of the plaintiff was not extinguished he would be entitled to recover the rent claimed by him in the suit.

In 1931 the plaintiff who was also the then Karnavan of his tarwad institutes suit, O.S. No. 183 of 1931 for recovery of possession of the property on the basis that the title to the property vested in the tarwad. He obtained a decree for possession on that basis and a certificate copy of the decree is marked as Exhibit P-5. That decree was not executed and was allowed to be barred. The plaintiff now alleges that he did not know his rights at the time he instituted that suit as he was then under the impression that the property belonged to the tarwad while, in fact, it belonged to the putravakasam tavazhi of which he is now the sole surviving member. The learned District Munsif who tried the present suit overruled the plea of the defendants that the present suit was barred by the decision in O.S. No. 183 of 1931. The earlier suit was brought by the plaintiff as a karnavan of his tarwad while the present suit is based on a different title, *viz.*, the title of the putravakasam tavazhi. The fourteenth defendant who was subsequently impleaded as a party to the suit is the seniormost anandravan of the tarwad. The view of the learned District Munsiff is that the parties were not litigating in the previous suit under the same title as is now claimed in the present suit and therefore there was no bar of *res judicata* for the present suit under section 11, Civil Procedure Code. The learned District Judge assumed that at the time the earlier suit was instituted by the plaintiff as karnavan he was the only member of the tarwad then alive and that therefore he should have validity included the alternative title based on the putravakasam tavazhi right in the earlier suit and as he failed and neglected to plead the alternative title and make it a ground of attack in the earlier suit he is now precluded from asserting the title of the putravakasam tavazhi in the present suit. According to his opinion the only course left open for the plaintiff was to have executed the decree in the earlier suit and the present suit was also barred under section 47, Civil Procedure Code. He relies for this position on the decision of the Full Bench in *Narayanan Nambudri* v. *Theva Amma*[1] and he also adds as a further ground for disallowing the claim of the plaintiff that the cause of action for the suit became merged in the earlier suit and that the second suit was incompetent also on the principle of the decision in *Mayan Kutti* v. *Kunhammad*[2] and *Gopalan* v. *Sankaran Nair*[3]. In the latter decision it was held by Wadsworth and Patanjali Sastri, JJ., that a subsequent suit for rent based on a lease, after the plaintiff had once

1. (1927) 53 M.L.J. 824 : I.L.R. 51 Mad. 46 (F.B.).
2. (1917) 34 M.L.J. 167 : I.L.R. 41 Mad. 641.
3. (1945) 1 M.L.J. 326.

obtained a decree in ejectment on the basis of that very lease was incompetent under section 47, Civil Procedure Code.

Under section 11 of the Civil Procedure Code one of the requisites for applying the principle of *res judicata* is that the issue raised in the second suit must have been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title. If the title asserted in the second suit is different from the title which was in issue in the earlier suit the bar under section 11 does not apply. In the earlier suit, the property was claimed as the property of the tarwad and the plaintiff instituted that suit in a representative capacity. As held by Justice Holloway in an unreported decision in A. S. No. 120 of 1862

> "A Malabar family speaks through its head in all Courts of Justice and except in antagonism to its head can speak in no other way."

It is on this principle that the earlier suit was constituted as a representative suit by the Karnavan. The assumption made by the learned District Judge that, at that monent, the plaintiff was the sole surviving member of his tarwad is obviously incorrect as there is the fourteenth defendant who is the seniormost anandravan of the tarwad who is still alive. As pointed out by the learned District Munsif, the marupat now in suit—Exhibit P-1 was taken by the plaintiff's brother Govinda Variar at a time when the karnavan of the tarwad was one Raghava Variar as is proved by the fact that this Raghava Variar was alive even in 1914 (Exhibit P-4). The marupat now in suit could not, therefore, have been taken by Govinda Variar on behalf of, and in his capacity as, karnavan of the tarwad. In view of the finding of the learned District Munsif which has not been challenged, the property, it has now been conclusively established, belongs in fact to the putravakasam tavazhi of which the plaintiff is now the sole surviving member. The title, therefore, now put forward by the plaintiff is totally different and wholly independent of the title put forward in the earlier suit. The decision in *Narayanan Nambudri* v. *Theva Amma*[1], does not conflict with the view that if the title put forward in a subsequent suit is different the principle of *res judicata* does not apply. On the contrary, the observations at page 65 of the report support the contention urged on behalf of the appellant by Mr. Sesha Ayyar, the learned advocate. It was observed at page 65 :

> "It appears to me that it does not follow that because a decision is binding upon a person therefore, he must be taken to be a party to the suit. *Prima facie* only those are parties to the suit within the meaning of S. 47, Civil Procedure Code, whose names appear in the decree. If any person's name so appears, then all questions raised by him relating to the execution etc., of the decree should be determined by the execution department, and not by a separate suit. If his name does not so appear, then the next question is—were his interests (that is, those put forward by him) represented in the suit. He may have his own separate or private interests, and he may have his common interests in the tarwad properties as a member of the tarwad. If only his common interests in the tarwad were represented, then it seems to me it is impossible to hold that his other interests (separate and private interests) should also be taken to have been represented in the suit, with the result that if in execution proceedings occasion arises for putting forward such separate and private interests, he should be treated not as a stranger *qua* such interests but as a party to the suit within the meaning of section 47, Civil Procedure Code."

This last sentence in the quotation clearly gives out the distinction between the representative interest of a karnavan of the tarwad and his separate interest. He represents the common interests of the tarwad in the suit and no more. The fact that he was a party in a representative capacity would not make him represent also his separate and private interests in that particular suit. It cannot, therefore, be assumed that when the plaintiff instituted the earlier suit he thereby brought into the action not only the interests of the tarwad which he held in common with the other members of the tarwad but also his individual, separate or private, interests. The view taken by the learned District Judge, therefore, that the earlier suit operates as *res judicata* cannot be upheld.

It was also suggested on behalf of the respondent that, at any rate, the plaintiff in the earlier suit must have made this alternative title as a ground of attack and

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1. (1927) 53 M.L.J. 824 : I.L.R. 51 Mad. 46 (F.B.).

as he did not do so it must be deemed to have been a matter directly and substantially in issue in the earlier suit under Explanation 4 to section 11, Civil Procedure Code and he is now precluded from raising that question in a suit in which the tarwad rights are being agitated. The Explanation requires that the matter not only "might" but "ought" to have been made a ground which implies that he was bound to include the present claim also in the earlier suit. There is no justification for holding that the plaintiff was under a duty to have included in that suit his individual or private right to the property. No principle of law and no decision in support of the argument that he is under an obligation to so include the present claim in the earlier suit has been brought to our notice; nor are we able to find any authority in support of such a view. No doubt a person in instituting a suit for recovery of possession of property based on his title in his individual capacity is bound to include all the available grounds of attack, that is, all the available titles under which he could have recovered possession of the property as, for example, in the case in *Fateh Singh* v. *Jagannath Baksh Singh*[1]. In that case, the first suit was instituted by the plaintiffs as the presumptive heirs to a widow's estate and when the widow died during the pendency of the suit the presumptive heirs applied to amend the plaint by setting up a family custom of inheritance and claiming possession of a share in the property. That application failed and the presumptive heirs thereafter admitted that, apart from the alleged custom, they could not succeed in the suit. The suit was accordingly dismissed. They instituted the subsequent suit basing their right to recover possession of the property on the alleged family custom. One of the questions decided was that they could not maintain a suit as they were bound to have included the title based on family custom in the earlier suit. On those facts if I may say so with respect it was rightly held by the Privy Council that the claim was within Explanation 4 to section 11, Civil Procedure Code and was barred by *res judicata*. But that decision, in my opinion, has no bearing on the question now under consideration for the reason that the capacities of the plaintiff in which the two suits were instituted were different and the titles agitated by the parties were also totally different. As karnavarthe of the tarwad the plaintiff was bound to include in the earlier suit all the available titles of the tarwad and not his individual right. As the cause of action in the present suit is different from the cause of action in the earlier suit, the decision in *Mayan Kutti* v. *Kunhammad*[2], has no application. In the judgment in S.A. No. 2329 of 1947 which has been delivered today I have given reason for not applying the principle of the decision in *Mayan Kutti* v. *Kunhammad*[2], where the causes of action are different. Nor does the decision of Wadsworth and Patanjali Sastri, JJ. in *Gopalan* v. *Sankaran Nair*[3], even if correctly decided, apply to the facts of the present case as the parties are different. The correctness of this decision is also open to doubt for the reasons mentioned in the judgment in S.A. No. 2329 of 1947. It is, however, unnecessary in this second appeal to go into the question of the correctness of either the decision in *Mayan Kutti* v. *Kunhammad*[2], or the decision in *Gopalan* v. *Sankarab Nair*[3], as section 11, Civil Procedure Code has no application to the present case. The bar, therefore, of section 47, Civil Procedure Code does not arise.

For these reasons, we are of opinion that the decision of the learned District Judge is wrong and must be set aside and that of the District Munsif restored with costs here and in the Court below. Ordered accordingly.

Viswanatha Sastri, J.—I had the opportunity of reading the judgment just delivered and I agree with the conclusion of my learned brother both for the reasons stated by me in my judgment in S.A. No. 2329 of 1947 and for the reasons stated by him in his judgment in this second appeal.

V.P.S. ——— *Appeal allowed.*

1. (1924) 48 M.L.J. 64 : L.R. 52 I.A. 100 : I.L.R. 47 All. 158 (P.C.).
2. (1917) 34 M.L.J. 167 : I.L.R. 41 Mad. 641.
3. (1945) 1 M.L.J. 326.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

Pulavarti Sitaramamurty and another .. *Petitioners* *

v.

Bangaru Sobhanadri and another .. *Respondents.*

Contract—Breach of—Question of damages when arises.

Breach of contract has of course to be proved before any enquiry could be conducted into the quantum of damages, so that, where it is impossible to say who had committed the breach no question of damages can arise.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Kakinada, in S.C. S. No. 239 of 1947.

D. Narasaraju and *K. B. Krishnamurthi* for Petitioners.

K. Venkataramana for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition for revising the judgment and decree of the Additional Subordinate Judge of Kakinada in S.C.S. No. 239 of 1947. The facts are briefly these. The plaintiffs, Bangaru Sobhanadri and Bangaru Krishnamurthi, had sued Pulavarti Sitaramamurthi and Pulavarthi Viswanadham for recovering damages of Rs. 789-13-6 for alleged breach of contract said to have been committed by the defendants in connection with the delivery of 50 bales of gunny bags consisting of 400 bags per bale. The contract, Exhibit A-1, was entered into on 8th July, 1947. Under its terms, 25 bales had to be delivered by 1st September, 1947, and the other 25 bales by 1st October, 1947, and it was expressly stated *that the delivery order should be taken by the plaintiffs only after paying the amount to the defendants.* The price was fixed at Rs. 85-8-6 per 100 bags. The plaintiffs, admittedly, did not go to the defendants with the money due and demand delivery, as the contract expressly required them to do. On 29th August, 1947, they sent a notice, Exhibit A-4, to the defendants stating they were ready to take delivery of the 25 bales due in August as per the above contract and asking the defendants to make the delivery order for the said 25 bales to them and receive the amount due as per the contract. The defendants kept quiet, probably because they were angry at the plaintiffs not going to the defendants and paying the money and demanding delivery as required expressly by the contract, and probably also because they were glad to get rid of the obligation to deliver, taking advantage of the breach of the contract terms by the plaintiffs, because the prices of gunnies were rising. The plaintiffs sent another notice, Exhibit A-5, to the defendants on 27th September, 1947, expressing their readiness to take delivery of the other 25 bales due in September 1947 after paying the amount due and requesting the defendants once more to go to them and deliver the same and receive the amount due. The defendants, as before, kept quiet, obviously for the two reasons mentioned above. The plaintiffs sent a notice, Exhibit A-6, on 1st September, 1947, to the defendants claiming damages for breach of contract regarding the 25 bales not delivered by that date. The defendants did not reply to this, obviously relying on the strength of their case should it go to Court, owing to the weakness in the plaintiffs' claim due to their breach of the terms of the contract. The plaintiffs sent another notice, Exhibit A-8, on 2nd October, 1947, to the defendants claiming damages regarding the non-delivery of the 25 bales due by 1st October, 1947. The defendants did not keep quiet this time, but sent a reply, Exhibit A-9 on 16th Octlober, 1947, stating that the plaintiffs had not observed the terms of the contract and were demanding delivery of goods without paying the amount, and that the defendants were not bound to go to the plaintiffs and deliver the goods, and that the plaintiffs had to go to the defendants and pay the full amount and then demand delivery and had

* C. R. P. No. 88 of 1949. 14th July, 1950.

not done so and could not claim any damages. In spite of this notice the plaintiffs rushed to Court and filed a suit.

The learned Additional Subordinate Judge remarked in the course of his judgment,

"The exact letter of the condition in the suit contract, *prima facie*, may lend itself to the interpretation that payment must be made and delivery order taken. Each party orally alleges that he was ready to perform his part; but, it is conceded that neither side made any tender through post."

The obvious thing, therefore, for him was to dismiss the suit without costs, as the platintiffs were bound to prove their contention that the defendants had broken the contract before they could get a pie as damages. Breach of contract has, of course, to be proved before any enquiry can be conducted into the quantum of damages, just as marriage must be proved before maintenance can be given to a woman claiming it as a wife. Unfortunately, the learned Sub-Judge considered the *surrounding circumstances* and decided the case against the defendants largely because the price of gunnies had risen and the defendants would have profited by not delivering the bales. On this conclusion, he held the defendants liable for breach, as they had a *motive to commit a breach*, and awarded damages of Rs. 631-4-0 against them on the difference in price between the market rate on the delivery dates and the agreed contract rates. It is obvious that he erred in doing so. Motive, by itself, will not do in law, Civil or Criminal. Many a man who has a strong *motive* to commit a murder may not commit it, and cannot be convicted of murder merely because he had a *motive* to commit it. So too, a man having merely a motive to commit a breach of c ntract cannot be mulcted in damages if he is not proved to have committed a breach. The Court has first to concentrate on the law, and then only on the results of its findings on law. In this case, unfortunately, the learned Sub-Judge, after having observed at first practically that it was impossible to say as to who had committed the breach of contract (which amounts to saying that it was not proved that the defendants had committed the breach) went into the question as to who had *profited* by the contracts not having been carried out, and decided the case on that fragile consideration, overlooking the fact that the plaintiffs had not themselves observed a material term in the contract. It follows that the judgment and decree of the lower Court must be set aside. It is hereby set aside, and the suit dismissed. But, in the circumstances, and in the light of the various facts found in the evidence, I direct all the parties to bear their own costs throughout.

V. P. S. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

The Governor-General of India in Council, by the General Manager, the Madras and Southern Maharatta Railway, Madras .. *Petitioner* *

v.

G. Krishna Shenoy .. *Respondent.*

Civil Procedure Code (V of 1908), section 80—Notice—Requirements of—Error in the matter of designation as Secretary of State—Effect—Notice received by authority empowered to receive notices addressed to the Governor-General-in-Council and acted upon—Sufficiency.

Railways Act (IX of 1890), section 77—If applicable to case of non-delivery of consignment.

Where although the name of the Secretary of State was inadvertently given at the head of the notice, yet it was treated by the Governor-General-in-Council as notice to him and action was taken in the same way as if the notice had been addressed to the Governor-General-in-Council, it is sufficient compliance with the requirements of section 80, Civil Procedure Code, because the Governor-General-in-Council was in fact given notice. It must be held that the notice was given to the Governor-General-in-Council notwithstanding an error in the matter of designation.

Governor-General-in-Council v. *Krishnaswami Pillai*, (1946) 1 M.L.J. 267, distinguished.

* C. R. P. No. 247 of 1948. 10th August, 1950.

Section 77 of the Railways Act requiring a formal claim to be made within six months of the despatch of goods relate only to compensation for loss, destruction or deterioration of goods and would not seem to apply in cases where there was for example a detention by the Railway. If the Railway wished to oppose a suit on the ground that the plaintiff had submitted his claim beyond six months of the date of delivery of the goods for carriage by the Railway, it would be incumbent on them to show that plaintiff's claim was beyond six months from the date of entrustment of the goods and also that the goods had been lost or destroyed or deteriorated. Section 77 of the Railways Act does not apply to non-delivery when it is not known what happened to the goods.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Cochin, in S.C.S. No. 7 of 1946.

S. S. Ramachandra Aiyar for Petitioner.

T. A. Anantha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff entrusted on 11th December, 1943, a parcel of iron screws to the South Indian Railway, Ernakulam, and consigned it to a client at Vizhakapatnam. To Vizhakapatnam the parcel would have had to travel over the lines of the South Indian Railway up to Jalarpet, on the M. & S. M. Railway from Jalarpet to Waltair, and on the B. N. Railway from Waltair to Vizhakapatnam. The South Indian Railway were able to satisfy the plaintiff that the parcel had been safely handed over to the M. & S.M. Railway authorities, Jalarpet. In answer to interrogatories, the M. &. S.M. Railway stated that they had entrusted the goods to the B. N. Railway at Waltair, but they produced no evidence in support of this, and the case proceeded on the basis that the parcel was in the custody of the M. & S.M. Railway, who are the petitioners here, at all relevant dates. After much correspondence the plaintiff sent a notice on 29th September, 1945, purporting to be a suit notice addressed to the Secretary of State for India. At that time the proper authority to whom notice should have been given was th Governor-General-in-Council. It was however received by the authority empowered to receive notices addressed to the Governor-General-in-Council and was dealt with as if it had been a notice to the Governor-General. A suit was filed against the Governor-General-in-Council on 20th March, 1946, and on account of an objection raised in the written statement, a formal notice addressed to the Governor-General was given on 14th November, 1946.

Various issues were taken in the suit, the principal ones being that no proper suit notice was given such as was required under section 80, Civil Procedure Code, and that the suit was barred by limitation, in that section 77 of the Railways Act, requiring that a person shall prefer his claim within six months of the loss, destruction or deterioration of his goods, has not complied with. The issues were decided against the Governor-General-in-Council and a decree passed in favour of the plaintiff. The Governor-General-in-Council or his successor-in-interest has filed this Civil Revision Petition.

The question as to whether the claim lies against the M. & S.M. Railway or against the B. N. Railway has not been seriously pressed here. The contention that the goods were lost after being entrusted to the B. N. Railway was mentioned in answer to certain interrogatories by the plaintiff; but no attempt was made to prove this. The matter was not seriously pressed even in the lower Court. I hold this point against the petitioner.

The contention based on the requirements of section 80, Civil Procedure Code, need not detain us long. Although the name of the Secretary of State was inadvertently given at the head of the notice yet it was treated by the Governor-General-in-Council as a notice to him, and action was taken on the notice in the same way as if the notice had been addressed to the Governor-General-in-Council. In my opinion, this is sufficient compliance with the requirements of section 80, because the Governor-General-in-Council was in fact given notice. The learned counsel for the Railways strongly relies upon an *obiter dicta* in the judgment of Leach, C.J., in *Governor-General-in-Council* v. *Krishnaswami Pillai*[1]. Being unnecessary

1. (1946) 1 M.L.J. 267 : (1946) F.L.J. 16.

for the disposal of the appeal before the learned Judges, the learned Chief Justice did not find it necessary to say very much on this head. He referred to the mandatory nature of the provisions contained in section 80 and considered that in the case before him and his colleague a proper notice such as was required by section 80 was not given. That case can however be distinguished from the present case on the facts, in that the notice here sent to the Secretary of State for India was accepted by the Governor-General-in-Council and treated by him as notice to himself. Moreover, the suit there was actually filed against the Secretary of State for India and not, as here, against the Governor-General-in-Council. It seems to me that notice was given to the Governor-General-in-Council, notwithstanding an error in the matter of designation.

The issue regarding the effect of not making a formal claim within six months of the despatch of the goods is one that deserves more consideration, in that, as has been pointed out in several cases, the object of section 77 of the Railways Act is that the Railways should not be liable for goods that had been lost long before, on a claim made at a time when an enquiry and examination of records would not be easy, on account of lapse of time. However, we have to construe the section as it is ; and it purports to relate only to compensation for loss, destruction or deterioration of goods, and would not therefore seem to apply in cases where there was, for example, a detention by the railway. Supposing, for example, the railway administration had conducted only a very perfunctory enquiry upon the plaintiff's claim and, in fact, the goods were lying at one of their stations, could it be said that the goods had been lost ? In my opinion, it could not, and section 77 would not apply to a case like that. When the plaintiff applied for compensation for goods that had not been delivered to the consignee or that had not been re-delivered to him, he was not in a position to know what had happened to the goods. If the railway authorities wished to oppose his suit and have him non-suited, on the grounds that he had submitted his claim beyond six months of the date of delivery of the goods for carriage by the railway, then it would be incumbent on them to show that his claim was beyond six months from the date of entrustment of the goods and also that the goods had been lost, destroyed, or deteriorated.

In the many cases that have come up before the Patna High Court from *G.I.P. Railway Co.* v. *Gopiram Gowrishanker*[1], onwards, there has been a clear and consistent authority that section 77 does not apply except where the property has been lost, destroyed or deteriorated and in particular it does not apply to mere non-delivery. The Allahabad High Court seems to be of like opinion, the leading authority of that High Court on this matter being *Secretary of State* v. *Firm Daulatram*[2]. That was a case of misdelivery of steel sleepers, in which it was held that where there was misdelivery there was no loss and that section 77 did not therefore apply. My attention has not been directed to any authority of the Allahabad High Court subsequent to this where a contrary opinion has been held. In the *Assam Bengal Railway Co., Ltd.* v. *Radhica Mohan Nath*[3], the learned Judges were prepared to place a very wide meaning on the word " loss " in section 77. They seemed to dissent from a decision of Jwala Prasad, J., in an earlier Patna case, *The East Indian Railway Co.* v. *Kalicharan Ram Prasad*[4]. They were inclined to hold that in any case where a person sought compensation for goods not delivered section 77 would apply. Even there however they left open the question whether in a case where goods had been wrongly obtained by the railway authorities section 77 would have any application. In *Shamsul Huq* v. *Secretary of State for India in Council*[5], in which on account of the wrong action of the railway authorities in detaining the goods, the goods perished, the learned Judge held that section 77 would have no application. He specifically referred to the earlier Calcutta case quoted above, and said that in the *Assam Bengal Railway Co., Ltd.* v. *Radhica Mohan Nath*[3], the learned Judges had

1. (1927) I.L.R. 7 Pat. 192.
2. A.I.R. 1937 All. 632.
3. (1922) 28 C.W.N. 438.
4. (1922) 69 I.C. 103.
5. (1930) I.L.R. 57 Cal. 1286.

clearly appreciated the distinction between loss, destruction or deterioration of goods on the one hand and detention or conversion on the other.

The only other case which in any way helps the petitioner is *M. & S. M. Railway Co., Ltd.* v. *Haridoss Banmali Doss*[1], in which there was a wilful delivery of goods to a person who was not in possession of a railway receipt. It was held that such a case was covered by section 77; and the learned Judges there, like the learned Judges in the *Assam Bengal Railway Co., Ltd.* v. *Radhica Mohan Nath*[2], were inclined to place a very wide meaning on the word "loss". What was however said in that case must be read in the context as applying to the facts of that case. Where the fate of the goods is known and loss had been irretrievably caused to the consignor by delivery to a wrong person, I would have no hesitation, even had I no support from *M. & S. M. Railway Co., Ltd.* v. *Haridoss Banmali Doss*[1], in saying that there was a loss to which section 77 would have applied. I do not however find anything in that judgment which would lead me to conclude that, had the learned Judge had to consider the possibility that the goods had been detained by the railway authorities and were still in their possession, section 77 would have applied. We do not know in this case what happened to the goods; but judging from the answers given in the interrogatories, it would have been a simple matter for the railway authorities to have proved, if they had so minded, that the goods had been lost; if so, then the suit would have had to be dismissed. The fate of the goods was specially within the knowledge of the railway authorities. They had documents and records which would have enabled them to trace the progress of the goods from Jalarpet onwards; but they adduced no evidence of what had become of them. It seems to me that the learned Subordinate Judge was justified in holding that since the railway authorities had failed to show that the goods had been lost, he could not apply section 77.

The Civil Revision Petition is dismissed with costs.

K. S. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Somasundaram Chettiar .. *Appellant**

v.

Chidambaram Chettiar .. *Respondent.*

Specific Relief Act (I of 1877), section 19—Grant of damages in addition to specific performance—When justified—Specific performance prayed for and granted—Alternative relief of refund not pressed—Granting of alternative relief by appellate Court.

Compensation for breach of contract by way of damages should be made to the plaintiff in addition to the relief of specific performance only when the Court is satisfied that the decree for specific performance is not sufficient to satisfy the justice of the case.

The appellate Court is not bound to grant the alternative relief of refund of purchase money with interest and damages to the plaintiff, where the plaintiff was satisfied with pressing in the lower Court for the relief of specific performance only and he did obtain that relief.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, dated 26th September, 1946, in O.S. No. 27 of 1944.

G. R. Jagadisan for Appellant.

V. Ramaswami Aiyar and *M. Natesan* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit filed by the respondent for specific performance of an agreement to assign the decree in O.S. No. 208 of 1932, on the file of the Court of the Subordinate Judge of Devakottai obtained by the appellant as a result of the decision of this Court in A.S. No. 237 of 1934.

1. (1918) 35 M.L.J. 35: I.L.R. 41 Mad. 871.
2. (1922) 28 C.W.N. 438.

* Appeal No. 658 of 1946. 1st March 1950.

The agreement was dated 17th December, 1942, and there is now no dispute that it was executed by the defendant who had full knowledge of what he was doing. In his evidence he admitted that though he was not originally agreeable to execute the deed of assignment of the decree, he eventually agreed to do so and executed the agreement, Exhibit P-2. There was an attempt in the Court below to establish a case of coercion which vitiated the agreement, but the attempt altogether failed. On a perusal of the evidence of the defendant himself and the other three witnesses examined on his behalf, there is no doubt left in our minds that the agreement was duly executed by the defendant and was intended to be acted upon. The defendant's case was that the transaction was brought about at the instance of two of the judgment-debtors in O.S. No. 208 of 1932 and the plaintiff was merely a name lender. Very probably it was so ; but we fail to see how that fact can have any material bearing on the rights and liabilities of the parties to this suit.

The defendant acknowledged in P-2 receipt of Rs. 13,100 the consideration for the assignment of the decree. But his case as developed in his evidence was that out of this amount only Rs. 11,100 had been received by him from P.W. 1, Raman Chettiar. The burden lay heavily on the defendant to establish his case in view of the express acknowledgment in Exhibit P-2. The amount of Rs. 11,100 was alleged to have been paid in three instalments by cheques but no attempt was made to have the cheques produced nor were the accounts of the defendant produced to show that the amounts were received as alleged towards the agreement to assign the decree and not in respect of dealings between the defendant and Raman Chettiar. In the absence of reliable evidence in proof of the defendant's case, it must be held that the full amount of consideration recited in Exhibit P-2 was paid to the defendant. There is really no defence to the suit for specific performance which was rightly decreed by the Court below.

The learned Subordinate Judge, in addition to the relief of specific performance which he granted to the plaintiff, also awarded him Rs. 1,000 as damages sustained by him on account of the breach of contract on the part of the defendant. In the plaint there was no specific prayer for the award of damages in addition to the grant of specific performance. There was an alternative plea that in case the specific performance was not ordered, the defendant may be directed to refund the sum of Rs. 13,100 with interest at 6 per cent. per annum from 17th December, 1942, as also Rs. 2,000 as damages for loss of profits. The defendant was therefore not called upon to meet the plaintiff's claim for damages in addition to the grant of specific performance. The learned Judge, however, thought th t this did not matter and that the failure to ask for damages in addition to the substantive relief of specific performance would not disentitle the plaintiff to damages being granted. He relied on the ruling in the *Arya Pradeshak Prithinidhi Sabha* v. *Lahori Mal*[1], in support of his conclusion. No doubt that decision appears to lay down, though the report is very meagre, that the plaintiff in a suit for specific performance can be awarded damages not only in lieu of but in addition to specific performance even though the plaintiff might not have specifically prayed for such a relief. As authorities for this proposition the learned Judges cited the rulings in *Callianji Harjivan* v. *Narsi Tricum*[2] and *Kalliandas* v. *Tulsidas*[3], but in neither case was there an award of damages in addition to the grant of specific performance. The learned Judges applied the principle on which these decisions rested on the ground that the Code of Civil Procedure conferred ample discretion upon the Court in the matter of granting appropriate relief. In the absence of any direct authority, with great respect to the learned Judges who decided the case in the *Arya Pradeshak Prithinidhi Sabha* v. *Lahori Mal*[1], we think that it is neither equitable nor legal to award damages in addition to the relief of specific performance to a plaintiff who has not chosen to ask for such relief of damages. Section 19 of the Specific Relief Act lays down that any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

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1. (1924) I.L.R. 5 Lah. 509.
2. (1895) I.L.R. 19 Bom. 764.
3. (1899) I.L.R. 23 Bom. 786.

It then provides for cases in which the Court decides that specific performance ought not to be granted and cases in which the Court decides that specific performance ought to be granted. In the latter case, it provides that some compensation for breach of contract should also be made to the plaintiff if in its opinion it is not sufficient to satisfy the justice of the case. But there must be an allegation by the plaintiff that having regard to the particular facts and circumstances of the case, the mere grant of specific performance would not satisfy the justice of the case. When such an allegation is made by the plaintiff, the defendant would have a fair opportunity of convincing the Court that there are no facts and circumstances which would render it just to award damages in addition to specific performance. Then again, the defendant ought to be put on notice that a particular amount is being claimed by the plaintiff for damages on this ground and it must be open to the defendant to adduce evidence that the damages claimed are excessive or that the plaintiff has not sustained any damages. In this case the award of Rs. 1,000 as damages is quite arbitrary. There is no evidence that the plaintiff would suffer loss to this extent because of the conduct of the defendant in refusing to specifically perform his contract. For all these reasons we consider that there is no justification for the award of Rs. 1,000 as damages in addition to the grant of specific performance.

Mr. V. Ramaswami Aiyar, the learned advocate for the respondent, wanted that the decree of the lower Court may be varied by awarding him the alternative relief claimed by him, *viz.*, the refund of the sum of Rs. 13,100 with interest and Rs. 2,000 as damages. It was quite open to the respondent to have abandoned his claim for specific performance and to have prayed for the alternative relief only before the Court below. He certainly had the option of choosing one of the alternative claims. But he was evidently quite satisfied with pressing for the relief of specific performance and he did obtain that relief. Till his learned counsel began his argument before us there was no mention that the respondent wanted the alternative relief in lieu of specific performance. No authority was cited to us that the appellate Court is bound to accede to this demand by the plaintiff even after the decree of the lower Court. In the absence of any indication till the time of the arguments that the plaintiff had changed his mind and had decided to choose the alternative relief other than what was granted to him by the Court below, we are not inclined to grant this request.

The appeal is allowed to the extent of Rs. 1,000 awarded as damages but is otherwise dismissed. The parties will pay and receive proportionate costs in this appeal.

V. P. S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

[On a difference of opinion between Satyanarayana Rao, J. and Govinda Menon, J.]

T. R. K. Ramaswami Servai and another .. *Appellants**

v.

The Board of Commissioners for the Hindu Religious Endowments, Madras, through its President .. *Respondent.*

Madras Hindu Religious Endowments Act (II of 1927, *as amended by Madras Act X of* 1946), *sections* 9 (12) *and* 84 (1), (2) *and* (3)—*Temple—Essential features of—Presence of an idol—Necessity—Endowment for temple under construction—Building not completed and idol not installed—Decision of Board that institution is a temple under the Act—Jurisdiction—Petition under section* 84 (2)—*Maintainability—Order on such petition—Appeal—Competency.*

A Hindu executed a deed of gift on 18th of March, 1920, endowing certain nanja lands for the upkeep of "Alagarswami temple now under construction." The deed of gift provided for the installation of the deity and *kumbabhishekam* after the completion of the temple and also for consti-

* Appeal No. 419 of 1947. 2nd September, 1949.

tution of the donor and two others as trustees for the carrying out of the objects of the trust. The donor and the other two trustees died but the building of the temple remained unfinished, the idol was not installed and the place could not be used as a place of worship. On the Hindu Religious Endowments Board collecting (from the heirs of the trustees who were in possession of the properties) the contribution leviable under the Madras Hindu Religious Endowments Act on "temples" as defined in the Act, one of the trustees filed a petition stating that as there was no temple in existence the Act did not apply and that therefore it may be declared that the endowment was outside the scope of the Act. This petition was treated by the Board as one under section 84 of the Act and the Board by its order dated 27th September, 1938, declared that the institution was a "temple" as defined in the Act and that it was also an excepted temple. This order was never challenged and matters were allowed to rest there till 1940 when the Board started proceedings for the settlement of a scheme for "Sri Alagarswami Temple" under section 62 of the Act. The trustees objected to the jurisdiction of the Board to frame a scheme in respect of a temple which had never come into existence. But their objections were overruled. Thereupon the trustees filed a petition under section 84 (2) to set aside the decision of the Board that there was a temple amenable to the jurisdiction of the Board in respect of which a scheme could be framed. The District Judge while holding that the temple building was incomplete, the deity had not been installed and the public could not use the place for worship, dismissed the petition on the ground that the prior order of the Board dated 27th September, 1938, declaring that there was a temple had been allowed to become final and conclusive under section 84 (2) of the Act. On appeal by the trustees to the High Court, the Board objected not only to the competency of the appeal but also to the maintainability of the original petition itself.

Held: (1) (agreeing with Satyanarayana Rao, J.) Section 84 (1) of the Act is designedly framed in wide terms. When the Board decides a dispute as to whether an institution is a "temple" as defined in the Act, whatever be the nature or stage of the proceeding in which such dispute arises or decision is given, the Board acts under section 84 (1) of the Act. It does not matter how the dispute is brought up before the Board. Whether the Board decides the dispute by holding a fresh enquiry or by holding that its prior order is conclusive, in either case, there is a decision of the Board under section 84 (1) which attracts the provisions of section 84 (2) and so the original petition to the lower Court was competent.

(2) (agreeing with Satyanarayana Rao, J.) Section 84 (3) gives a right of appeal to High Court against every order of the District Judge passed under section 84 (2). Even though the District Judge might have erred in holding that section 84 (2) applied to the case, still as he purported to entertain and decide the petition in the exercise of the jurisdiction assumed to have been conferred upon him by that section, the right of appeal given to an aggrieved party by section 84 (3) against an order under section 84 (2) is attracted. Further an order purporting to be passed by a Court of first instance under an appealable provision of law will be open to appeal even though, on the facts, the order is one that should not have been passed under that provision. Hence, the appeal to the High Court was competent.

(3) (agreeing with Govinda Menon, J.) As the Board whenever there is a dispute has to decide the question as to whether an institution is a temple or not, in either case, its order, right or wrong will be within its jurisdiction and not outside it. Accordingly the order of the Board of the 27th September, 1938, declaring the institution a "temple" cannot be said to be an order passed without jurisdiction. This question had to be and was decided, though erroneously, by a tribunal competent and empowered by the Legislature to decide it, and the decision of that tribunal having been allowed to become final by the inaction of the trustees, its correctness is no longer open to question.

Per Viswanatha Sastri, J.—If the public or that section of the public who for worship consider that there is Divine presence in a particular place and by offering worship at that place, they are likely to be the recipients of the bounty or blessings of God, then there are all the essential features of a temple as defined in section 9, clause (12) of the Act. The presence of an idol, though an invariable feature of Hindu temples is not a legal requisite under the definition of a temple in section 9 (12) of the Act.

Appeal against the order of the District Court of Mathurai in Original Petition No. 44 of 1946.

The appeal originally came on for hearing before Satyanarayana Rao, J. and Govinda Menon, J., who delivered the following differing

JUDGMENTS: *Satyanarayana Rao, J.*—This is an appeal under section 84 (3) of the Madras Hindu Religious Endowments Act (II of 1927), as amended by Madras Act X of 1946, against the order of the learned District Judge dismissing the appellants' petition under section 84 (2) of the Act.

The facts relating to this matter have been fully set out in the judgment of my learned brother which he is about to deliver and which I had the advantage of perusing, and therefore, need not be set out in great detail. One Venkataswami Servai executed on 18th March, 1920, a deed of gift (Exhibit R-2) declaring that he had already endowed nineteen acres, ninety-eight cents of nanja land to Alagarswami temple devasthanam and that the temple was already under construction.

He also expressed in that document his intention to have the deity Alagarswami installed in the building which was then under construction and to have *kumbabhishekam* performed after completion of the building. Under this deed he appointed two trustees, besides himself, Kamakshi Servai and Algar Servai, and laid down the duties to be discharged by the trustees. He, being the founder of the charity, laid down the rules for the devolution of the trusteeship and provided that, if no male issue were born to him, the trusteeship should devolve on the two trustees appointed by him under the deed and their heirs in perpetuity. The founder Venkataswami Servai died in 1925 leaving no male issue. Kamakshi Servai died some time in 1931 and was succeeded to the trusteeship by Ramaswami Servai (the first appellant). Alagarsami also died later and was succeeded by the second appellant, Subbiah Servai.

In the year 1937, the Hindu Religious Endowments Board demanded contribution from the trustees on the assumption that the temple of Sri Alagarswami was completed and came into existence. The claim was for eight faslis, 1339 to 1346, amounting to Rs. 600. When this demand was made, Ramaswami Servai filed a petition before the Board alleging that the order of the Board demanding contribution proceeded under a mistake that the family temple came into existence and that as the temple was not completed and the idol was not installed and consecrated, the endowment was entirely outside the scope of the Hindu Religious Endowments Act. In the petition, it was claimed that there should be a declaration by the Board that the trust created by Venkataswami was outside the scope of the Act and that the Board should refund the sum of Rs. 600 collected from the trustees as contribution. This application was considered by the Board under section 84 of the Act and the Board passed an order on the 27th September, 1938, in these terms :—

"Sri Alagar temple, Thevaram, Periyakulam taluk, Mathurai district, is a temple as defined in the Madras Hindu Religious Endowments Act, 1926, and is also an excepted temple."

The annexure to this order containing the reasons for the above decision was not filed by the Board in these proceedings and it is not known whether the Board after enquiry came to the conclusion on the evidence placed before it that the conditions of the definition of a " temple ", as contained in the Act, were satisfied or not. From a later order of the Board it is gathered, however, that at the time of the passing of the above order, both sides agreed to have the temple declared to be an excepted temple and that the deed of foundation supported that view. It is not clear from the evidence now adduced who the other side to the petition, Exhibit R-1, was. In the cause title of the petition itself there is no name of any respondent and it appears from the preamble to the order that Sri N. Sivaraj, Advocate for the appellant alone, appeared at the time of the final hearing of the petition. As there is no legal evidence such as the annexure containing the grounds of the decision, it is difficult to know what exactly were the reasons that influenced the decision of the Board and who the other party to the proceedings was. The statement in Exhibit P-2, later order of the Board, cannot be treated as secondary evidence of the contents of the annexure to the order in Exhibit R-1. Further, if the other party was the Board, how far the consent of the Board and that of the petitioner would be a substitute for an enquiry contemplated by the petition, Exhibit R-3 is a matter which will be considered later. No steps, however, were taken by any person to have the correctness of the order questioned in an appropriate proceedings.

In the year 1940 the Board *suo motu* initiated proceedings under section 62 of the Act for the settlement of a scheme for Sri Alagar temple, Thevaram. The reasons given in the notice issued on the 9th May, 1940 (*vide* Exhibit P-2) for starting the scheme proceedings by the Board were :—(i) steps have not been taken for the construction of the temple, (ii) each trustee leases the temple lands without the knowledge of the other, which results in litigation, (iii) accounts are not maintained (the word ' not ' is omitted in Exhibit P-2 at page 23), and (iv) trustees have not taken possession of certain properties endowed for the temple. After this notice, the matter came up for consideration before the Board and an objection was taken

that the Board had no jurisdiction to frame a scheme as the temple had not come into existence. This question was taken as a preliminary point for consideration by the Board consisting of Mr. Mannadi Nair and Mr. Kameswara Rao. Mr. Mannadi Nair was of opinion that as no temple had come into existence and as the existence of a temple was the first requisite for the exercise of the jurisdiction of the Board under the Act, including the framing of a scheme under sections 62 and 63 the proceedings were without jurisdiction. He thought that the prior order of the Board declaring the temple an excepted one must have proceeded under a mistake and that merely by reason of that order he could not assume the existence of a temple for the purpose of framing a scheme, when in fact none existed. Mr. Kameswara Rao, however, differed from this view. His opinion was that, as the prior decision was not challenged in a Court of law as provided by the Act, the Board had no right to go beyond the view contained therein which proceeded on the basis that there is a "temple" which is an "excepted temple" and that therefore the Board had jurisdiction. He, however, overlooked the fundamental fact that the very notice stated as the first ground for framing a scheme that steps had not been taken for the construction of the temple which clearly establishes that notwithstanding the order, there was in fact no temple in existence. The matter thereafter came up for consideration before a Full Board as a result of the difference of opinion between the two Commissioners. Mr. Ramachandra Chettiar, Commissioner No. 1, expressed as his opinion that the notional existence of a temple was sufficient to justify the action of the Board, notwithstanding that the building was not completed, the idol was not installed, and *pranaprathishta* and *kumbabhishekam* were not performed and expressed further that though it has not been possible for the public to go and worship the deity at the place, because there has not been a formal ceremonial consecration, it was still a temple which attracted the provisions of the Act. The Commissioner No. 3, Mr. Krishna Rao, thought that the prior order of the Board was final as it was not a case where the Board lacked inherent jurisdiction but was a case where the Board exercised jurisdiction irregularly. As a result of this opinion of the Full Board, it was decided that the Board had jurisdiction to start an enquiry under sections 62 and 63 of the Act. This order was dated the 2nd May, 1945. On this the two trustees filed in the District Court a petition under section 84 (2) of the Act to set aside the said order of the Board on the ground, that the Board had no jurisdiction to initiate proceedings under sections 62 and 63 of the Act, as there was no temple in existence at any time and as at the time of the passing of the prior order, first petitioner's advocate was not authorized to consent to any such order and that while fighting the jurisdiction of the Board, the Advocate could not possibly and legally have consented to the passing of such an order. It was also alleged in the petition that one of the joint trustees was not a party and that the order of the Board was without jurisdiction. The Board in the counter filed on their behalf pleaded that the prior order under section 84 of the Act was final and barred the present application and that the petition did not lie under section 84 (2). The Board did not, however, specifically deny in their counter the categorical assertion of the petitioners that there was no temple in existence as no idol was installed and consecrated.

The learned District Judge found that there was no "temple" as defined by section 9 (12) of the Act, there was no building, there was no consecrated idol and consequently, there could have been no occasion for any public religious worship. With reference to the contention that the petition did not lie under section 84 (2), the learned District Judge was of opinion that, as the Board held in Exhibit P-1 that it had jurisdiction to hold an enquiry under sections 62 and 63 of the Act on the basis that the institution in question was an excepted temple, the application would lie under section 84 (2), but according to the learned District Judge, the prior order under Exhibit R-1 became final and that it was not open to the petitioners to challenge the finality of the order under Exhibit R-1 in the present proceedings. The only ground, therefore, on which the learned District Judge dismissed the petition was that the order in Exhibit R-1 was final and its legality could not be questioned in the present proceedings. In the result he dismissed the petition.

In this appeal the points argued and raised in the judgment of my learned brother are as follows :—

(i) Is the present appeal competent ?

(ii) Was the application maintainable under section 84 (2) of the Act ?

(iii) Was there a temple as defined in the Act ?

(iv) Does the prior order of the Board preclude the petitioners from now contending that there was no temple in existence ?

Section 84 (3) of the Act, which was introduced by Madras Amending Act X of 1946, gave a right of appeal to this Court against every order of the District Judge on an application under section 84 (2) within three months from the date of the order. The learned District Judge in the present case clearly held that the application under section 84 (2) to avoid Exhibit P-1 would lie. He therefore purported to exercise a jurisdiction under section 84 (2) of the Act. Whether he had in fact the right to exercise the jurisdiction under that section or not, if he had purported to exercise jurisdiction under section 84 (2), the appellants would have an undoubted right of appeal to this Court. As pointed out by Wadsworth, J. and Govindarajachari, J., in *Somasundaramma* v. *Seshagiri Rao*[1] :

> " There is a considerable line of authority that when the Court wrongly acts under an appealable provision of law and passes an order, which, having regard to the provision of law under which it is passed is appealable, an appeal will lie even though the order should have been passed under a provision of law which would not carry with it a right of appeal."

The line of authority adverted to by the learned Judges begins from *Latchmanan Chetty* v. *Ramanathan Chetty*[2] and the Full Bench decision in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[3]. There are other cases on the same line. It is unnecessary to cite them in view of the latest decision of the Bench in *Somasundaramma* v. *Seshagiri Rao*[1]. Even assuming therefore that the learned District Judge was wrong in his view that the application was maintainable under section 84, still, the aggrieved party has got a right of appeal as the learned Judge purported to exercise jurisdiction under section 84 (2) and though on the merits he held that the application was barred by the prior order which became final. We are here concerned with an order which purports to have been passed in the exercise of jurisdiction under section 84, whether that jurisdiction in fact existed or not. The question whether the order was a final order in the sense that, if the Board ultimately were to decide that no case for framing a scheme was made out, the proceedings should be dropped is beside the point. So far as that Court is concerned, the decision of the learned Judge is final and can be set aside only by an appeal under section 84 (3). It is therefore a final order which attracts the provisions of section 84 (3) and an appeal would clearly lie against that order, in the light of a catena of decisions holding that in such a case an appeal lies.

It was next contended that the application under section 84 (2) did not lie to the District Court as this dispute was raised in proceedings under section 62 of the Act. The objection proceeds on the assumption that an application specifically restricted to the dispute contemplated by section 84 (1) is necessary and only in cases where a proceeding was initiated under section 84 (1) that an application under section 84 (2) would lie. It becomes necessary here to bear in mind the language employed by section 84 (1). It says :

> " If any dispute arises as to whether an institution is a mutt or temple, as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board."

The section, in my opinion, clearly enjoins a duty on the part of the Board to decide a dispute of the nature contemplated by the section at whatever stage and in whichever proceedings the dispute was raised. The dispute may be raised in a proceeding under section 62 or otherwise. In all cases, it is imperative on

1. (1947) 1 M.L.J. 202.
2. (1904) 14 M.L.J. 436 : I.L.R. 28 Mad. 127.
3. (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919 (F.B.).

the part of the Board to decide that dispute. A person may raise a dispute independently without the existence of a pending proceeding, by a petition under section 84 (1) ; in such a case also, the dispute has to be settled and decided. When the petitioners raised the dispute under section 62 that the Act did not apply and that the Board had no jurisdiction to frame a scheme, it would be incumbent on the part of the Board to resolve that dispute. That is the reason why the Board was obliged to consider the question of its jurisdiction to proceed further under sections 62 and 63 of the Act. It would be open to the Board, in deciding the dispute raised, to consider the question of the finality of its own order passed on a prior occasion. The fact, that the prior order was left unchallenged and therefore became final, would not preclude the Board from considering now or would not absolve it from its duty to consider the dispute raised. In deciding the dispute the Board may come to the conclusion that its hands were tied by the existence of a prior order which had become final. That does not mean that the Board is precluded from entertaining the dispute, though in its opinion it is bound by its own prior order. I therefore agree with the view of the learned District Judge that the application under section 84 (2) is maintainable.

The learned District Judge has definitely found that there was no " temple " as defined by the Act in existence. The Board in the counter filed in the lower Court did not seriously dispute this position and indeed in view of the notice of 9th May, 1940, which was the foundation for the proceedings *suo motu* taken under section 62, the Board could not dispute that position. Even the Commissioners who considered the question did not find that there was a " temple " as defined by the Act. One Commissioner went to the length of finding, notwithstanding that the idol was not consecrated and installed and the structure was not completed, that there was, what he calls, a notional temple. A temple is defined under section 9 (12) of the Act as follows :—

"Temple means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by the Hindu community or any section thereof as a place of religious worship."

Confining the attention to this definition, the essence of the matter is the existence of a place of public religious worship. In the case of a temple, it becomes a place of public religous worship when the idol was installed and consecrated and the *pranaprathishta* or vivification ceremony was performed. Until then, it is elementary knowledge that the image does not become an object of worship. The deity does not begin to reside in the idol (the visible image) until the consecration or the appropriate ceremony is completed. After the image is completed by the artist, it is brought in procession from the artist's place to the hall of ablution and thenceforward the ceremonies of consecration commence. This applies to *prathishta sthalams*, *i.e.*, to the temples in which the deity is established newly by observing a certain set of rules as opposed to *swayambhu sthalams*, temples in which the idol or the deity is *swayam vyektha* or self-revealed, *i.e.*, the image is not established by the act of men. A description of the ceremonies in the case of *prathishta sthalams* is to be found in Saraswathi's Hindu Law of Endowments (page 109) and in P. R. Ganapathi Ayyar's Religious Endowments (at page 224). Unless and until these ceremonies are gone through, the place where the idol is installed, and the idol itself, does not become a fit object of religious worship. We are not in this case concerned with other places of religious worship where it may be by custom or usage some stone image or wooden image becomes an object of worship. We are concerned only with the coming into existence of the temple as contemplated by the founder, the installation of the idol of Alagarswami and its consecration and performance of *kumbabhishekam* after the completion of the building. In the present case, therefore, there is no place of public religious worship. This aspect of the definition was clearly emphasized by the decision in *H. R. E. Board, Madras* v. *Rugmini*[1], where, at page 638, Beasley, C.J., observed as follows :—

1. (1932) 62 M.L.J. 594 : I.L.R. 55 Mad. 636.

"The definition of a temple in the Act requires it to be a place which is used; and this temple, not only was not used and is not being used, but it cannot be used until it is rebuilt. It has in fact been in ruins for many years. I, therefore, think, that the learned trial Judge was perfectly right in holding that the Board had no jurisdiction with regard to its properties."

The learned Chief Justice pointed out, lower down in the judgment, that the Board had no jurisdiction where the temple clearly is non-existent. It is therefore difficult to hold that when there is no temple as defined in the Act, the Board could have any jurisdiction in the matter. When the Act contains a definition of the word "temple" and when it says, in defining the words used in the Act, that unless there is anything repugnant in the subject or context, the word would have a particular meaning, it is not permissible to adopt the dictionary meaning of the word. It is not suggested—and there is no reason to assume—that in the subject or context there is any repugnancy to justify the adoption of the dictionary meaning of the word in preference to the meaning given to it by the Legislature by the definition of the word in the Act. Adopting therefore the definition of the word as given in the Act, there is nothing in the evidence on record or in any of the orders of the Board which justify the inference that there is any temple or a place of public religious worship, as defined by the Act. The very foundation of the jurisdiction of the Board to apply the Act is the existence of the temple. If it did not exist, the Act ceases to apply. By this, it should not be understood that Venkataswami failed to establish a valid religious charity. According to Hindu religion, the deity always exists and soon after the property is dedicated by an appropriate method, it vests in the deity. By the dedication the property ceases to belong to the owner and vests in the deity, but until the idol is established and consecrated and the *pranaprathishta* is performed, the deity does not begin to reside in the idol so as to make a proper object of religious worship. The jurisdiction of the Board over the endowments or the property dedicated commences only when appropriate ceremonies are performed, the idol is established and the place is made fit for public religious worship. Until then, it has no jurisdiction under the Act to exercise any powers over that property under the Hindu Religious Endowments Act. The trust created by the founder can well be enforced by other appropriate proceedings, but we are concerned in this case only with the jurisdiction of the Board to frame a scheme of administration in the exercise of the powers vested in it under sections 62 and 63 of the Act. The powers can be exercised only if there is a temple in existence in the sense in which it is defined in the Act. I therefore agree with the view of the learned District Judge and Mr. Mannadi Nair that there is no temple in existence.

If there was no temple in existence, does the prior order of the Board under Exhibit R-1 preclude the petitioners from now contending that there was no temple in existence. According to the learned District Judge, as the order under Exhibit R-1 became final, it is not open to the petitioners to contend now that there is no temple in existence. The contention urged on behalf of the appellants is that the order was passed without jurisdiction and that therefore it is a nullity. Is this contention well-founded? An act done by a Court or a quasi-judicial body without any power to do so is null and void. If a Court has no jurisdiction over the subject-matter, its judgment is a nullity and does not require to be set aside. On the other hand, if a judicial body has jurisdiction over the subject-matter and, in the exercise of that jurisdiction, decides a matter erroneously, that adjudication is not void but has to be avoided by an appopriate proceeding such as an appeal preferred against that judgment within the time permitted by law. The distinction, therefore, between the jurisdiction of a Court to try and determine a matter and the erroneous decision of a Court in the exercise of its admitted jurisdiction must be borne in mind. The line of demarcation between an error of judgment and the usurpation of power is that, in the former case, the decision is reversible by an appellate Court and could be thus avoided, while in the latter case, the judgment is an absolute nullity. The decision in *Malkarjun* v. *Narhari*[1],

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1. (1900) 10 M.L.J. 368; L.R. 27 I.A. 216; I.L.R. 25 Bom. 337 (P.C.).

which is very often cited for the position that when the parties are before the Court and present to it a controversy, which the Court has an undoubted authority to decide, the Court has jurisdiction to decide rightly as well as wrongly falls under the category of a mere error of judgment. If the Court has no jurisdiction over the subject-matter of a suit or proceeding, that the parties cannot by their consent confer jurisdiction upon the Court and convert the proceeding into a proper judicial process was settled very early by the Privy Council in the well-known case of *Ledgard* v. *Bull*[1], which was followed in the later case of *Minakshi* v. *Subramanya*[2]. Very often the jurisdiction of a Court or of a quasi-judicial body depends upon the fulfilment of a condition or the establishment of a collateral fact not touching the merits of the case. The power of a Collector to sell an estate under Bengal Act XI of 1859 is dependent upon the condition that the arrears of revenue existed. But if in fact no arrear of revenue was due on an estate, the Collector has no jurisdiction to sell the property and the sale is a nullity. The procedure prescribed by Bengal Act XI of 1859 and Bengal Act VII of 1868 to challenge such proceedings on the ground of irregularity or illegality in the sale proceedings would not preclude the person affected by the sale, when no arrear has existed, from challenging the sale in a civil Court; see *Balkishen Das* v. *Simpson*[3]. Sometimes, the jurisdiction of a Court or a quasi-judicial body is dependent on the establishment of collateral facts. A familiar example of such a case is the jurisdiction of the Revenue Courts to try suits under the Madras Estates Land Act. If the land is in an estate, certain suits have to be instituted only in the revenue Court. If, on the other hand, the land is not part of an estate, the ordinary civil Courts alone would have jurisdiction to entertain suits for relief in respect of such land. Very often, therefore, as a condition precedent for the exercise of jurisdiction, Courts are called upon to decide the question whether the village in which the land is situate and in respect of which a suit was instituted was or was not an 'estate.' The decision of the question whether the village is an "estate" or not depends upon a consideration of facts to be proved by evidence, oral and documentary. For instance, in cases falling under section 3 (2) (*d*) of the Estates Land Act, the Court has to consider the question whether the grant in a given case was of the whole village or not. The decision of this question necessitates usually the consideration of the inam proceedings of 1860 to find out whether the grant was of the nature contemplated by section 3 (2) (*d*). In such cases the decision of the Court on the question whether the village was an "estate" or not is a collateral fact, on the decision of which would depend the forum of the suit. In the case of, what one might call, jurisdictional facts, a Court by a wrong decision upon such facts cannot give itself jurisdiction which it would not otherwise possess. If a civil Court decides that the land is not an "estate", and if that decision is erroneous, the adjudication in the civil Court on the question of fact is not final and can be interfered by the High Court under section 115 of the Code of Civil Procedure as held in *Atchayya* v. *Sri Seetharamachandra Rao*[4]. The point is also illustrated by the case of *Bunbury* v. *Fuller*[5], where at page 140, Coleridge, J., observed :

"suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits ;".

The question, as will be seen, for decision, to settle the jurisdiction of the Court in such a case is whether the matter has occurred within the jurisdiction of a particular hundred or not, which is a collateral fact, collateral in the sense that it does not touch the merits of the case. The collateral fact has to be decided in the first instance. The decision in *Madhavarao* v. *Papayya*[6], establishes that a decision of a Revenue Court, when the land is not ryoti, is without jurisdiction and does not operate as *res judicata*.

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1. (1886) L.R. 13 I.A. 134 : I.L.R. 9 All. 191 (P.C.).
2. (1887) L.R. 14 I.A. 160 : I.L.R. 11 Mad. 26 (P.C.).
3. (1898) L.R. 25 I.A. 151 : I.L.R. 25 Cal. 833 (P.C.).
4. (1912) 24 M.L.J. 112 : I.L.R. 39 Mad. 195 (F.B.).
5. (1853) 9 Exch. 111.
6. (1946) 1 M.L.J. 287 : I.L.R. (1946) Mad. 760.

In the light of these principles, one has to determine whether the order under Exhibit R-1 was passed by the Board without jurisdiction or whether the Board merely committed an error in the exercise of its undoubted jurisdiction. The existence of a temple is a pre-requisite for the applicability of the Act and the exercise of the jurisdiction by the Board. It is in the nature of a collateral fact upon which depends the applicability or otherwise of the Act. As the annexure to Exhibit R-1 was not filed in the case, there is nothing to show that the Board investigated the facts and came to a conclusion on the evidence placed before it that the temple in fact had existed. The statement in Exhibit P-2 that both sides agreed to have the temple declared as an excepted temple, even if it be permissible as secondary evidence of the contents of the annexure, only shows that far from there being an enquiry by the Board, the matter proceeded with the consent of the petitioners and the Board. It is clear from the extract in Exhibit P-2 that what was conceded was not the existence of a temple, but only to have the temple declared as an excepted temple. A temple cannot be declared an excepted temple unless its existence is established in the first instance. The order in Exhibit R-1 goes beyond the concession, assuming that there was one, as it states that Alagar temple is a temple as defined in the Madras Hindu Religious Endowments Act. What is declared by Exhibit R-1 is therefore totally different from what was agreed to by both sides, as stated in Exhibit P-2. If, in fact, there was no material on which the Board could have come to the conclusion that there was a temple in existence at the time, it is impossible to find any basis for the order under Exhibit R-1. Further, this being a collateral fact, the Board cannot by a wrong decision, assuming that there was one, confer upon itself a jurisdiction which in fact did not exist. By consent a jurisdiction cannot be conferred and there is nothing to show that the consent extended to facts establishing the existence of jurisdiction. It is common ground that the temple had never existed.

Under these circumstances, the case does not fall within the principle of the decision in *Malkarjun* v. *Narhari*[1] as the Board had no jurisdiction at all to deal with the matter. It is not as if the Board had undisputed jurisdiction and in exercise of that jurisdiction decided a matter or a controversy placed before it in an erroneous manner. The order, therefore, in Exhibit R-1 is entirely without jurisdiction and is a nullity.

There is also another aspect from which the matter can be viewed. Exhibit P-2 establishes that the very basis on which the proceedings under section 62 were *suo motu* initiated by the Board was that the construction of the temple was not completed, as no steps were taken by the trustees in that direction. This is the basis on which the Board wanted to start the proceedings under section 62. It is not now open to the Board to go behind their own notice and behind the statement of facts in that notice and contend that in fact the temple had existed either in fact or even notionally. If on the face of the notice, the Board has no jurisdiction to initiate proceedings under section 62, the present order of the Board that it has jurisdiction to start an enquiry under sections 62 and 63 of the Act is totally without jurisdiction. It is unnecessary to consider from this point of view the effect of the prior order Exhibit R-1 and its finality. Even if that order had become final and was passed on the footing that the Board had jurisdiction to pass it, it does not affect the present proceedings for the simple reason that the very foundation of the proceedings is the non-existence of the temple. I am therefore clearly of opinion that the present proceedings of the Board are entirely without jurisdiction and that the appeal should be allowed and the order of the Board, dated 2nd May, 1945, in Original Application No. 375 of 1940 must be set aside with costs here and in the Court below.

As my learned brother takes a different view, the matter has to be placed before a third Judge, and for this purpose papers may be placed before the Hon'ble the Chief Justice.

1. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216 : I.L.R. 25 Bom. 337 (P.C.).

Govinda Menon, J.—Under sub-section (3) of section 84 of the Madras Hindu Religious Endowments Act, the appellants who were the petitioners in the District Court of Madura, appeal to this Court against the judgment and decree of the learned District Judge in Original Petition No. 44 of 1946, which was a petition praying that the Court may be pleased to set aside an order, dated 2nd May, 1945, in Original Application No. 375 of 1940, passed by the Board of Commissioners for the Hindu Religious Endowments, Madras. Though the order of the Board of Commissioners aforesaid was stated to be passed in proceedings under section 62 of the Act for the settlement of a scheme of administration for Sri Alagar temple, Thevaram, Periyakulam taluk, Madura district, the appellants herein have construed it as an order passed by the Board under section 84 (1) of the Act and on that basis the present appeal has been preferred.

The Board, by a majority, decided that it has jurisdiction to start an enquiry under sections 62 and 63 of the Act and it is this order that the appellants, construing it as one under section 84 (1), have sought to get modified by the application under section 84 (2) of the Act.

It is necessary to set out in brief outline the events which culminated in the filing of the above petition. One Venkataswami Servai residing in Thevaram in Periyakulam taluk, by a deed of gift, Exhibit R-2, dated 18th March, 1920, endowed and dedicated certain properties in favour of Sri Alagar temple, Thevaram, the construction of which building had been commenced by him before his death. The work was then progressing and his idea was to have the deity, Alagar, installed in the building and to have the *kumbabhishekam* performed after the completion of the building. By the said deed of gift he appointed two other persons along with himself as trustees of the said devasthanam for the conduct of the said charity permanently and without default and for improving the properties which have been endowed as aforesaid. By this document, it is conceded that there had been created a valid trust and dedication in favour of the deity Alagar and therefore the properties vested in the said deity, with the three trustees as managers thereof. The donor Venkatasami Servai died in 1925 and thereafter the other two trustees appointed by him continued as joint trustees. One of them, Kamakshi Servai, died on 1st April, 1931 and was succeeded as trustee by his minor son, the present first appellant. The second of the trustees, Alagar Servai, died on 19th June, 1939, having been succeeded by the second appellant as the joint trustee. But it is to be noted that the construction of the building was not completed and there was neither the installation nor the consecration of the deity, Alagar, in the temple.

In the meanwhile, the respondent Board took steps to collect the contribution which it is entitled to levy under the Act, and for the eight faslis from 1339 to 1346 both inclusive, a sum of Rs. 600 was collected from the trustees. Thereupon, the first appellant filed a petition before the Board in January 1938 praying that the President of the Board may be pleased to hold and declare that the endowment under the deed of trust by Venkataswami Servai was outside the scope of the Act and for an order to refund the sum of Rs. 600, collected from the trustees as contribution. Though the petition does not mention the provision of law under which it is made, the parties rightly proceeded under the belief that the proper provision of the statute applicable was section 84. We see from Exhibit R-1, the order of the Board of Commissioners, dated 27th September, 1938, that the application was treated as one under section 84 of the Act to decide whether the institution in question was a temple as defined in the Act and if so, whether it was an excepted one or not. The decretal order of the Board is contained in Exhibit R-1; but the reasons or the annexure, containing the grounds of the decision have not been placed before the Court by either of the parties. The order, dated 27th September, 1938, is in the following terms :—

"Sri Alagar Temple, Thevaram, Periyakulam taluk, Madura district, is a temple as defined in the Madras Hindu Religious Endowments Act, 1926, and is also an excepted temple."

Thereafter, nothing seems to have been done for sometime, but in 1940, the Board, of its own accord, started proceedings under section 62 of the Act for the settlement of a scheme of administration for the suit temple; whereupon, a preliminary objection was taken that the Board had no jurisdiction to proceed with the framing of the scheme on the ground that the institution in question cannot be said to be a temple as defined in section 9 (12) of the Act and therefore the Act had no application. Two of the Commissioners who heard this objection differed in their opinion, Commissioner III holding that the Board had no jurisdiction to frame a scheme, while Commissioner I held that it had jurisdiction. The matter was taken before a Full Board who by a majority held that the Board had jurisdiction to start the enquiry and pass the order, dated 2nd May, 1945, about which reference has already been made. After that, the appellants filed Original Petition No. 44 of 1946 which has given rise to this appeal, under section 84 (2) of the Act and section 151, Code of Civil Procedure, for setting aside the order of the Board in Original Application No. 375 of 1940, dated 2nd May, 1945. The learned District Judge found that even though the construction of the temple had not been completed and no deity had been installed or consecrated therein, still the Board had jurisdiction to frame a scheme because the previous order of the Board in Original Application No. 58 of 1938, dated 27th September, 1938, holding that the institution in question was a temple as defined in the Act, had become conclusive since no proceedings were taken to modify or set aside that order within the time allowed by law. Upholding the objection taken on behalf of the respondent Board, the learned Judge dismissed the petition and the present appeal is from that order.

At the very outset, it seems to me that the appeal itself is incompetent. The order of the Board holding that it has power to frame a scheme is certainly not a final order but is in the nature of a preliminary order. If, after enquiry, the Board were to hold that no scheme should be framed there is an end of the matter. If, on the other hand, a scheme is settled as provided under section 63 of the Act, then it is open to the trustees or any person having an interest in the institution, within six months from the date of the publication of such scheme, to institute a suit in the Court to modify or set aside such an order (last clause of section 63). Therefore, it is clear that the proper remedy is to file a suit in case the Board decided to frame a scheme, and not an application under section 84 (2) of the Act. Moreover, the proceedings before the Board, being under section 62 of the Act for framing a scheme under section 63, it cannot be said that there was any application by the trustees requesting the Board to exercise its functions under section 84 (1) of the Act, which it had already decided by its previous order, dated 27th September, 1938. It is not pretended that the present application before the lower Court is a suit as contemplated by the last clause of section 63. The petition itself is designated an Original Petition and not an Original Suit since what is contemplated by the last clause of section 63 is a regular suit to modify or set aside an order by which a scheme is settled for the institution. I am therefore of opinion that both the application before the District Judge and the appeal to this Court are incompetent.

One of the arguments advanced by the learned counsel for the appellants is to the effect that when the Board *suo motu* embarked upon the task of attempting to settle a scheme by taking action under section 62 of the Act, a dispute has arisen as to whether the institution in question is a temple as defined in the Act or not and when the Board, as a preliminary issue, decided that question the provisions of section 84 (2) have been immediately attracted and therefore the petition before the lower Court and the present appeal are maintainable. This contention overlooks the fact that already a dispute had arisen and a decision arrived at, which, by not being modified or set aside, has now become final and cannot be questioned. To my mind, it is a fallacious argument to contend that in spite of an earlier decision, every time the appellants contend that the Act is not applicable to this institution, a dispute has arisen as envisaged in section 84. If the earlier decision of the Board

was the outcome of an action entirely without jurisdiction passed by a tribunal incompetent to decide the dispute, then, how is it that the Board is competent to decide it now and how does an application under section 84 (2) lie to the District Court? If the Board is now proceeding upon a course of action unwarranted by law in investigating as to whether the institution is a temple as defined in the Act or not and takes steps to frame a scheme, the proper remedy for the appellants is either to file a regular suit restraining the Board from proceeding further or to approach this Court, if the appellants have any such legal right, for the issue of one of the prerogative writs for preventing the so-called illegal action of the Board. Without resorting to either of the above remedies, the appellants cannot now be heard to say that the later order of the Board is tantamount to a decision under section 84 (1) of the Act and a petition lies to set it aside under section 84 (2). Therefore, on the appellants' own showing, since the order, dated 2nd May, 1935, was passed by the Board in the exercise of its proper jurisdiction, it necessarily follows that the earlier order also stands on the same footing.

But Mr. Muthia Mudaliar, for the appellants, contends that since, admittedly, there is no temple building in existence and no deity installed or consecrated, the institution cannot be a temple as defined in section 9 (12) of the Act or the trust a "religious endowment" as defined in section 9 (11). For this purpose, reliance is placed on *Sri Vythilinga Pandara Sannadhi* v. *Sir T. Sadasiva Aiyar*[1] and the appeal therefrom reported in *H. R. E. Board, Madras* v. *Rugmini*[2]. In the earlier case Kumaraswami Sastri, J., has held that, where there is no temple in existence as a place of worship when the Act came into force, the old temple having fallen into ruins or having been demolished long ago section 84 of the Act does not give the Board any power to call upon the trustees to account for the endowed properties or to direct them to re-build the temple or to apply the income in a particular manner by invoking the doctrine of *cypres* for the purpose of dealing with the income. It was therefore declared the Act did not apply to the properties which originally were dedicated or endowed for a temple which had been demolished or destroyed long prior to the coming into existence of the Act. Beasley, C.J. and Cornish, J., in appeal from the above decision, agreed with the view of the trial udge and held that the Board had no jurisdiction where the temple was clearly non-existent, not temporarily but permanently, and there was no apparent intention of bringing it into existence again. But where it had been temporarily abandoned as a place of worship either on account of its being washed away by flood or submerged or burnt down, in such a case there is no permanent annihilation of the institution and as such the Act would apply to the properties of such a temple. This is clear from the definition of the word "temple" in section 9 (12) to which reference has already been made. In order that the Act should be made applicable, the institution in question should be used firstly, as a place of public religious worship and secondly, dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship. The definition connotes two distinct matters. There should be firstly a place of public religious worship and secondly dedication or user by the Hindu community or any section thereof. It is unnecessary that a building should be in existence; for it is a matter of common knowledge that in many places in South India there are idols being worshipped without a roofing to cover the idol. One is aware of idols in forests or under trees without any roofing. In the present case there is no user of the place for the purpose of religious worship because it is admitted that though an idol is in existence, it has not been installed or consecrated. The creator of the trust, as is seen from the trust deed Exhibit R-2, contemplated the existence of the temple with the deity installed though the building had not been completed, because in more than one place in the document it is clearly mentioned that the dedication is to the deity, in the temple to be built thereafter. Therefore it may be that the contention of the learned Advocate for the appellants that the order of the Board dated 27th September, 1938, is a wrong order on the merits cannot be rejected.

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1. (1928) 55 M.L.J. 605, 612, 613. 2. (1932) 62 M.L.J. 594 : I.L.R. 55 Mad. 636.

The question then arises whether, without setting aside the order, it is open to the appellants to contend that the Board now has no right to take proceedings to frame a scheme. In order to justify such a contention the argument is advanced that the order of the Board evidenced by Exhibit R-1 is *ab initio* void and without jurisdiction, because the Board acted absolutely without any jurisdiction in holding that where there was no public worship, a temple as defined in section 9 (12) exists. Reliance was placed for this contention on *Thiruvengadam* v. *H. R. E. Board, Madras*[1]. The facts of that case were as follows :—

There was a separate charity connected with the Sri Nachiar Temple at Srivilliputhur. Treating it as a specific endowment attached to the temple, the Board levied an annual contribution under section 69 whereupon, the trustee filed a petition under section 84 (2) of the Act before the District Judge for a decision whether the endowment came within the purview of the Act. The District Judge, on the acquiescence of the Board that section 84 applied to such a case, held that the charity did constitute a specific endowment. In spite of this decision the trustee filed a suit in the Sub-Court for a declaration that the charity is a private charity and should not be regarded as a specific endowment. On the Subordinate Judge dismissing the suit holding that the previous order of the District Judge under section 84 (2) was a bar to the suit, an appeal was filed to the High Court. Leach, C.J. and Yahya Ali, J., held that, since the District Judge had no power to pass an order on an application under section 84 (2) because the dispute was not one of the nature referred to in the first sub-section, the suit was maintainable and therefore held that the order of the Subordinate Judge dismissing the suit was not correct. Because section 84 refers only to a mutt or temple as defined in the Act, the learned Judges were of opinion that it had no application to the question as to whether the endowment is a specific endowment to the temple or a private charity, even though the trustees themselves had invoked the powers under section 84 for a decision under that section. It is contended that this decision is in favour of the appellants for the reason that the principle underlying it is to the effect that, where the original decision was one without jurisdiction, even if the parties invited the Court to pass it and acquiesced in such a decision, a subsequent suit is still maintainable. If the circumstances of the present case are exactly similar to those in *Thiruvengadam* v. *H. R. E. Board, Madras*[1], I am bound by that decision. But in my view the facts of the present case are different. That the original donor intended the existence of a temple is clear ; and therefore the question before the Board was whether a temple as defined in section 9 (12) existed or not. The Board had to decide whether such a temple or institution was used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship. It may be that the Board wrongly decided that the place was used as a place of public religious worship. But that would not be sufficient to justify the view that the Board had no initial jurisdiction. The utmost that could be said is that the action of the Board amounted to a wrong exercise of the jurisdiction vested in it, on the merits of the case, and hence such a wrong decision ought to have been set aside by appropriate proceedings under section 84 (2) of the Act, in default of which the order would become final. The question whether a suit can be filed for that purpose has now been set at rest by the amendment of section 84 itself probably as a result of the decision in *Sri Iswarananda Bharathi Swami* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[1]. In my opinion the Board, in passing the order, Exhibit R-1, acted in full exercise of its jurisdiction. I would clarify my view by an illustration. Suppose there is a temple situated in and appurtenant to a residential house which the owner uses as a private temple where members of the Hindu community are not allowed to worship and suppose a dispute arises before the Board that such an institution is one coming within the definition in section 9 (12) and the Board, after enquiry, wrongly decides that it is used as a place of public religious worship

1. (1945) 1 M.L.J. 427 : I.L.R. 1946 Mad. 968.

1. (1931) 61 M.L.J. 117 : I.L.R. 54 Mad. 928.

and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, can it be said that the order of the Board is without jurisdiction? I am of opinion that though the order may be wrong, it is in the exercise of jurisdiction. As I have already pointed out, a building is not a necessary *sine qua non* for the existence of a temple. The point before the Board was whether the temple in existence was one as defined in section 9 (12), *i.e.*, fulfilling the necessary conditions laid down in that definition, in order that it might be a temple as defined in the Act. Where a Court or a tribunal having power or jurisdiction to decide a particular dispute comes to a wrong conclusion, it is difficult to say that such as an order is void. The observations of the Judicial Committee in *Malkarjun* v. *Narhari*[1] have to be applied to such circumstances:

> "The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramalingappa. He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. In so doing, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law."

In this connection, it is useful to refer to the dictionary meanings of the word "temple." In the Concise Oxford Dictionary, at page 1261, the meaning of the word "temple" is given as follows:—

> "Edifice dedicated to service of God; or place in which God resides."

In the New English Dictionary, Volume IX, Part II, the meaning for the word "temple" is given thus:—

> "An edifice or place regarded primarily as the dwelling place or house of a deity. Hence an edifice devoted to divine worship. Historically, the word is applied to sacred buildings of Egyptians, Greeks, Romans, etc., but now to those of Hinduism, Budhism, Confucianism, Taoism, Shudaism, etc."

It seems to me therefore that when the donor endowed the property to the Alagar temple which was being built by him, there was a place which was intended to be used as a place of divine worship and there would have been nothing wrong in characterising that unfinished building as a temple as understood in common parlance. If the Board is invited to decide whether such a temple is an institution coming within the definition of section 9 (12) and accordingly, the Board comes to a conclusion, which is either right or wrong, I fail to see how it can be successfully argued that the Board's action was entirely without jurisdiction and therefore *ab initio* void. To a case like this, the decisions like *Ledgard* v. *Bull*[2] and *Minakshi* v. *Subramanya*[3] have no application, because in both those cases the Courts dealing with the proceedings had no initial jurisdiction and therefore any acquiescence by the parties in the Court's jurisdiction cannot confer a right on it.

It is noteworthy that the appellants herein by their own misconduct, are gaining an advantage which the law cannot countenance. The maxim, *nemo ex suo delicto meliorem suam conditionem facere potest* (No one can better his condition by his own wrong), applies to the facts of this case very well. It is seen from Exhibit P-2 that the landed properties endowed under exhibit R-2 yield roughly an income of nearly Rs. 3,000 annually. In Exhibit R-3, dated January, 1938, the first appellant herein states as follows:—

> "It is only for the last few months that the petitioner has been constructing the temple in which the family deity Alagarswami is to be installed. It will take another two or three years to complete the temple."

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1. (1900) 10 M.L.J. 368: L.R. 27 I.A. 216: I.L.R. 25 Bom. 337, 347 (P.C.).
2. (1886) L.R. 13 I.A. 134: I.L.R. 9 All. 191 (P.C.).
3. (1887) L.R. 14 I.A. 160: I.L.R. 11 Mad. 26 (P.C.).

In the application to the lower Court, dated 11th September, 1946, we find the statement, in paragraph 6, that the temple and the deity had not come into existence even on that date. The donor dedicated the properties as long ago as 18th March, 1920 and he died in 1925. More than a quarter of a century has now elapsed and the trustees have not performed the trust imposed upon them by constructing the temple and installing the deity. In these circumstances can they be allowed to say

> "though we are trustees and are enjoying the income from the trust property we have not yet built the temple and performed the *Prathishta* and therefore the temple has not come into existence and the Board has no jurisdiction ?"

In my view, a statement like that emanating from the trustees carries with it its own condemnation. Therefore, it seems to me that, if the argument on behalf of the appellants is to be accepted the result comes to this, that the appellants are gaining an advantage as a result of their own misconduct. Moreover, if the appellants do not construct the temple at all and if, according to their arguments, section 9 (12) of the Act has no application, then the Board, in my view, cannot even proceed for the settlement of a scheme by resorting to a Court of law under section 73 of the Act. How far section 92 of the Code of Civil Procedure, in such circumstances, would be applicable is really a moot question and as I am not concerned at this stage to give an answer on the applicability of section 92, Civil Procedure Code, I refrain from doing so.

I am therefore of opinion that the decision of the learned District Judge holding that the order Exhibit R-1, since it was not set aside by appropriate proceedings within the time allowed by law, has become final, is right, and if finality is thus attached to it, it is not competent for the appellants to question its correctness now.

The appeal is therefore dismissed with costs. With due and profound respect to my learned brother I regret to find that I cannot agree with his decision and therefore the appeal will have to be heard by another Judge whom my Lord the Chief Justice nominates.

As the two Judges differed, the Appeal was referred to a third Judge, Viswanatha Sastri, J., for opinion.

On the Reference :

S. Muthia Mudaliar for appellant.

M. Chockalingam for respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—This case discloses a divergence of opinion among the legal minds that have been applied to its decision, the Commissioners of the Madras Hindu Religious Endowments Board, the learned District Judge of Mathurai, and two learned Judges of this Court who have differed in their reasoning and conclusions. I need recapitulate only the essential facts.

Venkataswami Servai, a pious Hindu of Thevaram village, Mathurai district, executed a deed of gift Exhibit R-2, dated 18th March, 1920, endowing about twenty acres of nanja lands for the upkeep of "Alagarswami temple now under construction." The deed provided that after the completion of the building by the donor in his village, the deity Alagarswami should be installed therein and kumbhabhishekam (consecration ceremony) performed. Three persons including the donor were constituted trustees under the deed for carrying out these objects, the management of the endowed lands and the conduct of the daily pooja and periodical festivals in the temple. The donor died in 1925 and the other trustees followed suit. To-day things remain where they stood in 1923. The building is yet unfinished, the idol Algarswami, though said to be ready for its reception into the temple, has not been installed and the place could not be used as a place of public worship. The heirs of the two stranger trustees claim to be the present trustees and have been in possession for a long time now of the incomplete building

and the endowed lands yielding a considerable annual income. I agree with Govinda Menon, J., that the conduct of the trustees is blameworthy. They have shown a keen appreciation of the fact that Courts provide but an imperfect instrument for rectification of wrongs and have not evinced any anxiety to fulfil the purposes of the trust. I shall endeavour, however, to disembarrass the case of the prejudice that might arise from their conduct.

The Madras Hindu Religious Endowments Board (hereinafter called the Board) collected a sum of rupees six hundred from the trustees as contribution leviable under the Madras Hindu Religious Endowments Act of 1927 (hereinafter called the Act) on "temples", as defined in the Act. One of the trustees filed a petition in January, 1938 (Exhibit R-3) before the Board, praying the Board.

"to hold and declare that the endowment under the deed of trust of Venkataswami Servai is outside the scope of the Act and to order refund of rupees six hundred collected from the trustees as contribution."

The Board treated the petition as one under section 84 of the Act and passed an order Exhibit R-1, dated 27th September, 1938, in these terms :

"Sri Alagar Temple, Thevaram, Periyakulam taluk, Madura district, is a temple as defined in the Act 1926, and is also an excepted temple."

The annexure to the order of the Board is not in evidence. The trustee appeared by Counsel before the Board when this order was passed. In a later proceeding of the Board (Exhibit P-2) there is a statement that the Counsel for the trustee agreed to have the temple declared an excepted one at the time when the Board passed its order, Exhibit R-1. It is not clear whether Counsel admitted that there was a temple or whether he stated that if the Board decided that there was a temple, it could declare it an excepted temple. Exhibit R-3, the petition of the trustee, had stated that, as there was no temple in existence, the Act did not apply. Be it as it may, matters were allowed to rest there till 1940 when the Board started proceedings for the settlement of a scheme for the "Sri Alagar temple" under section 62 of the Act.

The proceedings for the settlement of a scheme dragged on from 1940 till 1945 and apparently no scheme has yet been framed. The two trustees objected to the jurisdiction of the Board to frame a scheme in respect of a temple which, according to them, had never come into existence. The Board, by a majority of its members, overruled the objection of the trustees by its order Exhibit P-2, dated 2nd May, 1945 and held that it had jurisdiction to frame a scheme. One of the members of the Board, who was of the majority, held that there was a temple, as the founder had intended there should be a temple and had even called the building a temple and endowed it with properties. Another member of the majority (with whom the President agreed) held that the "notional existence of the temple was sufficient for the Board to act," and that since the donor "had laid the foundation of the building" and "given a name to the deity" he had "conceived more or less the temple." That the "conception" did not result in the birth of a temple was a matter of no consequence to him and in his view, "the structure would still be a temple to which the Act applied." Another reason given by the majority—and one that has been canvassed at great length in this Court—was that the Board had, in the exercise of its jurisdiction under section 84 (1) of the Act decided in Exhibit R-1, dated 27th September, 1938, that the institution was a temple and an excepted one, and the said order of the Board, not having been set aside or modified in the manner provided by section 84 (2), had become final and conclusive in the scheme proceedings. After deciding that the institution was an excepted temple, the Board was about to frame a scheme when the trustees started the proceedings which have culminated in this appeal.

The trustees filed Original Petition No. 44 of 1946 on the file of the District Court of Madura under section 84 (2) of the Act to set aside the decision of the Board Exhibit P-2, dated 2nd May, 1945, to the effect that there was here a temple amenable to the jurisdiction of the Board in respect of which a scheme could be

framed. The learned District Judge of Madura, while holding that the temple building was incomplete, the deity had not been installed and the public could not use the place for worship, dismissed Original Petition No. 44 of 1946, on the ground that the prior order of the Board, Exhibit R-1, dated 27th September, 1938, declaring that there was here a temple and an excepted temple, had been allowed to become final and conclusive under section 84 (2) of the Act. The trustees appealed to this Court against the order of the learned District Judge, and Satyanarayana Rao and Govinda Menon, JJ., who heard the appeal, differed on most of the points raised and also about the result of the appeal. As the case is one of some difficulty, it would be convenient to deal separately with each of the points raised by the learned Counsel appearing in the case.

Objection is raised by the Board to the maintainability of Original Petition No. 44 of 1946 in the lower Court under section 84 (2) of the Act. Govinda Menon, J., upheld the objection, but I am unable to agree. The argument for the Board is that its order Exhibit P-1, dated 2nd May, 1945, overruling the objections of the trustees and holding that it had jurisdiction to proceed with the scheme, is an interlocutory order or preliminary decision, analogous to the decision of a preliminary issue in a suit, and it is only if and when a scheme is framed by the Board under section 63 that the trustees have a right of suit to set aside the scheme under section 63, clause (7), of the Act. Govinda Menon, J., holds that if, as alleged by the trustees, the Board had no jurisdiction to declare the institution a temple and an excepted temple, under section 84 (1) when it passed the order Exhibit R-1, dated 27th September, 1938, it had equally no jurisdiction to decide the same question in the later proceedings for framing a scheme and that the proper remedy of the trustees is not to file an application under section 84 (2) of the Act but to file a suit for an injunction against the Board or

"to approach this Court if the appellants have any legal right, for the issue of one of the prerogative writs for preventing the so-called illegal action of the Board."

Apparently the learned Judge was thinking of the writs of *quo warranto* and prohibition and was not reminded of the *Ryots of Garabandho* v. *Zamindar of Parlakimidi*[1]. The remedy by an original suit would not be available to the trustee by reason of the prohibition contained in section 84 (1) of the Act unless the initiation of the proceedings was wholly without jurisdiction. Be this as it may, I consider that the existence of other remedies, if any, did not stand in the way of the trustees claiming an enquiry under section 84 (1) of the Act.

A dispute as to whether an institution is a "temple" as defined in the Act may arise in the course of the numerous proceedings which the Board might claim to initate in respect of temples, in the exercise of the powers conferred upon the Board by the several sections of the Act. Such a dispute may arise in the course of any of the proceedings contemplated by sections 18, 38, 42, 45, 51 to 57, 59, 60, 65, 69, 70, 73, 75-A, 76 and 80. A decision of the dispute as to whether an institution is a temple as defined in the Act might be essential before further action is taken under the above sections by the Board or the Assistant Commissioner, as the case may be. Section 84 (1) is designedly framed in wide terms. When the Board decides a dispute as to whether an institution is a "temple" as defined in the Act, whatever be the nature or stage of the proceeding in which such dispute arises or decision is given, the Board acts under section 84 (1) of the Act. Section 84 (1) does not insist that the dispute should be brought before the Board by means of an independent application or original petition or that the dispute contemplated by the section should be the only matter arising for the decision of the Board. If this view is correct, the remedy under section 84 (2) was open to the trustees to set aside the decision of the Board, given in the course of the proceedings for settling a scheme, that there was here a "temple" as defined by the Act.

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1. (1943) 2 M.L.J. 254: I.L.R. 1944 Mad. 457 (P.C.).

Govinda Menon, J., holds that it could not be said that there was here a dispute of the kind referred to in section 84 (1) of the Act, because that dispute had already been decided by the prior order of the Board Exhibit R-1, dated 27th September, 1938. According to his view, there could be no further dispute about the character of the institution as that had been finally decided by Exhibit R-1. Therefore, he holds that section 84 (1) would not apply to the case. But it must not be forgotten that one of the points debated before the Board in the scheme proceedings was that the prior order of the Board Exhibit R-1 was wholly without jurisdiction and the whole matter was *res integra*. Further a plea of *res judicata* is no bar to the institution of a suit but only a bar to its trial. It is only the decision of a tribunal of competent jurisdiction that is a bar to a subsequent proceeding for the same relief, and the plea of the trustees in the present case is that the Board has no jurisdiction to pass the prior order, Exhibit R-1. It is apparently for these reasons that the Board, in the present case, held that the dispute raised by the trustees was one under section 84 (1) of the Act and gave its decision (Exhibit P-2), dated 2nd May, 1945, holding that the institution was a "temple" in respect of which it was competent to the Board to frame a scheme. Whether the Board decided the dispute by holding a fresh enquiry or by holding that its prior order was conclusive, in either case, it seems to me that there is a decision of the Board under section 84 (1) which attracts the provisions of section 84 (2). For these reasons I hold that the petition to the lower Court was competent.

I am also of the opinion, differing from Govinda Menon, J., that the appeal to this Court was competent. The learned District Judge held that the petition (Original Petition No. 44 of 1946) filed by the trustees to set aside the order of the Board, Exhibit P-1, dated 2nd May, 1945, was maintainable under section 84 (2) of the Act. In entertaining and deciding the petition, he purported to act under and exercised the jurisdiction conferred by section 84 (2) of the Act. Section 84 (3) gives a right of appeal to this Court against every order of the District Judge passed under section 84 (2). Even though the District Judge might have erred in holding that section 84 (2) applied to the case, still, as he purported to entertain and decide the petition in the exercise of the jurisdiction assumed to have been conferred upon him by that section, the right of appeal given to an aggrieved party by section 84 (3) against an order under section 84 (2) is attracted. This is the view that has consistently been taken by this Court. In the leading case of *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*[1] the District Judge, under a misconception of his powers under section 43 of the Guardians and Wards Act, granted an injunction and appointed a receiver in a proceeding to remove a guardian. An appeal would have lain in this Court if the orders had been made under sections 492 and 503 of the Civil Procedure Code of 1882 then in force. This Court entertained an appeal and reversed the orders of the District Judge as having been made without jurisdiction. The objection to the maintainability of the appeal was overruled by this Court in these terms :

> "The fact that the District Judge had no power in this case to pass an order under these sections (sections 492 and 503 of the Civil Procedure Code of 1882) does not bar this Court from treating the order as having been passed thereunder for the purpose of entertaining an appeal against the order, seeing that there is no provision of law under which the judge could pass an order attaching the property or appointing a receiver without such order being subject to appeal."

An order purporting to be passed by a Court of first instance under an appealable provision of law will be open to appeal even though, on the facts, the order is one that should not have been passed under that provision. Authority for this view will be found in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[2] and *Somasundaramma* v. *Seshagiri Rao*[3].

The question that now arises for consideration and on which my learned brethren have differed is as to the effect of the prior order of the Board, Exhibit R-1,

1. (1900) 10 M.L.J. 305 : I.L.R. 23 Mad. 517. (F.B.).
2. (1921) 41 M.L.J. 316: I.L.R. 44 Mad. 919
3. (1947) 1 M.L.J. 292.

dated 27th September, 1938, declaring the institution a temple and an excepted temple. Under section 84 (4) the decision of the Board is final subject only to the result of an application in the District Court under section 84 (2) or appeal to this Court under section 84 (3). No such application was at all preferred in the present case to set aside the order Exhibit R-1. Gonvinda Menon, J., in effect, holds that the Board had jurisdiction under section 84 (1) of the Act to decide whether an institution in question was a temple or not and the decision in Exhibit R-1, right or wrong, had become final and conclusive and could not be re-opened or questioned in these proceedings for framing a scheme. Satyanarayana Rao, J., holds that the existence of a temple was essential to give jurisdiction to the Board to start an enquiry under section 84 (1) of the Act, that there was no temple in this case at the time when the Board passed its order, Exhibit R-1, and that the order of the Board, Exhibit R-1, was one passed wholly without jurisdiction, and therefore null and void. It is a striking proof of the fineness of the distinction between want of jurisdiction and the erroneous exercise of jurisdiction in particular cases, that my learned brethren, while purporting to follow settled principles, have arrived at contrary results.

The expression " want of jurisdiction " is often loosely used to cover a variety of objections to orders or judgments deciding rights of parties. If on the face of the order and a reading of the relevant statutory provisions under which action was taken, the jurisdiction of the tribunal is found to have been ousted, it is a patent defect of jurisdiction and the order of the tribunal will be a nullity. The want of jurisdiction in such a case is patent or apparent, the order being on the face of it " a speaking order " to use the language of Earl Cairns, L.C., in *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.*[1]. The present case does not fall under this category. The order of the Board, Exhibit R-1, is *ex facie* regular and apparently within the ambit and scope of the power conferred on the Board by section 84 (1) of the Act. On the face of the order, it cannot be said that the Board acted outside its jurisdiction.

There may be other cases where the want or defect of jurisdiction is not apparent from the record but is latent, consisting of matters which are collateral or extrinsic to the merits of the case. Objections founded on the personal incompetency of the Judge or the nature of the subject-matter or the absence of some essential preliminary to the enquiry are defects of this type. The Court may not be properly constituted, the judge or a member of the Court being disqualified. Jurisdiction over the subject-matter may not have been given or might have been taken away. Such objections, if substantiated, would render the decision one passed without jurisdiction. The observations of Sundara Ayyar, J., in *Atchayya* v. *Sri Seetharamachandra Rao*[2] that, if a Court, by an error of law in deciding whether it had jurisdiction, exercised jurisdiction not vested in it, the High Court's power to interfere under section 115 cannot be objected to on the ground that the Court had jurisdiction to decide whether it has jurisdiction or not, had reference to this class of cases. The decision in *Madhavarao* v. *Papayya*[3] is another illustration of this class of cases. In this case it was held that decrees of revenue Courts, both original and appellate, decreeing rent in favour of a landholder were without jurisdiction and nullities, as the land in respect of which rent had been decreed was not ryoti land, that being a condition precedent for the exercise of jurisdiction by revenue Courts. The general rule is that

> " no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends " ;

per Coleridge, J., *Bunbury* v. *Fuller*[4] cited by Blackburn, J., with approval in *Pease* v. *Chaytor*.[5]

1. (1878) 4 A. C. 30, 40.
2. (1912) 24 M.L.J. 112 : I.L.R. 39 Mad. 195, 207 (F.B.).
3. (1946) 1 M.L.J. 287 : I.L.R. 1946 Mad. 760.
4. (1853) 9 Ex. 111.
5. (1863) B. & S. 620 : 122 E.R. 233.

Unless forced to that conclusion by the express language of an enactment, Courts will not countenance the view that a body of limited jurisdiction can, by an erroneous decision of its own, extend its jurisdiction. Satyanarayana Rao, J., holds that the present case falls under this category.

There is a third class of cases where the objection to an order is that

"the judge has erroneously found a fact which though essential to the validity of his order, he was competent to try. This objection proceeds on the assumption that, having general jurisdiction over the subject-matter, he properly entered upon the enquiry but miscarried in the course of it." *The Colonial Bank of Australasia* v. *William*[1].

It is in connection with this class of cases that the oft-quoted observation of the Judicial Committee in *Malkarjun* v. *Narhari*[2] repeated in *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury*[3] that a Court has jurisdiction to decide rightly as well as wrongly, applies. Where a Judge decides an issue or convicts a man without evidence or misconstrues a statute or misconceives a point of law in the course of reaching his decision, he could not be said to have acted without jurisdiction. If the Court has gone wrong in such matters, the remedy of the aggrieved party is by way of appeal from the erroneous order, if the statute provides an appeal. Otherwise, the decision, however wrong, cannot be disturbed or questioned in subsequent proceedings. The error, however serious, does not amount to an usurpation of jurisdiction and the decision cannot be ignored as a nullity or impeached or re-opened in collateral proceedings. The respondent-Board maintains that the present case falls within this last category.

There have been instances where, by statute, jurisdiction has been conferred upon a tribunal not conditionally upon the existence of a state of things, but it is left to the tribunal itself to decide the question whether or not the state of things exists, as part of the jurisdiction conferred upon it. The distinction between the two types of cases is well brought out in the following passage from the judgment of Lord Esher M. R. in *The Queen* v. *Commissioners for the Special Purposes of the Income-tax*[4] :—

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more . . . . . . In the second of the two cases, I have mentioned, it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends . . . . ."

This statement of the law has been approved by the Judicial Committee in *Rex* v. *Nat Bell Liquors, Ltd.*[5], and followed in *Rex* v. *Bloomsbury Income-Tax Commissioners*[6]. If a tribunal is given jurisdiction to embark upon an enquiry and also decide the preliminary, extrinsic or collateral facts which related to its jurisdiction, then, its decision on such matters though erroneous, will not render its ultimate decision devoid of jurisdiction. The error is a matter for correction by way of appeal or otherwise as the statute may provide just like an error affecting the decision on the merits of the case.

The facts, on which the presence or absence of jurisdiction turns, may themselves be such as can only be determined as part of the general enquiry and in such cases, the question of jurisdiction does not depend on the ultimate view

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1. (1874) L.R. 5 P.C. 417, 443.
2. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216 : I.L.R. 25 Bom. 337 (P.C.).
3. (1949) 2 M.L.J. 6 : L.R. 76 I.A. 131 (P.C.).
4. (1888) 21 Q.B.D. 313.
5. (1922) 2 A.C. 128, 151.
6. (1915) 3 K.B. 768.

of the Court as to the truth or otherwise of the facts investigated. To find out whether such a large and extended jurisdiction of this type has been given to the Board, the scheme of the Act and the terms of section 84 have to be carefully examined. Unless the jurisdiction to decide the preliminary facts or extrinsic and collateral matters which must exist before the Board decides a dispute under section 84 has also been given to the Board, it will be usurping jurisdiction if, by erroneous decision on these preliminary facts or extrinsic and collateral matters, it proceeds to decide the merits of the dispute.

In the light of these principles, I shall examine the provisions of the Act and consider the effect of the order of the Board, Exhibit R-1, declaring the institution to be a temple and an excepted one. I may at once point out that the only point now open to the appellants is whether the order was passed without jurisdiction. Its soundness in law or on the facts is not a matter that can be canvassed in these proceedings. It is only if Exhibit R-1 is held to be an order passed without jurisdiction, the matters purporting to be decided by it can be considered afresh by the Board in the proceedings for framing a scheme or by the Court in this appeal. The language of section 84 is wide and comprehensive to the effect that, if any dispute arises as to whether an institution is a temple as defined in the Act, such dispute shall be decided by the Board. The aggrieved party is given a remedy by an application to the Court under section 84 (2) and an appeal to this Court under section 84 (3), as amended in 1946. Subject to the result of such application or appeal, the decision of the Board is final. The ordinary original jurisdiction of Civil Courts to try such disputes was held to be barred by implication in *Iswarananda Bharathi's case*[1] and is now expressly barred by section 84 (1) as amended in 1946. As I have already pointed out, a dispute of the kind mentioned in section 84 (1) might arise in the course of very many proceedings contemplated and authorized by the Act and whatever be the nature or stage of the proceedings in which the dispute arises, the Board is empowered, and indeed required, to decide the dispute. The only preliminary fact or condition that must exist in order to attract the Board's jurisdiction is the existence of a dispute as to whether an institution is a " temple " as defined in the Act. The enquiry by the Board must extend to, and indeed begin with, a consideration of the question whether the institution with reference to which the dispute has arisen is a temple or not. The decision of the Board as a result of the enquiry might be that there is a temple as defined in the Act or there is not. In either case, its order, right or wrong, will be within its jurisdiction and not outside it.

The view of Satyanarayana Rao, J., is that no temple was in existence in 1938 when the Board passed the order Exhibit R-1 and as the existence of a temple, in the usual and accepted sense of that term, was an essential pre-requisite to give jurisdiction to the Board under section 84 of the Act, its order, Exhibit R-1, was one passed without jurisdiction. It would be a strained construction of section 84 to say that it merely empowered the Board to declare that a temple was a temple or that a temple admitted to be such, was a temple as defined in the Act. When the Board decided in Exhibit R-1 that there was " a temple " as defined in the Act, it decided that the institution was a temple. If the matter were *res integra*, I would hold with Satyanarayana Rao, J., that in spite of the several features adverted to by the Board, there was here no temple according to ordinarily accepted notions. But this question had to be and was decided, though erroneously, by a tribunal competent and empowered by the Legislature to decide it, and the decision of that tribunal has been allowed to become final by the inaction of the trustees. Its correctness is, therefore, no longer open to question.

It is common knowledge that there are in this Presidency many institutions of a mixed character, whose exact place among religious and charitable foundations is likely to be a matter of doubt or dispute. There are some samadhis or tombs

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1. (1931) 61 M.L.J. 117 : I.L.R. 54 Mad. 928.

and sepulchres of holy men, where an image of Siva is usually installed and worship, regular or occasional, is offered. Some of them have come to be considered as public temples by reason of the sanctity of the persons interred. There are private mausoleums where idols are installed and pooja offered, but which are not temples or temples as defined in the Act, because the public either do not care or are not allowed to worship at such places; *Draiviasundaram* v. *Subramania*[1], *Veluswami Goundan* v. *Dandapani*[2]. There have been cases where memorials erected originally in honour of heroes or martyrs have developed into places of public worship and have been declared to be public temples; *Board of Commissioners for the H. R. E., Madras* v. *Narasimham*[3]. There are institutions like *bhajana matams* where pictures or idols of gods of the Hindu pantheon are kept, the public congregate daily or on stated occasions, sing the praise of God and receive *prasadams*. There are institutions loosely called mutts which, however, are private buildings in which householders, belonging to particular sects or following particular tenets, live with their families. A so-called mutt may merely be the residence of a *sanyasi* or *paradesi*. There are also endowed mutts which are public institutions established for propagating particular systems of religious philosophy, presided over by an ascetic head. There are choultries resorted to by the public, where images of Gods are installed and daily worship offered. There are also endowments of immovable property and cash for institutions of the foregoing types. There are foundations, of which it is difficult to say whether they are temples or mutts at all and whether they are temples or mutts as defined in the Act. If with reference to institutions of this kind, a dispute arises as to whether they are temples or mutts as defined in the Act, the Board is empowered, and indeed the duty is cast on the Board by section 84 to enquire into and decide this dispute. If on enquiry the Board decides that the institution in question is not a temple or a mutt, its decision will be final, subject to the result of an application and an appeal under section 84 (2) and (3) of the Act. Its decision cannot be considered to be one rendered by a tribunal without jurisdiction merely because it turned out as a result of the enquiry that there was no mutt or temple. The same result would follow a decision of the Board that there was an institution answering the description of a temple or mutt as defined in the Act. Though the Act applies only to temples and mutts which are public institutions and though the jurisdiction of the Board does not extend to private temples or mutts which are not of the type defined in section 9, clauses (7) and (12) of the Act, still, the Board is, in my opinion, empowered by section 84 to decide on the true character of these institutions as a preliminary to its exercising the other powers conferred by the Act in respect of "temples" and "mutts". In my opinion, the whole scheme of the Act and the language of section 84 (1) bring this case within the category of cases referred to by Lord Esher, M. R., in *The Queen* v. *Commissioner for Special Purposes of the Income-Tax*[4] and in this case, the Legislature has entrusted the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. It is an erroneous application of the formula to say that in such a case the tribunal cannot give itself jurisdiction by wrongly diciding certain facts to exist because the Legislature gave it jurisdiction to determine all the facts including existence of the preliminary facts on which the further exercise of its jurisdiction depends. If this reasoning is correct, it cannot be said that Exhibit R-1 was an order passed without jurisdiction. The appellants, however, have relied strongly upon a decision of this Court in *H. R. E. Board, Madras* v. *Rugmini*[5] in support of their contention and my learned brother Satyanarayana Rao, J., has also placed considerable reliance on this decision to support his conclusion. In that case, Kumaraswami Sastri, J., sitting on the Original Side of this Court, passed a decree declaring that the Act did not apply to the properties endowed for a temple which had disappeared long before the Act came

1. (1945) 1 M.L.J. 328 : I.L.R. 1945 Mad. 854.
2. (1946) 1 M.L.J. 354.
3. (1939) 1 M.L.J. 134.
4. (1888) 21 Q.B.D. 313.
5. (1932) 62 M.L.J. 594 ; I.L.R. 55 Mad. 636.

into force and granting an injunction restraining the Board from exercising any of the powers confrerred by the Act in respect of that endowment; *Sri Vythilinga Pandara Sannadhi* v. *Sir T. Sadasiva Ayyar*,[1]. This decree was was affirmed by Beasley, C.J., and Cornish, J., in *H. R. E. Board, Madras* v. *Rugmini*[2]. The learned Chief justice referred to the fact that the temple in question had been in ruins for many years, that there was no prospect of its reappearance and that it was not used and could not be used as a place of public worship as contemplated by section 9 (12) of the Act. He also held that the Board had no jurisdiction over the endowments of a temple where the temple itself was clearly not in existence, not temporarily but permanently and there was no apparent intention of bringing it into existence. He added, however, a qualification of this proposition in these terms :—

> "The difficulty, however, is in laying down that the building of the temple must actually exist in order to give the Board jurisdiction as cases can be imagined where clearly the Board should and must be intended by the legislature to exercise its control."

By way of illustration, the case of a temple temporarily submerged by a flood was mentioned. There might be other cases as well. There have been cases where the imgage of the deity is periodically set up and destroyed. Section 9 (11) of the Act has been amended in 1946 so as to nullify the effect of the decision in *Hindu Religious Endowments Board, Madras* v. *Rugmini*[2]. The passage from the judgment quoted above does not suggest that in the view of their Lordships who decided that case, section 84 of the Act was confined in its application to institutions admitted or conceded to be temples. The Hindu law recognizes the validity of dedications for the establishment of a deity and the maintenance of its worship. It is immaterial that the image of the deity has not been established before a gift or bequest is made for it. The decision in *Thiruvengadam* v. *H. R. E. Board, Madras*[3] relied upon by the appellants has no bearing on the question now under consideration. Section 84 of the Act, as it stood before its amendment in 1946, did not empower the Board to decide a dispute as to whether any property endowed was a specific endowment as defined in the Act or a mere private charity and its decision on this question was held to be one given without jurisdiction. Section 84 has since been amended in 1946 by the insertion of clause (*c*) in sub-section (1) so as to give the Board jurisdiction to decide such disputes as well.

It is next contended by Mr. Muthiah Mudaliar that there there is no "institution" in this case so as to attract the operation of section 84 (1), the institution, according to him, coming into existence only if and when the building is completed and the idol installed and consecrated in the manner prescribed by the *Agama Sastras*, and described by Satyanarayana Rao, J., in his judgment. Consecration according to the ceremonial rites prescribed by the *Agama Sastras* is not a legal requisite, though it is a sacerdotal necessity according to the views of the orthodox. The test is not whether the installation of an idol and the mode of its worship conform to any particular school of *Agama Sastras*. If the public or that section of the public who go for worship consider that there is a Divine presence in a particular place and by offering worship at that place, they are likely to be the recipients of the bounty or blessings of God, then, you have got the essential features of a temple as defined in section 9, clause (12) of the Act. The presence of an idol, tough an invariable feature of Hindu temples, is not a legal requisite under the definition of a temple in section 9, clause (12) of the Act. The word "institution" which is used in section 84 (1) of the Act is a term of very wide import, capable of different meanings according to the context in which it is used. It means, among other things, a foundation, a system, a constitution, an establishment, or organization, a place designed for the promotion of some religious, charitable or other object of public utility and so on. In this case, the place for the construction of the temple had been fixed, the building had been substantially erected though not completed, the idol was ready to be installed,

1. (1928) 55 M.L.J. 605.
2. (1932) 62 M.L.J. 594 : I.L.R. 55 Mad. 268.
3. (1945) 1 M.L.J. 427 : I.L.R. 1946 Mad. 636.

properties had been endowed and trustees appointed for the conduct of the worship and the management of the properties. The Board had jurisdiction to decide the preliminary fact, whether there was an institution within the meaning of section 84 (1) and whether it was a temple as defined in the Act. It decided in the affirmative in its order Exhibit R.-1 dated 27th September, 1938. Its decision has not been set aside in the only manner permitted by law and has now become final and binding on the trustees. Merely because I would have come to a different conclusion from the Board, I cannot treat the order of the Board as null and void.

The learned Advocate for the appellants boldly suggested that the Act would be *ultra vires* if such a wide interpretation were to be put on section 84 (1), but he did not support his contention by any reasons, evidently because he had no faith in it. It was next urged that it could hardly have been the intention of the Legislature to invest the Board with such wide and sweeping powers as are claimed by it. In theory, it may be objectionable to make a body invested with limited jurisdiction a judge of the question as to whether the subject of enquiry is within its jurisdiction or not. In spite of forensic protests, the legislative practice of substituting for the jurisdiction of the Court that of a specially constituted tribunal has become increasingly frequent both here and in England and, in such cases, the Court is concerned only with the question whether the tribunal has acted within its jurisdiction. It must, however, be pointed out that section 84 (2) and 84 (3) of the Act provide ample and adequate remedies by way of an application to the District Court and an appeal to this Court for the correction of an erroneous decision of the Board.

Though I have reached the same conclusion as my learned brother Govinda Menon, J., I have travelled by a different route. I have also differed from the conclusion of Satyanarayana Rao, J., for whose opinion I have unfeigned respect. The case is also one of some difficulty and importance. For these reasons I have stated at length the considerations which have compelled me to the conclusion that I have formed.

Following the precedent in *Dasureddi* v. *Venkatasubbammal*[1], the appeal will be posted before the Bench for orders being passed in accordance with the opinion of the majority of the Judges who have heard the appeal.

The appeal on coming for final hearing before the Court, Satyanarayana Rao and Govinda Menon, JJ., after expression of opinion by Viswanatha Sastri, J., the Judgment of the Court was delivered by

Satyanarayana Rao, J.—Following the opinion of the third Judge, the appeal has now to be dismissed with costs. The learned Advocate for the appellants now states that he mentioned some other points when the appeal was argued in the first instance before us and that he should have an opportunity now to argue and develop those points. We have dealt in our judgments with the points that were urged before us and argued at length. Even at the time when our judgments were delivered on 18th February, 1949, the learned Advocate for the appellants did not draw our attention to the fact that there were other points, which he mentioned at the time of the arguments and which we omitted to consider in our judgments and that, at any rate, he should have a further opportunity to argue those points. In those circumstances, we think we are not justified in re-opening the hearing of this appeal at this distance of time and giving a further opportunity to the appellants' learned Advocate to further argue the appeal.

V.S. *Appeal dismissed.*

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1. (1933) 67 M.L.J. 721 : I.L.R. 57 Mad. 979.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BALAKRISHNA AYYAR.

Arunachala Naicker .. *Appellant* *

v.

Ghulam Mahmood Saheb .. *Respondent.*

Transfer of Property Act (IV of 1882), section 106—Scope of.

Where not merely did the parties intend that the period of notice should be one month, but also that the one month's notice could be given at any time, there is a contract to the contrary as contemplated by section 106 of the Transfer of Property Act.

Where the lessee was allowed to extend his cultivation according to his own pleasure and at his convenience and except as to rent the parties intended to be governed by the original contract, then it would follow that only one month's notice was necessary and the lessor could give that month's notice at any time he chose.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Ayyar, J., dated 21st January, 1948, in C. C. C. A. No. 78 of 1946, preferred against the decree of the City Civil Court, Madras, dated 20th August, 1946, in O.S. No. 283 of 1945.

C. R. Krishna Rao for Appellant.

S. Balasingam Satyanadar and *N. C. Rangaswami* for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—On the 4th August, 1917, the parties entered into a contract, Exhibit P-1, whereby the appellant took on lease a small plot of land from the uncle of the respondent for two years on a rent of Rs. 2 a month. The land is said to have been lying waste at that time and the appellant desired to cultivate a garden there. One of the material terms of the lease was :

"Besides this, if you, after the expiry of the said stipulated period, send me a notice giving one month's time I shall vacate the said land and deliver to you possession thereof."

After the expiry of the lease, the appellant continued in possession ; but from time to time the lessee seems to have extended the area of cultivation. After the death of the lessor in 1932, the legal representatives of the lessor, some time in 1936, thought that in view of the extended area then under cultivation, the lessee should pay an increased rent. This the lessee was willing to do. At first he paid Rs. 36 per annum, later Rs. 48, and eventually, as time went on, Rs. 100 which was the rent in force at the time when the suit was brought. From the 4th July, 1939 onwards notices were sent to the lessee by the legal representatives of the original lessor terminating the lease. Replies were sent by the lessee that he was unwilling to quit the land ; and so this suit was filed in 1945.

The suit was resisted on two grounds : the first was that under section 106 of the Transfer of Property Act the lessee was entitled to six months' notice, since the land had been leased for agricultural purposes, and the second was that the period of notice should expire with the year of the tenancy. Both these points were found against the defendant by the trial Court. The appeal of the lessee to this Court was dismissed by Chandrasekhara Ayyar, J. This Letters Patent Appeal has thereupon been filed by the lessee.

A contract to the contrary within the meaning of the words in section 106, Transfer of Property Act, was certainly entered into by the parties by Exhibit P-1. It is argued by Mr. C. R. Krishna Rao for the appellant that section 106 requires not only a contract to the contrary with regard to the period of notice, but also with regard to the expiry of the notice. It seems to us that when there is a contract governing the question of notice, we must read that contract in a reasonable way to ascertain what the parties intended by way of notice and not try to read into the contract some term that would have to be implied only if there were no contract.

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*Letters Patent Appeal No. 28 of 1948. 24th March, 1950.

It seems to us reasonable to conclude from the passage set out in the opening paragraph that not merely did the parties intend that the period of notice should be one month, but also that the one month's notice should be given at any time.

A further question argued is whether on the pleadings and the evidence, it would appear that the lessee was holding over from month to month or whether, as contended Mr. Krishna Rao for the lessee, that from time to time fresh contracts were entered into between the legal representatives of the original lessor and the lessee. It is contended that all the evidence points to the conclusion that the parties had no intention of regulating their new relationships by the terms of the original lease; but they entered into oral agreements from time to time in which the only term was the rent to be paid for the extent of the land then cultivated. If so, then the provisions of section 106, Transfer of Property Act, would supply other implied terms. As a part of this question, we have been invited to consider the question whether the parcels of land brought under cultivation from time to time were accessions within the meaning of section 108, Transfer of Property Act. If so, then the question before us would be fairly simple one; because the terms of the lease would govern in entirety the relationship between the parties up to the date of suit. It is argued that the land brought under cultivation from time to time could not be regarded as a mere accession, leading to the inference that the parties were to be governed by the original contract; for it is clear that from time to time, the parties did enter into fresh relationships and agreed that the rent should be increased as the area brought under cultivation by the lessee increased.

There is a great deal to be said for the appellant's contention that fresh contracts were entered into from time to time; but we do not think that the position of the lessee would thereby become any stronger. The pleadings and the correspondence between the parties lead to the conclusion that the only discussion entered into between the parties from time to time was with regard to the amount of rent to be paid and that otherwise they intended that their legal relationship should be governed by the terms of the original contract. It is true that what was originally a monthly rental became in time a yearly rent; but as the learned trial Judge pointed out, that may have been merely a matter of convenience. The earliest of the new rents was Rs. 36 a year, obviously calculated on a monthly rent of Rs. 3 instead of the original Rs. 2. The next increase of rent was, we understand, to Rs. 48, *i.e.*, Rs. 4 a month. It is true that the present rent is Rs. 100 a year; but during the course of the many years upto the time of the filing of the suit in 1945, the parties had become accustomed to thinking in terms of an annual rent rather than a monthly rent. There does not seem to have ever been any agreement as to the extent to be cultivated. The land around the cultivated area was waste. The lessee was allowed to extend his cultivation according to his own pleasure and at his own convenience, the rent being fixed from time to time with regard to the actual extent then cultivated. If, except as to rent, the parties intended to be governed by the original contract, then it would follow that only one month's notice was necessary and that the lessor could give that month's notice at any time he chose.

The appeal is dismissed with costs.

The case having been set down for being mentioned this day, the Court made the following

ORDER.—A request has been made on behalf of the defendant that since he is now an elderly man aged 62 years, very much attached to the land on which he has spent much thought and energy during the past 33 years, he should be allowed at least one year to accustom himself to the idea of leaving the land. The plaintiff is willing to allow him to continue in possession for a year from this date, provided that from 1st March, 1950, he pays mesne profits at the rate of Rs. 250 per annum from that date until he quits the land. He will of course have to pay the arrears of mesne profits at the old rate of Rs. 100 per annum upto 1st March, 1950.

V. P. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO, AND MR. JUSTICE PANCHAPAKESA AYYAR.

Goli Paddaraju and others .. *Appellants* *

v.

Mattapalli Raju and another .. *Respondents.*

Mortgage—Suit on—Preliminary decree—Final decree and sale—Appeal against preliminary decree—Subsequent decision in the appeal—Whether sale void in the circumstances.

On the question whether a sale held in execution of a final decree in a mortgage suit would be void if subsequently, in an appeal filed against the preliminary decree, the final decree was modified, though the said modification did not affect the right of the mortgagee to proceed against the properties concerned,

Held: that where subsequent to the sale the preliminary decree was only modified in regard to the order prescribed for sale of the different items and even that modification only gave relief to certain of the defendants who did not question the sale, the sale would be valid and binding on all the parties.

Case-law reviewed.

Appeal against the order of the Court of the Subordinate Judge, Kakinada, dated 3rd October, 1945, in E.A. No. 15 of 1941, in O.S. No. 31 of 1926.

V. Parthasarathi for Appellants.

G. Balaparameswari Rao for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—The mortgagors are the appellants. The history of this litigation is found in the judgment of Wadsworth and Patanjali Sastri, JJ., in A.S. No. 463 of 1941. It is not necessary to restate the facts as they have been fully stated in that judgment. It will be enough if we notice the relevant facts sufficient for disposing of this appeal. The respondents obtained a preliminary decree on two mortgages on 17th August, 1928, against the appellants and others. The final decree was passed on 16th September, 1929. Defendants 3 and 15, who are the purchasers of portions of the hypotheca, preferred an appeal to the High Court, being A. S. No. 33 of 1929. That appeal was disposed of on 8th December, 1933. The preliminary decree was modified in some respects. Whereas under the decree of the Subordinate Judge, all the mortgaged properties were directed to be sold in the order mentioned in the mortgage deed, in the appeal the High Court directed that the properties purchased by defendants 3 and 15 should be sold last. With this modification the appeal was dismissed. Before the appeal against the preliminary decree was disposed of, the final decree was executed and the decree-holder purchased the properties, and the decree was satisfied in part. The decree-holder filed application No. 5 of 1937, on 8th December, 1936, for the passing of a fresh final decree, while the judgment-debtors filed an application under Madras Act IV of 1938 for scaling down the decree debt. For tactical purposes the plaintiffs obviously withdrew their application, and the application was accordingly dismissed. In the application filed by the judgment-debtors for scaling down the decree debt, it was scaled down. The plaintiffs preferred an appeal to the High Court, being A. S. No. 463 of 1941. The learned Judges held that the amount due under the decree after giving credit to the amounts realised by the sale of the properties should be scaled down. When the mortgagors brought to the notice of the Court that they had filed an application in the lower Court for restitution of the properties sold, the learned Judges reserved the right of the mortgagors to proceed with that application. After the disposal of A. S. No. 463 of 1941, the restitution application was taken up and the learned Subordinate Judge dismissed the same. The mortgagors have preferred the above appeal.

The only question that arises in the appeal is whether a sale held in execution of a final decree would be void if subsequently, in an appeal filed against a preliminary decree, the final decree was modified, though the said modification did not

* A.A.O. No. 174 of 1946. 22nd March, 1950.

affect the right of the mortgagee to proceed against the properties concerned. The learned counsel for the appellants contended that in a mortgage action there can be only one final decree, that when in the appeal against the preliminary decree the appellate Court modified the preliminary decree, the final decree lost its legal force, that the sale held pursuant to the final decree was void and therefore that the judgment-debtors would be entitled to a restitution of the properties so sold leaving the mortgagees to work out their rights by filing a fresh application for the passing of the final decree. This argument was based upon some observations made by the Judicial Committee and by the High Courts in the various decisions cited before us. In *Jowad Hussain* v. *Gendan Singh*[1], the question for consideration was whether the time for filing an application for the passing of the final decree should be computed from the date of the appellate decree or from the date of the original decree. The Judicial Committee held that the period of limitation would run from the date of the appellate decree, though the appellate decree only confirmed the original decree. In the course of the judgment they expressed their approval of the view of the Allahabad High Court in the decision in *Gajadar Singh* v. *Kishan Jiwan Lal*[2], to the effect that a mortgage action contemplates the passing of only one final decree in a suit for sale upon a mortgage. The Patna High Court in another decision, *Somar Singh* v. *Deonandan Prasad Singh*[3], held that an application for enforcing a final decree for sale in a mortgage suit was an application for execution and was governed by Article 182 and not by Article 181 of the Indian Limitation Act. This view is not sound in view of the later decisions. At page 787 the learned Judges say—

> "In the case now before us the final decree for sale which was made on the 28th October, 1922, during the pendency of the appeal, against the preliminary decree was clearly imperilled by the appeal, and the decree made by the High Court on the 29th October, 1925, clearly supplemented and completed the decree on the 28th October, 1922."

The observation does not touch the question to be decided in this case. Whenever an appeal is filed against the decree of an original Court, certainly it is imperilled, as the appellate Court may modify, confirm or allow the appeal and the decree of the lower Court is necessarily subject to the decision of the appellate Court. The observations of the learned Judges in *Jankidas* v. *Sheoprasad*[4], were also pressed into service by the learned counsel. The question in that case was whether an appellate Court had power to stay execution of a final decree although no appeal was filed from the preliminary decree. In the course of that judgment they observed—

> "It cannot be denied that any interference with the preliminary decree in the appeal therefrom would have the effect of the final decree being vacated, and that if execution of the final decree is allowed to proceed, rights may come into existence before the disposal of the appeal from the preliminary decree."

It is no doubt true that if a preliminary decree is modified, to that extent, the final decree will have to be modified, as otherwise the final decree will be inconsistent with the preliminary decree. The wide observations made by the learned Judges in connection with a different argument cannot be utilised in support of an argument which was neither raised nor considered by the Court in that case. In *Talebali* v. *Abdul Aziz*[5], the learned Judges held that an appeal from a preliminary decree was not incompetent if a final decree was made before the appeal was presented. The observations relied upon are found at page 1038—

> "In my judgment, the final decre · ı-, in its nature, dependent and subordinate because it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon."

These observations need not be questioned. But at page 1039 they also observed—

> "I would add that when a preliminary decree is set aside, the final decree is superseded, whether the appeal was brought before or after the passing of the final decree and that, in my judgment, an appellate Court, when setting aside or varying a preliminary decree, can, and indeed should give

1. (1925) 51 M.L.J. 781 : L.R. 53 I.A. 197 : I.L.R. 6 Pat. 24 (P.C.).
2. (1917) I.L.R. 39 All. 641 (F.B.).
3. (1927) 6 Pat. 780.
4. (1931) I.L.R. 54 All. 344.
5. (1929) I.L.R. 57 Cal. 1013.

directions for the setting aside or varying of the final decree, if the existence of the final decree is brought to its notice, as in all cases it ought to be."

These observations indicate that the proper modifications can be embodied in the final decree if in an appeal against the preliminary decree the original decree was varied. In *Periakaruppan* v. *Venugopal*[1], a Bench of this Court had to consider the scope of a decree of the appellate Court in appeal against the preliminary decree. The facts in that case are that a preliminary mortgage decree was passed on 4th May, 1929. A final decree was passed on 23rd September, 1933. On 26th November, 1934, in the appeal against the preliminary decree, the decree amount was reduced. No fresh final decree was passed. The decree-holder filed two execution applications for executing the final decree passed on 23rd September, 1933, and on 31st March, 1942. Along with the second execution application, he filed an application for amendment of the execution petition by substituting the amount awarded by the appellate decree in place of the amount awarded by the final decree of 23rd September, 1933. The District Judge allowed the amendment and directed execution to proceed. It was argued that the application was barred by time. In dealing with that question, the learned Judges made the following observations :

" If this function of a final decree for sale is borne in mind it becomes clear that on principle there ought not to be any distinction between a case of an affirmance and a case of variation of the preliminary decree by an apellate Court. The final decree passed in the case, if it was passed before the disposal of the appeal against the preliminary decree, would in our opinion automatically operate on the preliminary decree as affected by the decision of the appellate Court. It might be affected to a greater or lesser decree. The alterations which may be necessary, if they have to be made formally in the final decree already passed, would be practically the same whether the appellate decree is one of affirmance or of variation."

In this case when the properties were sold, the final decree was in force. Subsequent to the sale the preliminary decree was only modified in regard to the order prescribed for sale. Even that modification only gave relief to defendants 3 and 15. The said defendants are not now questioning the sale of their properties. The preliminary decree passed by the Subordinate Judge in so far as the appellants are concerned was not even modified by the appellate Court. In the circumstances following the observations of the learned Judges in the above case, we have no hesitation in holding that the sale held in execution of the final decree passed on 16th September, 1929, was valid and binding on all the parties concerned.

The order of the lower Court is right, and the appeal is dismissed with costs.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON, AND MR. JUSTICE BASHEER AHMED SAYEED.

Sabapathy Mudaliar .. *Appellant* *

v.

Mahalinga Padayachi .. *Respondent.*

Limitation Act (IX of 1908), Article 182 (5)—" Final order "—Application for execution filed by pleader duly authorised and returned for complying with certain requirements—Re-presentation by another pleader who had no authority from the pleader on record—Rejection of application on the ground that re-presentation was by an unauthorised person—If final order saving limitation.

An execution application which was presented by a pleader with proper authority and was returned for compliance with certain requisites but was re-presented by some other pleader on his behalf (not authorised by the pleader on record), even though the application has come to the custody of the Court though not in the regular way, cannot be deemed to be non-existent and treated as such.

The circumstance that the petition which was returned again came back to Court through the agency of an unauthorised person would not invalidate its original valid presentation and therefore the order rejecting the same for non-compliance with certain requirements would be a " final order " so as to save the period of limitation.

Case law discussed.]

1. (1946) 1 M.L.J. 347 : I.L.R. (1947) Mad. 132.

* A.A.O. No. 453 of 1947. 3rd August, 1950.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated 18th December, 1946, in E.P. No. 35 of 1946, in O.S. No. 2 of 1932.

C. Natarajan for Appellant.

S. Jagadisa Aiyar and *S. Nagaraja Aiyar* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—In O.S. No. 2 of 1932 on the file of the Court of the Subordinate Judge of Cuddalore a decree was passed on 19th December, 1932, for a sum of Rs. 6,328-5-6 with interest and costs. There was an appeal against that decree to this Court which was dismissed on 31st January, 1938. Subsequently an application for scaling down the decree under the provisions of Madras Act IV of 1938 ended in the decree being scaled down in favour of the judgment-debtor. Even prior to the scaling down of the decree, there were various petitions for execution, but still a portion of the decree amount remained unrealised.

The execution petition out of which the present appeal arises *viz.*, E.P. No. 35 of 1946 was filed on 17th December, 1945 and would be in time according to Article 182 (5) of the Limitation Act, if, on an application filed on 10th February, 1941, a "final order" had been passed. The lower Court has found that there was no step-in-aid of the execution as a result of the petition filed on 10th February, 1941. It is necessary to set out briefly the various vicissitudes which that application underwent.

Mr. A. Sundararaja Aiyangar, pleader for the plaintiff, in O.S. No. 2 of 1932 acted in this execution petition also. Without being numbered, the petition was returned on 17th February, 1941, for complying with five requirements endorsed on that application, of which the last two were that the amount of Rs. 700 realised in execution previously had not been appropriated and deducted on the due dates and also that the copy of the decree as scaled down had not been filed. On 25th February, 1941, the same was re-presented with the following endorsement :

"Pray for two weeks' time to comply with the order of return and production of copy of amended decree. Re-presented ".

This prayer was granted on 27th February, 1941. On 13th March, 1941, the petition was re-presented after complying with one of the requisitions but with a statement that an application had been made for a copy of the amended decree which had not been obtained and therefore the petitioner would be filing the same as soon as it was received. Again the Court returned the application, stating that return Nos. 4 and 5 had not been complied with, on 18th March, 1941. Time for re-presentation was fixed as five days from that date. The stipulated time expired on 23rd March, 1941, which happened to be a Sunday and therefore the re-presentation took place on 24th March, 1941, which re-presentation would be proper compliance as regards the time fixed. This re-presentation was not made by Mr. Sundararaja Aiyangar but by Mr. P. S. Gopala Aiyar and is as follows :

"I pray for a week's further time to comply with the return, (Signed) P. S. Gopala Iyer, Pleader for Mr. A. Sundararaja Aiyangar, Pleader, 24th March, 1941."

On 27th March, 1941, the petition was rejected with the following order of Court :

Re-presentation and prayer for extension are unauthorised. Returns not complied with. Rejected 27th March, 1941."

If the order of the Court, dated 27th March, 1941, is a "final order" passed on an application made in accordance with law to the proper Court, then there can be no doubt that the two subsequent applications made on 2nd January, 1943 and 18th December, 1944, are both in time and therefore the present petition, dated 17th December, 1945, is also in time.

The controversy has centred round the point as to whether the rejection of the execution petition on 27th March, 1941, on account of the fact that the returns had not been complied with is a final order or not. The learned Subordinate

Judge has held that it was admitted before him by Mr. Sundararaja Aiyangar who himself argued the application out of which this appeal arises, that he did not authorise Mr. Gopala Iyer to re-present the execution petition on 24th March, 1941 and therefore as the re-presentation on 24th March, 1941, was unauthorised, there was no valid re-presentation of the petition with the result that the execution petition acquired no legal existence and therefore no valid and final order could be passed on such an application. Reference was made by the lower Court to a passage in the judgment of Agha Haidar, J., in *K. L. Gauba* v. *Indo Swiss Trading, Co.*[1], to the following effect :

> "This rule of law is well understood and a clear distinction is recognised in forensic parlance between 'pleading' and 'acting'. It has been held in *Amir Shah* v. *Abdul Aziz*[2], that a pleader who appears on behalf of another pleader engaged by a party, can appear for the, latter pleader only 'to plead' on behalf of the party, but he has no power "to act' on his behalf without a document in writing being executed in his favour in the manner prescribed by Order 3, rule 4, Civil Procedure Code. This proposition of law is perfectly correct and I have no hesitation in following it."

The learned Subordinate Judge also referred to certain observations of King, J., in *Modono Mahono* v. *Kunja Behari*[3], to the effect that an execution application filed by a vakil who had no vakalat from the decree-holder is not one in accordance with law within the meaning of Order 3, rule 4, Civil Procedure Code and therefore is null and void and is also not a step-in-aid of execution which would save limitation. Reference was also made to a decision of a Bench of this Court consisting of Burn and Menon, JJ., in *Nandamani Anangabhima Deo* v. *Modono Mohana Deo*[4], where the learned Judges expressed the opinion that where an execution application is presented by a pleader without any documentary authority in his favour from the decree-holder, it is not a question of a defect in the pleader's authority ; nor is it a question of an irregularity, nor even of an illegality, in anything that he does but it is simply a question of want of power or capacity on his part to act. Therefore the pleader having no capacity or power to act, the application has no legal effect as not having been made in accordance with law. The learned Judge also placed reliance upon *Satyanarayana* v. *Kajireddi*[5], where Leach, C.J. and Rajamannar, J., laid down that since the number of the suit is one of the particulars which the mandatory rule 11, of Order 21, Civil Procedure Code, states the application shall contain, an execution petition which gives an incorrect number of the suit is not one filed in accordance with law and the mistake in the number of the suit is fatal. The learned Subordinate Judge concluded that the aforesaid authorities supported his view that the re-presentation by Mr. Gopala Iyer on 24th March, 1941, was by an unauthorised person and therefore no valid application presented in accordance with law was before the Court on which a final order could be passed and such being the case it should be deemed as if the execution petition filed on 10th February, 1941, did not exist so far as the Court was concerned and no final order was passed thereon.

It seems to us that the learned Judge is in error. The case in *K. L. Gauba* v. *Indo Swiss Trading, Co.*[1], related to the presentation of an appeal by a pleader who had no authority but who acted on behalf of another to whom a proper power was given. In those circumstances, Agha Haider, J., of the Lahore High Court held the presentation was invalid and no appeal came into the custody of the Court. There was no question of any re-presentation there and it cannot be said that there is any similarity between the point that arose in that case and the question that arises for consideration in the present case. Similarly, the case in *Nandamani Anangabhima Deo* v. *Modono Mohana Deo*[4], which itself was an appeal from the decision in *Modono Mahono* v. *Kunja Behari*[3], dealt with the case of original presentation and

1. (1936) I.L.R. 17 Lah. 610.
2. A.I.R. 1932 Lah. 373.
3. A.I.R. 1935 Mad. 786 at page 789.
4. (1936) 71 M.L.J. 604 : I.L.R. 1937 Mad. 320.
5. (1945) 2 M.L.J. 427.

not of re-presentation. The decision of Leach, C.J. and Rajamannar, J., in *Satyanarayana* v. *Kajireddi*[1], also related to a case of initial presentation and refers to the non-compliance with a mandatory provision of Order 21, rule 11, Civil Procedure Code, which non-compliance could not be rectified or condoned by any subsequent act. In none of these cases was the question raised, whether an application which was presented by a pleader with proper authority and was returned for compliance with certain requisities but was re-presented by some other pleader on his behalf—let us take it that this pleader was not authorised by the pleader on record—even though the application has come to the custody of the Court though not in regular way, can be deemed to be non-existent and treated as such. A somewhat similar point came for decision before King, J., in *Parankusa Naidu* v. *Ayyanna Naidu*[2], where the facts were as follows. An execution petition was filed in Court on the 21st June, 1937. The Court made an endorsement thereon. "Vakil has no power. Returned. Time seven days". Though there was an order of return, the petition was not taken possession of by the party or the pleader from Court and remained in the Court office. Subsequently, on the 23rd December, 1937, the Court made an order rejecting the application. In the circumstances, King, J., held that the order, dated 23rd December, 1937, was a final order as contemplated by Article 182 (5) of the Limitation Act and a subsequent application within three years of such order was within time. The learned Judge expressed the opinion that an order rejecting an application of this kind because the applicant would not comply with certain requisitions was a final order which put an end to the application in respect of which it is made so far as the Court passing it is concerned. He referred to *Syed Ghulam Khadir Sahib* v. *Viswanatha Iyer*[3]. Reference is also made to *Official Receiver, Ramnad* v. *Narayanaswami Thevar*[4]. In both these cases there were expressions of opinion that an application which had been returned to the party who did not re-present it for more than three years cannot be said to be an application made in accordance with law so as to invoke the provisions of the final order phrase in Article 182 (5), Limitation Act. King, J., was inclined to think that when the initial presentation of the execution petition was by a vakil who had no power, still, when the Court rejected that application later on, without its having been taken back by the party or the pleader, it should be deemed that there has been a valid petition presented in accordance with law on which a final order has been made. We do not think that we should go to that extent because in *Nandamani Anangabhima Deo* v. *Modona Mohana Deo*[5], which confirmed the decision in *Modono Mahono* v. *Kunja Behari*[6], this Court had held that if the original presentation was without authority it should be deemed that there was no valid presentation at all. To a certain extent the view expressed by King, J., in *Parankusa Naidu* v. *Ayyanna Naidu*[2], runs counter to his view in *Modono Mahona* v. *Kunja Behari*[6]. But whatever that might be, in our opinion the present appellant cannot be placed in a worse situation than the appellant in *Parankusa Naidu* v. *Ayyanna Naidu*[2], where an unauthorisedly presented application was allowed to remain in Court with the result that the Court passed an order rejecting it and it was held that it was a final order. If, instead of the execution petition in the present case being taken back on 18th March, 1941, by Mr. Sundaraja Aiyangar it was allowed to remain in court with the requirements not complied with and finally on 27th March, 1941 an order rejecting the application was passed, then according to the ruling above referred to, it has to be held that there was a final order passed on an application made in accordance with law. The intervening stages in a properly presented application during which it was returned, and re-presented by an unauthorised person would not make the original presentation invalid or illegal. It cannot for a moment be doubted that on 10th February, 1941, the application filed by Mr. Sundararaja Aiyangar was one made in accordance with law to a proper court for

1. (1945) 2 M.L.J. 427.
2. (1943) 1 M.L.J. 445.
3. (1942) 2 M.L.J. 768 at 772 : I.L.R. 1943 Mad. 357.
4. (1941) 2 M.L.J. 1018.
5. (1936) 71 M.L.J. 604 : I.L.R. 1937 Mad. 320.
6. A.I.R. 1935 Mad. 786.

executing the decree. The fact that it was re-presented to the court by a pleader without authority cannot detract from the validity of the original presentation and since, on a properly presented petition, there was an order passed by the Court stating that returns had not been complied with, it has to be held that there was a final order on that application in accordance with law. The above decision of King, J., was cited with approval by Wadsworth, J., in *Nataraja Pillai* v. *Narayanaswami Pillai*[1], whose opinion was that where an execution petition is ordered to be returned for supplying certain information within the time given and the decree-holder does not in fact take the return of the petition from the court and the court thereupon rejects the petition on a subsequent date, the order of rejection would be a final order on a subsisting petition for the purpose of saving limitation. It was also held that though the decree-holder might have neglected to comply with the court's requirements in regard to execution petitions, their ultimate rejection by the court for such non-compliance will be final orders sufficient to save limitation for succeeding petitions. A discussion to the effect that an execution petition which was properly presented but was unnumbered and was rejected by an order of court should be deemed to be one on which a final order disposing of it was made, was made by Gentle, C.J., and Thyagarajan, J., in *Seetharaman Chettiar* v. *Muthukrishna Chettiar*[2]. In all these cases, it was impliedly understood that if there had been an initial proper presentation of an execution petition, any intermediate order or subsequent irregularities such as not taking back the return or not numbering it would not take away from the effect of the initial valid presentation so as to detract from the final nature of the order which ultimately rejected the petition. But, the learned counsel for the respondent relied upon a decision of Krishnaswami Aiyangar and Kunhi Raman, JJ., in *Syed Ghulam Khadir Sahib* v. *Viswanatha Aiyer*[3], where the learned Judges expressed the view that when an execution petition is returned for the purpose of the petitioner doing something to enable the court to proceed further with it, the court really defers its consideration until it is brought back with the defects remedied. It is only then that the court is placed in a position to consider it judicially and make what can be regarded as a "final order" on it. Therefore an execution petition returned for amendment but not re-presented has no legal existence till it is re-presented and if it is re-presented after the time limited, it does not acquire the status of a petition calling for an order unless delay is excused. Where the application for excusing the delay is rejected by the Court, the consequence is that there is no valid petition before the Court to be ordered or rejected. In the opinion of the learned Judges if the execution petition originally validly presented was returned for complying with certain requirements and a time was given for such compliance but it was represented after the expiry of the time, an order rejecting the petition cannot be said to be a "final order" within the meaning of Article 182 (5) of the Limitation Act. In *Gopalaswami Mudaliar* v. *Executive Officer, Tiruvarur Devasthanam*[4], Somayya, J., agreed with the contention raised that *Syed Ghulam Khadir Sahib* v. *Viswanatha Aiyar*[3] required reconsideration. He also agreed with the view taken by King, J., in *Ramachandra Naidu* v. *Muthu Chettiar*[5]. To the same effect is the view taken by Yahya Ali, J., in *Veerabadriah* v. *Seshiah*[6]. We may also remark that in *Muthuvenkatasubba Reddi* v. *Thangavel Chetti*[7], the learned Judges were not inclined to accept the correctness of *Syed Ghulam Khadir Sahib* v. *Viswanatha Aiyar*[3]. We are therefore of opinion that the circumstances that the petition which was returned again came back to Court through the agency of an unauthorised person would not invalidate its original valid presentation and therefore the order rejecting the same for non-compliance with certain requirements would be a "final order" so as to save the period of limitation. In this view the learned Subordinate Judge's decision holding that the present execution petition is barred cannot be supported. The

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1. (1947) 1 M.L.J. 393.
2. (1947) 2 M.L.J. 553.
3. (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357.
4. (1945) 1 M.L.J. 428.
5. (1943) 1 M.L.J. 236.
6. (1948) 2 M.L.J. 369.
7. (1948) 1 M.L.J. 327 : I.L.R. (1949) Mad. 88.

appeal is therefore allowed and E. P. No. 35 of 1946 is remanded to the executing Court for disposal according to law. The appellant will be entitled to his costs in this appeal.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Sheik Meera Sahib .. *Appellant**

v.

Akkalaneni Venkatapathi Naidu .. *Respondent.*

Stamp Act (II of 1899), section 36—Admission of secondary evidence—No objection in trial Court that original was not properly stamped—Objection as to admissibility if can be raised in the appellate Court.

Where without any objection being raised as to its admissibility an original instrument or secondary evidence of its contents has in fact been admitted, such admission cannot be called in question at any later stage in the same suit on the ground that the instrument was not properly stamped.

The language of section 36 of the Stamp Act is imperative and no objection at any stage of the suit or proceedings can be raised on the ground of insufficiency of stamp on the original.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A. S. No. 224 of 1946 (A. S. No. 132 of 1946, District Court) presented against the decree of the Court of the District Munsiff, Nellore, in O. S. No. 796 of 1944.

K. Umamaheswaram for Appellant.

K. Krishnamurthi and *M. Dwarakanath* for Respondent.

The Court delivered the following

JUDGMENT.—The third defendant is the appellant in this second appeal. The suit out of which this second appeal arises was instituted for a declaration of the plaintiff's title to the plaint schedule properties and for possession. To establish his title the plaintiff relied upon an agreement of sale, dated 26th July, 1926, Exhibit P-8 executed by one Subbayya in favour of the first defendant and a conveyance by the first defendant, dated 19th August, 1944, Exhibit P-1 in his favour. The third defendant claimed that the purchase by the first defendant from Subbayya the original owner was really for his benefit and he relied in support of his title upon Exhibit D-1, dated 26th July, 1926, *i.e.*, the same date as Exhibit P-8, which, it is alleged, was executed by Subbayya in favour of the third defendant who was then a minor represented by the first defendant as guardian. It has now been found by the Courts below that Exhibit D-1 is not genuine. The only question which remains outstanding for disposal and which is a question of law is whether Exhibit P-8, which is a copy of the original agreement by Subbayya in favour of the first defendant is admissible in evidence as the original, it is common ground, was not stamped as required by law. The copy Exhibit P-8 was admitted by the trial Court without any objection. Objection regarding its admissibility was for the first time raised in the lower appellate Court. As no objection was raised in the trial Court and as it was admitted in evidence it was held by the lower appellate Court that under section 36 of the Stamp Act, the defendant was not entitled to raise the objection at a later stage in the appeal. In this view, the learned Judge followed the decision of Venkataramana Rao, J., in *Satyavati* v. *Pallayya*[1].

In this second appeal the correctness of this decision was questioned. In *Raja of Bobbili* v. *Inuganti China Sitaramasami Garu*[2], the Judicial Committee considered section 34 of the Stamp Act of 1879 which corresponds to the present section 35. The document that was produced as secondary evidence of the original grant in that case was an unauthenticated copy of an original draft of a deed of gift of the plaint lands. Objection to its admissibility was taken soon after it was produced in Court

*S.A. No. 557 of 1947. 3rd March, 1950.

1. A.I.R. 1937 Mad. 431.
2. (1899) L.R. 26 I.A. 262 : I.L.R. 23 Mad. 49 (P.C.).

on the ground that it was a copy of a document which was insufficiently stamped. The objection was given effect to and the trial Court refused to receive the document tendered as secondary evidence of the grant. On appeal, the High Court agreed with the view of the trial Judge and this was affirmed by the Judicial Committee. It was pointed out by the Judicial Committee that that section (section 34) had exclusive reference to the admission as evidence of original documents which were not stamped at the time of their execution or were insufficiently stamped and as the original was not available and could not be produced, it was impossible for the Collector to impose the duty leviable upon the instrument. Under those circumstances, the Judicial Committee had no doubt in upholding the objection regarding the admissibility of secondary evidence of the original document which was tendered in evidence. Under section 36 of the Stamp Act, if an instrument has been admitted in evidence such admission, except as provided in section 61, shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The language of the section is imperative and no objection at any stage of the suit or proceedings can be raised on the ground of insufficiency of stamp on the original. This view was taken by Venkataramana Rao, J., in *Satyavati* v. *Pallayya*[1], and the opinion of the learned Judge was based upon an earlier decision of Madhavan Nair, J., in *Venkateswara* v. *Ramanatha*[2], and of Rankin, C.J., in *Nirode Basini* v. *Sithalchandra*[3]. He also points out that the view taken by Madhavan Nair, J., was followed by the Allahabad High Court in *Noor Ahmed* v. *Irshad Ghaus*[4]. The Rangoon High Court referred to the decision of the Privy Council in *Raja of Bobbili* v. *Inuganti China Sitaramaswami Garu*[5] in *Maung Po Htoo* v. *Ma Ma Cyi*[6] and also to the language of section 36 and came to the conclusion that section 35 excludes the original instrument itself and secondary evidence of its contents. Under section 36, similarly, whether the original instrument or secondary evidence of its contents has in fact been admitted, that admission cannot be called in question in the same suit on the ground that it was not properly stamped. The Peshawar Judicial Commissioner's Court, however, takes a different view, vide *Bhagwan Das* v. *Amardas*[7]. In view of the several decisions which have taken a view in favour of making the admission of a copy final even if the original instrument was not properly stamped, I am not prepared to accept the view of the Peshawar Court. There is no dissent in our Court and I think the Court below was right in following the decision in *Satyavati* v. *Pallayya*[1].

This was the only point argued in the second appeal. The second appeal fails and is dismissed with costs.

(No leave.)

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Natesan Servai and others .. *Petitioners* *

Criminal Procedure Code (*V of* 1898), *Section* 192 (1)—*Superior Magistrate framing charge—Transfer of case to subordinate Magistrate—Legality.*

When the Criminal Procedure Code in sub-section (1) of section 192 speaks of the words 'enquiry or trial' specially since the section appears at that stage of the Code which relates to the place of enquiry or trial or the initial stages of hearing, it is not intended to mean that sub-section (1) of section 192 could give a superior Magistrate, who has heard the case in part, power to transfer the case to a subordinate Magistrate to hear the rest of it. It makes no difference that the stage of transfer was immediately after the enquiry and framing a charge.

Tota Venkanna and others, (1900) 2 Weir Rulings, 152 followed.

1. A.I.R. 1937 Mad. 431.
2. A.I.R. 1929 Mad. 622.
3. (1930) 51 C.L.J. 569 at 570.
4. A.I.R. 1933 All. 821.
5. (1899) L.R. 26 I.A. 262 : I.L.R. 23 Mad. 49 (P.C.).
6. (1926) I.L.R. 4 Rang. 363.
7. (1938) 176 I.C. 312.

* Cr. R.C. No. 782 of 1949. (Cr. R. P. No. 720 of 1949). 2nd August, 1950.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Tanjore in C.A. No. 60 of 1948, preferred against the order of the Court of the Stationary Sub-Magistrate, Sirkali in C. C. No. 847 of 1948.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Appellants.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—The four petitioners who were accused 1 to 3 and 7 in the Court of the Stationary Sub-Magistrate, Sirkali, were convicted by that Court, petitioners 1 to 3 of an offence under section 324, Indian Penal Code and the fourth petitioner of an offence under section 324 read with section 511, Indian Penal Code. Petitioners 1 to 3 were sentenced to pay a fine of Rs. 200 each, or in default, to suffer rigorous imprisonment for six weeks and the fourth petitioner was sentenced to a fine of Rs. 100 or in default to suffer rigorous imprisonment for one month. Along with them seven others also were charge-sheeted but before the case came to the Sub-Magistrate, Sirkali, and while it was before the Sub-Divisional Magistrate, Mayuram they were discharged under section 253 (1) of the Criminal Procedure Code. Against their conviction, the petitioners preferred Criminal Appeal No. 60 of 1948 and that was heard by the Sub-Divisional Magistrate of Tanjore who confirmed the convictions and sentences. Hence this revision petition.

The only point raised by Mr. K. S. Jayarama Iyer for the petitioners is one of pure law and hence it is unnecessary for us to go into the facts at all, which we would not have done even otherwise, this being a revision petition. Originally eleven accused were charge-sheeted before the Sub-Divisional Magistrate of Mayuram for offences under Sections 147, 148, 323, 324, Indian Penal Code, etc. After the prosecution evidence was let in before that Court, the Sub-Divisional Magistrate found that there was no *prima facie* case proved against seven of them and as stated already they were discharged. He framed charges against the first three accused of an offence under section 324, Indian Penal Code and against the seventh accused of an offence under section 324 read with section 511, Indian Penal Code. After framing the charge, the Sub-Divisional Magistrate transferred the case for disposal to the Sub-Magistrate of Sirkali on the footing that as the offences of which the accused were charged were triable ordinarily by a Magistrate exercising second class powers, it would be in the interests of justice to have a second class magistrate try the case. Accordingly the Court to which it was transferred, *viz.*, the Stationary Sub-Magistrate, Sirkali took up the case on file, heard the evidence and convicted the accused as stated by us above. In the appeal to the Sub-Divisional Magistrate the said convictions and sentences were confirmed.

What is contended for the petitioners before us is that section 192, Criminal Procedure Code which relates to tranfer of cases by Magistrates cannot have any application to the facts of the present case because the transfer contemplated by section 192 (1), Criminal Procedure Code is a transfer " for enquiry or trial, to any Magistrate subordinate to him " by a Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate who has taken cognizance of the case. In the present case the Sub-Divisional Magistrate, Mayuram, who had examined the witnesses, discharged some of the accused and framed charges against the other accused cannot, according to the contentions raised by the learned counsel for the petitioners, transfer the case at that stage but should himself have tried it to the end.

It is therefore necessary to examine the provisions of the Code regarding transfers. Sub-section (1) of section 192, Criminal Procedure Code positively states that the three classes of Magistrates may transfer any case of which they have taken cognizance of, *for enquiry or trial* to any magistrate subordinate to them. Especially since section 192, Criminal Procedure Code appears in Chapter XV which relates to the jurisdiction of the Criminal Courts in inquiries and trials, and lays down the

procedure to be followed when a Court is requested to take cognizance of a complaint and has taken cognizance of it, it must be presumed section 192, Criminal Procedure Code must be intended to contemplate a case which has not reached the stage of enquiry or trial. But when once the proceedings have reached the stage of enquiry or trial, wholly or partially, it cannot be said that sub-section (1) of section 192, Criminal Procedure Code can be availed of for transfer by the Magistrate who has taken cognizance of the case. The other section relating to the transfer is section 528, sub-section (2), which is to the effect that any Chief Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate, may withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and may enquire into or try such case himself or refer it for inquiry or trial to any other such Magistrate competent to enquire into or try the same. This again contemplates a situation where the superior Magistrate recalls a case which he had transferred to a subordinate Magistrate and either tries it himself or sends it to some inferior Magistrate competent to enquire or try the same. The learned Public Prosecutor does not contend that sub-section (2) of section 528 can be availed of in this case. The third section to which our attention was invited is section 346 which deals with cases where, in the course of an inquiry or a trial before a Magistrate in a mofussal place, the evidence appears to the Magistrate to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate, the Magistrate before whom the case is pending shall stay the proceedings and submit the case with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate having jurisdiction, as the District Magistrate directs. This illustrates a converse case where a Subordinate Magistrate, who during the enquiry or trial, finds that he cannot try the offence which is disclosed in the evidence, is empowered to send up the papers to a superior Magistrate for such legal action as is necessary in the circumstances of the case. It cannot also be said that this section can have any application to the facts of the present case. But the learned Public Prosecutor contends that since under sub-section (1) of section 192, the transfer to a Subordinate Magistrate is for "enquiry or trial", it should be presumed that since the word "trial" has been used and in common parlance, it is understood that a trial begins only after the charge is framed, the transfer after the framing of the charge is legal. In *Sriramulu* v. *Veerasalingam*[1], there are observations to the effect that until a charge is framed in a warrant case, the proceedings are in the nature of an enquiry, with the result that it is only after the charge is framed that they partake of the nature of a trial. At page 587 there is this observation :

> "As far as this Court is concerned, it is settled law that the proceedings before a Magistrate in a warrant case under Chapter XXI of the Criminal Procedure Code are only an "enquiry" until the charge is framed : and on charge being framed become a trial (vide *Palaniyandy Goundan* v. *Emperor*[2], and *Narayanaswami Naidu* v. *Emperor*[3])."

From these observations it is contended that when sub-section (1), section 192 speaks of the transfer for trial, it should be understood that the transfer can be effected in a warrant case after the charge is framed. It is not necessary for us in the present case to canvass the correctness of the observations contained in *Sriramulu* v. *Veerasalingam*[1], supported as it is by the earlier decisions of this Court. But what we have to find out is whether the Legislature contemplated in Section 192 (1) the transfer of a case which has proceeded to a stage of the framing of the charge, simply because the word "trial" is used in that section. Now it will be useful to compare a few other sections of the Code where the word "trial" has been used. For example, in summons cases it has to be admitted that there is no procedure like the framing of a charge and a further cross-examination and all the other complex procedure usually found in a warrant case. Chapter XX deals with the *trial* of summons cases by Magistrates. So, whenever a Magistrate is asked to take evidence and decide whether a person against whom a complaint of a summons case has

1. (1914) 27 M.L.J. 589 : I.L.R. 38 Mad. 585
2. (1908) I.L.R. 32 Mad, 218.
3. (1909) 19 M.L.J. 157 : I.L.R. 32 Mad. 220.

been made is guilty or not, his proceedings have to be considered to be "trial of summons cases". Similarly the heading of Chapter XXI is "Of the trial of warrant cases by Magistrates". The Code nowhere makes any distinction between an enquiry in a warrant case preceding the stage of the framing of a charge and the subsequent stage when it gets transformed into a trial after the charge is framed. Similarly if we look at the heading of Chapter XVIII, it will be found that where an offence is exclusively triable by a Court of Session, then the initial stage of finding out whether there is a *prima facie* case for being committed to the Court of Session is designated: "Inquiry into cases triable by a Court of Session or High Court." So, one thing is certain and that is that if an accused has to be committed for trial by a Court of Session or a High Court, the preceding stage of the commitment is certainly an inquiry. We may also refer to the heading of Chapter XXII which deals with 'Summary Trials'. Therefore even where an offence is triable summarily, the proceedings are designated "trials". It seems to us therefore that when the Code in sub-section (1) of section 192 speaks of the words "enquiry or trial" especially since the section appears at this stage of the Code which relates to the place of enquiry or trial or the initial stages of the hearing, it is not intended to mean that sub-section (1) of section 192 could give a superior Magistrate, who has heard the case in part, power to transfer the case to a subordinate Magistrate to hear the rest of it. We are fortified in this conclusion by an early decision of this Court reported in *Tota Venkanna and others*[1]. Sir C. A. White, Kt., C.J. and Moor, J., have held therein that a Magistrate who has taken cognizance of a case having tried it partly, finds that an offence which a subordinate Magistrate is competent to try has been committed has no power to transfer the case to a subordinate Magistrate but must himself dispose of it. This case has stood the test of time for nearly 34 years until a dissenting note was sounded by Bardswell, J., in *Public Prosecutor* v. *Shunmuga Nadar*[2]. The learned Judge there held that the decision in *Tota Venkanna and others*[1], cannot be held to be any longer law because sub-section (3) to section 350 had been enacted in the Code later on. What the learned Judge says is that the point of illegality referred to in *Tota Venkanna and others*[1], was under the law as it was then understood in this Court, it was the duty of the Sub-Magistrate when a case was transferred to him, to take evidence afresh. That is no longer the law in view of sub-section (3) to section 350 and therefore according to the learned Judge the decision in *Tota Venkanna and others*[1], cannot be an authority in point. We are of opinion that the learned Judge has not given sufficient importance to the other provisions of the Code as well as to the place in which section 192 comes in when he gave his opinion. According to the learned Judge it is permissible for a Magistrate empowered under sub-section (1) of section 192 to transfer a case even at a later stage because in a warrant case the stage of trial is not reached until the charge is framed. It seems to us that the decision of Bardswell, J., runs counter to the Bench decision in *Tota Venkanna and others*[1], and in our opinion the Bench decision lays down the law correctly. We are therefore of opinion that the transfer of the case at the stage at which it had reached before the Sub-Divisional Magistrate of Mayuram is illegal. The convictions of the petitioners by the Stationary Sub-Magistrate of Sirkali are therefore illegal. We set aside the convictions and sentences of the petitioners. Since the offence took place more than two years ago, we feel that a re-trial of the petitioners is not necessary and the petitioners are acquitted.

V. P. S. *Appeal allowed.*

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1. (1900) 2 Weir Rulings 152. 827.
2. (1934) 67 M.L.J. 120: I.L.R. 57 Mad.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRY.

Koroth Tanicheri Kunhikannan Nambiar .. *Appellant**

v.

Cheriath Cheeru and others .. *Respondents.*

Malabar tarwad—Partition decree—One item omitted—Power of karnavan to represent tarwad thereafter in respect of that item.

Where there has been a decree for partition in respect of the properties of a Malabar tarwad there is a severance of status among all the members of the tarwad who express a desire for partition by their pleadings in the suit or among whom the decree effects a partition. If by an accidental omission, one item of the tarwad property happens to remain undivided by the decree it cannot be said that the members of the tarwad continue to remain undivided in status *quoad* that item or the erstwhile karnavan of the Malabar tarwad continues to represent the family and would be in a position to exercise those rights which he could have exercised before the institution of the suit in respect of the omitted item. Unless the decree itself provided to the contrary it must be held that the suit and the decree effect a complete division in status among the members desiring a partition and division by metes and bounds in respect of those properties which are acutally divided under the decree. It was no longer open to the karnavan to represent the tarwad after the passing of the decree.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 163 of 1946, preferred against the decree of the Court of the Principal District Munsiff, Tellicherri, in O. S. No. 735 of 1944.

A. Achuthan Nambiar for Appellant.

V. P. Gopalan Nambiar for Respondents.

The Court delivered the following

JUDGMENT.—Plaintiff is the appellant in this second appeal. His suit for recovery of arrears of rent by sale of the kuzhikanam and other rights of the defendant-tenant in the property described in the schedule to the plaint has been dismissed by the Courts below. The property of which the rent is now claimed was leased on kuzhikanam by the karnavan of a tarwad to the predecessor-in-interest of the defendant. As the result of the decree in a suit for partition filed under the Madras Marumakkattayam Act, VII of 1933, the members of the tarwad which granted the lease became divided. Nevertheless, the plaintiff, the karnavan of the disrupted tarwad, claimed rent from the defendant on the footing that he retained his status as karnavan to represent the members of the tarwad in respect of the property of which the rent is now claimed because this property had not been partitioned among the members of the tarwad by the decree. The defendant, tenant, resisted the claim on the ground that the property had been allotted under a maintenance arrangement to a tavazhi and that he had paid the rent to the tavazhi karnavan. He also pleaded that after the partition of the tarwad the plaintiff had no right to represent the tarwad and sue by himself for the rent due. The Courts below have accepted the latter contention of the defendant and dismissed the plaintiff's suit. Hence this second appeal.

Mr. Achuthan Nambiar for the appellant contends that since the item of property in respect of which the rent is now claimed was left out of the partition decree, it continues to be tarwad property and the plaintiff continues to be the karnavan so far as this property is concerned and therefore, his suit for rent was maintainable. It may be stated at the outset that the property in question was not included in the decree for partition by an accidental omission and not as the result of any concensual arrangement between the parties to the suit.

It has been held by this Court that in the case of a Malabar tarwad a severance of status is effected on the institution of a suit for partition under the Madras Marumakatayam Act of 1933 and after such severance of status it is not open to the erstwhile karnavan to represent the tarwad and initiate proceedings in Court in respect

*Second Appeal No. 955 of 1948. 15th March, 1950.

of the tarwad so as to bind the other members of the family who had unequivocally expressed their intention to separate, in the suit for partition. It is open to the members of a Malabar tarwad as in the case of the members of a joint Hindu family to effect a partition by metes and bounds or to effect a severance of interest in respect of a part of the joint estate retaining their status as a tarwad or as a joint family and holding the rest of the properties as the properties of a tarwad or an undivided Hindu family. This is in accordance with the decisions of the Judicial Committee in *Appovier* v. *Ramasubba Aiyar*[1] and *Ramalinga Annavi* v. *Narayana Annavi*[2], and of this Court in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[3]. The mere fact that the members of a joint Hindu family divided among themselves a portion of the family assets does not by itself create, or imply a division in status among them and such intention to become divided in status must appear from the terms of the document effecting a partition, see *Appavu* v. *Manickam*[4]. In *Muthuswami Mudaliar* v. *Nallakulantha Mudaliar*[5], it was held by this Court that where a portion of joint family property is reserved for a future partition without any division of any kind, the previous coparcenary continued *quoad* the property in question. In *Gavrishankar Parabhuram* v. *Atmaram Rajaram*[6], it was held that the circumstance that there has been a partition between the members of a joint Hindu family does not, in the absence of any special agreement between them alter their rights as to the property still undivided. As to this they continue to stand to one another in the relation of members of an undivided Hindu family. The decisions in *Dagadu Govind* v. *Sakkhubai*[7], and *Marland Pandharinath* v. *Radhabai Krishnarao*[8], in so far as they hold that where coparceners in a joint Hindu family effect a partition and division of a portion of the joint property with the exception of some portions kept undivided, they are, in the absence of any indication to the contrary tenants-in-common with reference to the excepted property in the absence of a special agreement to hold the excepted property as joint tenants, may not be quite accurate and the criticism of these two decisions in Mayne's Hindu Law (11th edn.), page 564, would appear to be justified.

In my opinion, where there has been a decree for partition in respect of the properties of a Malabar tarwad or a joint Hindu family there is a severance of status among all the members of the joint family or the tarwad who express a desire for partition by their pleadings in the suit or among whom the decree effects a partition. If by an accidental omission, one item of the joint family or tarwad property happens to remain undivided by the decree, it cannot be maintained that the members of the joint family or the tarwad continue to remain undivided in status *quoad* that item or that the erstwhile manager of the joint family or karnavan of the Malabar tarwad continues to represent the family and would be in a position to exercise those rights which he could have exercised before the institution of the suit in respect of the omitted item. Unless the decree itself provides to the contrary it must be held that the suit and the decree effect a complete division in status among the members desiring a partition and a division by metes and bounds in respect of those properties which are actually divided under the decree. In this view, the conclusion of the lower appellate Court that it was no longer open to the plaintiff to represent the tarwad after the passing of a decree for partition is correct.

It is contended by Mr. Achuthan Nambiar for the appellant that I must remand the suit to the trial Court so as to give an opportunity to the plaintiff to implead the other members of the tarwad who are interested in the property either as co-plaintiffs or as defendants and prosecute the suit. The objection as to the incompetency of the plaintiff to maintain the suit was taken in the trial Court, but no application was made either to that Court or to the lower appellate Court

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1. (1866) 11 M.I.A. 75 : 20 E.R. 30 (P.C.).
2. (1922) 43 M.L.J. 428 : L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 (P.C.).
3. (1949) 2 M.L.J. 751.
4. (1945) 2 M.L.J. 504 : I.L.R. 1946 Mad. 557.
5. (1894) I.L.R. 18 Mad. 418.
6. (1893) I.L.R. 18 Bom. 611.
7. (1923) I.L.R. 47 Bom. 773.
8. (1930) I.L.R. 54 Bom. 616.

to have the other members impleaded as parties. In these circumstances I do not consider I shall be justified in remanding this case for the purpose of enabling the plaintiff to rectify the defect in the suit, especially when the addition of new parties after the period of limitation for the suit is not likely to cure the defect.

The result is that this second appeal fails and is dismissed with costs.

No leave.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Goteti Ramachandra Rao and another .. *Appellants**

v.

Kasa Ammiraju and others .. *Respondents.*

Limitation Act (*IX of* 1908), *Article* 142—*True owner's possession must be with animus within statutory period.*

The mere fact of physical possession held by the true owner within the statutory period is not sufficient if it is traceable not to an animus on his part to exercise it in assertion of his own right but to the sufferance of the person in wrongful possession.

Where the plaintiffs alleged that the suit property was allotted to them at a partition and that within the statutory period of 12 years under Article 142 of the Limitation Act they had been in possession of the same but it turned out to be that they had possession by permission only of defendants,

Held, that the kind of possession had by the plaintiffs in this case within 12 years before the suit was not sufficient to satisfy the statute.

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, in A. S. No. 12 of 1946, preferred against the decree of the Court of the District Munsiff, Narasapur, in O. S. No. 89 of 1945.

V. Suryanarayana for Appellants.

V. Parthasarathi for Respondents.

The Court delivered the following

JUDGMENT.—An interesting question of law has been argued in this case before me by the learned counsel for the appellants. The suit out of which the second appeal arises was instituted by the appellants for recovery of possession of the suit house and site and for recovery of rent. The plaintiffs alleged that the property in question having been originally purchased by their father was allotted to them at a partition between themselves and their brothers. They also alleged that the first defendant was in possession as a lessee under Ex. P-1. The title of the plaintiffs was found by both the Courts below; but on the question of the genuineness of Ex. P-1 they have differed, the trial Court holding that it is genuine, but the appellate Court holding *contra*. The Courts below have also differed on the question whether the plaintiffs have proved possession within 12 years prior to suit, the trial Court holding that they have, but the appellate Court holding that they have not. The suit was decreed by the trial Court, but has been dismissed on appeal.

It is common ground that when the plaintiffs' mother died in 1940 in another house the plaintiffs lived for some time in the suit house. That was of course with the permission of the first defendant in whose favour at that time according to the plaintiffs' case Ex. P-1 was in force. The learned District Munsiff and the learned Subordinate Judge on appeal have both held that the possession which the plaintiffs had at the time was with the permission of the first defendant, although the learned District Munsiff has said what the appellate Judge has not accepted that it was as a matter of friendly or neighbourly obligation that they did so. On the basis of such possession, Mr. Suryanarayana for the appellants contends that the plaintiffs

* S. A. No. 877 of 1947. 24th March, 1950.

have proved possession within 12 years prior to suit as required by Article 142 of the Indian Limitation Act. "Possession", according to learned counsel, must be taken at its *ex facie* meaning and ought not to be needlessly limited or qualified. He says that possession howsoever obtained within the statutory period is sufficient compliance with the requirement of Article 142, no matter whether the obtaining was by force or otherwise. That is true, and there is ample authority to that effect, of which it is sufficient to mention *Narasayya* v. *Subbayya*[1]. That was a case in which the true owner obtained forcible possession of the property from a trespasser, and the Court held that that possession was quite sufficient to fulfil the requirement of Article 142. No question however arose in that case whether where the possession was obtained with the permission of the trespasser it could be regarded as sufficient compliance with the statute. The passage from Lord Selborne's judgment in *Lows* v. *Telford*[2], which is quoted at page 126, of *Narasayya* v. *Subbayya*[1], is as follows :

"In the case also cited at the Bar of *Jones* v. *Chapman*[3], it is accurately stated by Mr. Justice Maule that 'as soon as a person is entitled to possession and enters in the *assertion of that possession*, or, which is exactly the same thing any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. . . . . . . And in *Harvey* v. *Brydges*[4], it is pointed out that so far as relates to the fact of possession and its legal consequences it makes no difference whether it has been taken by the legal owner *forcibly or not.*"

The words italicised to be found at the end of the passage are emphasised by Mr. Suryanarayana before me in support of his argument; but this argument unfortunately ignores the words italicised at the beginning of the passage which, in my opinion, indicate that possession howsoever obtained in order to save the bar of the statute must be possession obtained in the assertion of a right to possession, not as learned counsel would have it with the permission of the wrongful possessor. Mr. Surynanarayana contends that the case of possession obtained with the permission of the trespasser is, for the purpose of the application of the rule relied upon by him, if anything a *fortiori* to the case of possession obtained forcibly. It seems to me that on principle this contention is unsound.

It is true that in U. N. Mitra's Limitation and Prescription, Vol. 2, 6th Edn., at page 1686, there is a passage relied upon by learned counsel to the effect that

"the *true owner's* possession *however* obtained would be possession within the meaning of Article 142, that the law immediately vests actual possession in that person, and that it makes no difference whether it has been taken by the legal owners forcibly or not."

But then as pointed out at pages 1683, 1684 and 1687 of the same work :

"There is perhaps no legal conception more open to a variety of meanings than possession. Possession is a flexible term not necessarily meaning occupation. . . . Possession must be accompanied by an intention to possess, since possession involves an *animus possidendi*, i.e., occupation *with the intention of excluding the owner as well as other people.* Possession is the occupation of anything *with the intention of exercising the right of ownership* in respect of it."

If this legal signification of the word "possession" is borne in mind, it, in my opinion, follows that the mere fact of physical possession held by the true owner within the statutory period is not sufficient if it is traceable not to an animus on his part to exercise it in assertion of his own right but to the sufferance of the person in wrongful posession.

In U. N. Mitra's Limitation and Prescription, 6th Edn., Vol. I, Tagore Law Lectures, the same point of view is brought out at page 140 in footnote 4. It is there stated—

"Possession by the plaintiffs" (who set up a title by adverse possession to a strip of land belonging to the defendants) "involves an *animus possidendi*, *i.e.*, occupation with the *intention* of excluding the owner as well as other people. *Per* Lindley, M.R., in *Littledale* v. *Liverpool College*[5]."

Then, citing Hunter's Roman Law, page 209, it is further stated that possession is the occupation of anything with the *intention* of exercising the right of ownership in respect of it."

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1. (1942) 2 M.L.J. 266 : I.L.R. 1943 Mad. 122.
2. (1876) 1 A.C. 414, 426.
3. 154 E.R. 717.
4. 153 E.R. 546.
5. (1900) 1 Ch. 19 at 23.

Then again at page 151 in enunciating the proposition that dispossession within the statute ought to be by means of unequivocal acts the author points out:

"It was held in the Privy Council in *Van Diemen's Land Co.* v. *Table Cape Marine Board*[1], that the construction of a jetty over a part of the disputed land and giving a lease of the jetty to a third person was, in the absence of any evidence of such severance of interest as might in law lead to such acts being regarded as evidence only of an easement, clearly evidence of seisin in the *locus quo*. Erecting gates and locking them, or doing other equivocal acts on a strip of land over which one has a right of way, with the intention of protecting such right from invasion by the public, does not amount to a dispossession of the servient owner. *To dispossess such owner the land must be occupied with the intention of excluding him as well as other people.*"

Reference is then made to *Littledale* v. *Liverpool*[2], and it is further observed, noting *Muniappan* v. *Muppil*[3], that

"possession will not generate a prescriptive right to property unless it is a possession to hold *exclusively* and *as owner*."

In the light of the foregoing—a part of which, it may be, has reference to adverse possession which is not strictly material to the case on hand but only affords assistance by way of analogy, I have arrived at the unhesitating conclusion that the learned Subordintate Judge on appeal was right in holding that the kind of possession had by the plaintiffs in the present case within 12 years before suit is not such as satisfies the statute.

The second appeal is accordingly dismissed with costs.

No leave.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Tirugnanasambandam Pillai .. *Appellant**

v.

K. R. Shanmughasundaram Pillai and another .. *Respondents.*

Will—Testator appointing a trustee by name to dispose of certain properties and manage certain trusts—Provision for a gift of property to a person doing obsequies of the testator—Whether successor in the place of trustee could give away property in accordance with the will—Gift after long lapse of time—Effect.

A testator in his will appointed a person as trustee, who had also the duties of an executor. There was a direction to him to give a particular individual chosen by the testator to do his last obsequies some portion of the properties after various other dispositions. The executor did not make any gift and died and his heir and legal representative, the second defendant, who succeeded to the office of trustee made a gift of some properties to the first defendant who did the obsequies. The plaintiff, a distant relation of the testator, brought a suit questioning this gift on the grounds that a successor of the trustee had no power under the will to make the gift and that the claim of the donee had become barred by limitation as it was made 24 years after the death of the testator.

Held: (1) On a construction of the language of the provisions of the will in particular reference to the suit matter it was clear that the power and discretion conferred by the provisions were upon the person to act as trustee and so it could also be exercised by his successor.

(2) That if the 1st defendant had tried to enforce his claim in Court he might have been met by a plea of limitation. But that is not sufficient reason to say that the executor of a person in the position of the 2nd defendant would be guilty of *devastavit* if in accordance with the will he made a gift or distributed a legacy or paid a debt, even though such gift or legacy or debt may not be enforceable on account of the bar of limitation. *Vide* Lewin on Trust, 14th Edn., page 306.

Appeal against the decree of the District Court, East Tanjore, Nagapattinam, in O. S. No. 9 of 1945 dated 18th April, 1946.

T. V. Muthukrishna Aiyar for *R. Sundaralingam* for Appellant.

V. Ramaswami Aiyar and *N. Muthuswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—One Ramalingam Pillai died on 1st October, 1917, leaving behind him his last will and testament, dated 27th September, 1917. It is not

1. (1906) A.C. 92.
2. (1900) 1 Ch. 19, 23.
3. (1898) 8 M.L.J. 117: I.L.R. 21 Mad. 169, 171.

* Appeal No. 613 of 1946. 5th April, 1950.

necessary to set out in detail the several provisions of the will. It suffices to state he appointed one Audiappa Naidu as the person to carry out his directions. He is referered to as the trustee but there can be no doubt whatever from a perusal of the several provisions of the will that Audiappa Naidu was also appointed executor. After payment of the debts of the testator the trustee Audipappa Naidu is directed to do renovation work in certain temples for different amounts, make arrangements for the performance of Pooja in certain temples and make certain other disbursements to his relations and, out of the surplus income provide for the education of poor boys of the High School and give them free boarding and lodging. The will then goes on to say that should there be still any surplus income, the trustee shall do other good charities according to his discretion. Then comes the passage which is material for the disposal of the case before us. It runs thus,

"For performing my obsequies, after my lifetime, I have affectionately chosen one Shanmugasundaram, son by the second wife of my dayadi Karumabayiram Pillai, residing at Kottapattar tope. So, the trustee Audiappa Naidu, shall after my death, get the said Shanmughasundaram to perform the obsequies with the aforesaid funds and shall in return for that give the said Shanmughasundaram some such property as he, *i.e.*, the said Audiappa Naidu may choose."

It is common ground that Shanmughasundaram Pillai (the 1st defendant) performed the obsequies of the testator. But Audiappa Naidu did not make any gift as contemplated by the above provision in the will. Audiappa Naidu died on 8th April, 1934, and the 2nd defendant as heir of Audiappa Naidu succeeded to the office of trustee and executor. On 11th June, 1941, the 2nd defendant executed a deed of gift in favour of the 1st defendant conveying to him an extent of 16 acres, 66 cents. The gift purported to be in pursuance of the direction contained in the will above mentioned. The recital is—

"As you have performed the funeral obsequies of the said Ramalingam Pillai, and of Rathanathachi, the widow of Swaminatha Pillai, elder brother of the said Ramalingam Pillai, and in view of the fact that you have to perform the funeral obsequies of the others mentioned in the said will, according to the wishes of the said Ramalingam Pillai, as it is mentioned in the will that you should be given properties, from and out of the properties belonging to the said estate, I hereby make a gift to you of 16 acres, 66 cents of land."

The plaintiff is the grandson of the testator's paternal uncle. Admittedly he is not one of the legatees under the will; nor is he directly interested in any of the charities specifically mentioned in the will. The only interest which he has got is set out in paragraph 5 of the plaint, namely, that he is a permanent resident of the village where several of the charities are to be performed and is likely to be benefited by the proper administration of the trust estate. He also stated that as he came from the family of the testator, he was interested in the proper administration of the trust estate. He sued in this capacity for a declaration that the aforesaid gift was not binding on the trust created by the will of the testator. The main grounds on which he challenged the validity of the gift were that the material provision in the will contemplated an exercise of discretion by Audiappa Naidu personally and such discretion could not be exercised by Audiappa Naidu's successor in office. The power was personal and limited to Audiappa Naidu in whom the testator had special confidence. The other ground was that the claim, if any, of the first defendant had become barred by limitation and a gift made 24 years after the date of the death of the testator was neither valid nor *bona fide*.

The learned District Judge of East Tanjore held that the 2nd defendant had authority and power to make the gift. He considered that the power and discretion were given to the trustee as such and not to Audiappa Naidu personally. He also held that though the gift was made many years after the obsequies of the testator it was not invalid on that ground. He therefore dismissed the suit and the plaintiff is the appellant before us.

Mr. Muthukrishna Aiyar, the learned counsel for the appellant, again pressed before us the above two grounds. So far as the first ground is concerned, our decision must rest entirely on a construction of the actual words used by the testator in this behalf. We have no hesitation in holding that the later referenee to Audiappa Naidu is to him as trustee. At the opening of the sentence the testator refers to

Audiappa Naidu as "the trustee Audiappa Naidu". It is this trustee Audiappa Naidu who is enjoined to get the first defendant to perform the obsequies. In the same sentence the testator also provides that in return for this service of the first defendant, he should be given some property. It does not specify the extent of the property, but leaves it to Audiappa Naidu. In this context it is clear to us that the reference to Audiappa Naidu is a reference to him as trustee. It is undoubtedly true that the testator did not contemplate that Audiappa Naidu would not make a gift soon after the performance of the obsequies and that his successor should make the gift. The question, however, is whether the language compels us to hold that it is only Audiappa Naidu personally who could make the gift and that his successor would not have such power. In our opinion, the power and discretion conferred by this provision were on Audiappa Naidu as trustee and they could also be exercised by his successor the 2nd defendant.

It is quite true that the gift was executed a very long time after the performance of the obsequies. We shall even assume that if the first defendant had tried to enforce his claim in Court, he might have been met by a plea of limitation, but that is not sufficient reason to say that an executor or a person in the position of the 2nd defendant would be guilty of *devastavit* if in accordance with the desire of the testator expressed in the will, he makes a gift or distributes a legacy or pays a debt, even though such gift or legacy or debt may not be enforceable on account of the bar of limitation. *Vide* Lewin on Trust, 14th Edn., page 306. If soon after the obsequies were performed, it happened that Audiappa Naidu died, surely it could not be contended that the 1st defendant would lose all rights to obtain some property from out of the estate of the testator. That would be defeating the express intention of the testator. If Audiappa Naidu himself failed in his duty we see no reason why the 2nd defendant should not have performed it. It appears that the 1st defendant on the date of the will was a very young boy about 4 or 5 years old and this fact may be another and sufficient reason for the late execution of the gift deed in his favour. In any event we are not convinced that there is substance in either of the contentions of the learned counsel for the appellant.

We may mention that we are not convinced of the *bona fides* of the plaintiff in instituting this suit. It is difficult to see how the plaintiff is in any way directly or indirectly interested in any of the charities set out in the will, but we are not disposing of the appeal on the ground that the plaintiff's suit itself was unsustainable.

The appeal fails and is dismissed with costs of the first respondent. The second respondent will take his costs from the estate.

K. C. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Original Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND S. R. DAS, JJ.

Ashutosh Lahiry .. *Petitioner**

v.

The State of Delhi and another .. *Opposite Party.*

Preventive Detention Act (IV of 1950), section 3 (2)—Satisfaction of the authority making the order of detention—Province of Court in regard to.

The satisfaction of the authority making the order of detention as to the matter specified in the Preventive Detention Act is the only condition for the exercise of his powers and the Court cannot substitute its own satisfaction for that of the authority. It is, however, open to the detenu to establish if he can that the order was made *mala fide* and in abuse of process. The recourse to the drastic order of detention rather than to a preventive order under section 144, Criminal Procedure Code, may lend some colour to a contention that the order is *mala fide*. But suspicion, however, is not proof and in the circumstances of the case, it cannot be said that the act of the District Magistrate was actuated by any improper or indirect motive.

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* Petition No. XXVIII of 1950. 19th May, 1950.

Per *Mukherjea, J.*—The order of detention may be declared invalid if it could be proved to have been made by the authorities concerned in *mala fide* exercise of their power. The burden of proving the absence of good faith is upon the petitioner and in cases of this description is certainly a heavy burden to discharge. Though there could be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the Preventive Detention Act for purposes for which ordinary law is quite sufficient, in the circumstances of the case, it could not be definitely held that there was want of good faith on the part of the authorities.

I can only hope that the authorities will take care to see that no instances occur which might savour of injustice or oppression through misuse of those extraordinary powers which the Parliament has vested in the executive in the interests of the State itself.

N. C. Chatterjee, Advocate, Supreme Court (*B. Banerji*, Advocate, Supreme Court, with him), for Petitioner.

M. C. Setalvad, Attorney-General of India (*Jindra Lal*, Advocate, Supreme Court, with him), for *Opposite Party*.

The Court delivered the following

JUDGMENTS: *Das, J.*—This application under Article 32 of the Constitution of India for a writ of *habeas corpus* made by Ashutosh Lahiry at present detained in District Jail, Delhi, under an order of detention passed on the 1st April, 1950, by the District Magistrate of Delhi under the Preventive Detention Act, 1950, raises two questions, namely :—

"(i) That the Preventive Detention Act, 1950, takes away or abridges the fundamental rights of the Indian citizens conferred by Part III of the Constitution and is accordingly void under Article 13 (2) of the Constitution; and

(ii) That the Order of detention has been made *mala fide* and is an abuse of power and as such void, illegal or inoperative."

The first question mentioned above is now concluded by the decision of this Court which, by a majority, upheld the validity of the impugned Act except as to certain provisions which were held to be severable. The provisions which were held to be bad have no bearing on the present case.

In order to determine the second question it will be necessary to state a few facts. The petitioner is a member of the Hindu Mahasabha. He is a representative of the Bengal Hindu Mahasabha on the Working Committee as well as on the All-India Committee of that organisation. In the recent past there were serious communal disturbances in East Bengal in course of which there were, as alleged, extensive killings of Hindu minorities and abduction of Hindu women. This resulted in a large-scale migration of Hindus from East Bengal into West Bengal which, it is said, is still in progress. There can be no question that Hindu feelings were and are running high and communal incidents and repercussions took place in West Bengal also. A large number of refugees poured into West Bengal and particularly in Calcutta. The petitioner actively took part in the relief work undertaken by the Hindu Mahasabha and actively co-operated with the Bengal Chief Minister (Dr. B. C. Roy) in the work. On the 5th March, 1950, the Prime Minister of India visited Calcutta to study the situation on the spot. There was a move to hold a *hartal* on that day. The petitioner issued a Press statement deprecating such move as ill-advised and called upon the citizens not to join in the *hartal*. The petitioner claims that as a result of his appeal the *hartal* fell through. The petitioner is said to have interviewed the Prime Minister in connection with relief work. It appears that there was a public meeting in Delhi on or about the 19th March, 1950. It is alleged that intemperate speeches were delivered at this meeting touching the communal situation in East Bengal and that such speeches led to a communal riot in Delhi on the 19th March, 1950. On the 23rd March, 1950, the petitioner came to Delhi for, he says, attending the Board meeting of a company of which he is a director. On the 27th March, 1950, the petitioner held a press conference at Delhi where, it is alleged, he gave a highly exaggerated and communal version of the happenings in Bengal and East Bengal. No report of the press conference, however, was published by the authorities. On the 28th March, 1950, the petitioner returned to Calcutta where he ordinarily resides. A meeting of the Working Committee and a meeting of the All-India Committee

of the Hindu Mahasabha were called by its president for the 1st and 2nd April, 1950, the notices having been issued on the 15th March, 1950. The object of these meetings was to discuss the situation in Bengal with special reference to the large influx of refugees. These were not public meetings. The meetings were, however, banned and the President, the General Secretary, the Organizing Secretary and others were externed from Delhi on the 1st April, 1950. On the same day at 8-45 P.M. a detention order dated the 31st March, 1950, was served on the petitioner. On the 3rd April, the following grounds of detention were served on the petitioner under section 7 of the Act :—

> "You came to Delhi on March 27, 1950 and held a press conference in which you gave a highly exaggerated and communal version of happenings in Bengal and East Bengal. It is understood that since after the press conference your activities have continued to be of a nature inciting communal passions. It has also come to notice that your activities during your stay in West Bengal had also been of a communal nature. Your activities in the present atmosphere in Delhi where a communal riot took place on March 19, 1950, as a result of the intemperate statements made in a public meeting are likely to create hatred between different communities which may lead to disturbance of public peace and order."

The petitioner alleges that his object in coming to Delhi was not to create any communal bitterness. He came here in March, 1950, to attend a Board meeting. It is true that he held a press conference but no report was published in any newspaper and, therefore, there can be no question of his comments having created any mischief even if they were highly communal, which is denied. On the 1st April, 1950, he came to attend the two meetings but the meetings were banned and no mischief can possibly be said to have been done. All the important leaders of the Mahasabha had been externed from Delhi and the meetings were banned by the Government in order to prevent persons opposing the Congress Governments from criticising the policy of the party in power. The Prime Minister of Pakistan had come or was due to come to Delhi at or about that time and all these steps were taken to prevent the ventilation of the genuine feelings of the people. In particular, the petitioner was co-operating with Bengal Government in the relief and rehabilitation work and there could be no justification for taking the petitioner into custody.

The District Magistrate of Delhi has filed an affidavit in opposition to this application. He states that before he made the order he satisfied himself from reports and information from persons experienced in investigating matters of this kind and whose duty is to make such investigations and report the same to him confidentially that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of public order.

It is now well settled that the satisfaction of the authority making the order as to the matters specified in the Act is the only condition for the exercise of his powers and that the Court cannot substitute its own satisfaction for that of the authority. It is, however, open in the detenu to establish, if he can, that the order was made *mala fide* and in abuse of powers. The facts and circumstances set forth in the petition and in the affidavit in reply and summarised above are calculated to give rise to a certain amount of suspicion in the mind of the Court. The recourse to the drastic order for detention rather than to a preventive order under section 144 of the Criminal Procedure Code lends some colour to the petitioner's contention. Suspicion, however, is not proof and I am not convinced that the act of the District Magistrate was actuated by any improper or indirect motive. The communal situation in Delhi was tense. In fact there was a communal riot on the 19th March, 1950. The petitioner held a press conference where he is alleged to have given a highly exaggerated and communal version of the happenings in Bengal. The District Magistrate, in these circumstances felt satisfied, he says, that it was necessary to take action against the petitioner. I am not prepared to say that in view of the prevailing situation his satisfaction was patently stimulated. The petitioner's active participation in relief work to which reference has been made is not necessarily inconsistent with and does not exclude or rule out the possibility of his inflaming the communal passions of the Hindu refugees. In the premises, I am unable to accede to this petition, which must, therefore, stand dismissed.

Mukherjea, J.—This is an application for a writ of *habeas corpus* presented by the petitioner Ashutosh Lahiry who complains of illegal detention in the Delhi Jail in pursuance of an order of the District Magistrate of Delhi made under section 3 (2) of the Preventive Detention Act.

Mr. Chatterjee, appearing for the petitioner, has raised a two-fold ground in support of the petition. His contention, in the first place, is that the Preventive Detention Act of 1950 is *ultra vires* the Constitution and any detention made under its provisions is illegal and inoperative in law. He has argued, in the second place, that the facts of the case would establish that the order of detention is a *mala fide* order, amounting to abuse of authority vested in the District Magistrate under the Preventive Detention Act.

So far as the first point is concerned, this Court has held by a majority in the case of *A. K. Gopalan* v. *The State*[1], that the Preventive Detention Act is not *ultra vires* the Constitution with the exception of section 14 which, being severable from the rest of the Act, does not affect the validity of the latter in any way. Having regard to the pronouncement already made by this Court, it is not possible to accept the first contention which has been raised by the learned counsel.

As regards the second ground, it is perfectly true that the order of detention may be declared invalid if it could be proved to have been made by the authorities concerned in *mala fide* exercise of their power. The burden of proving the absence of good faith is upon the petitioner and in cases of this description, it is certainly a heavy burden to discharge.

From the facts set out in the affidavit of the petitioner which have not been controverted by the respondents, it appears that the petitioner is a member of the Working Committee as well as of the All-India Committee of the Hindu Mahasabha. He ordinarily resides in Calcutta, West Bengal, and came to Delhi on 23rd March, 1950, to attend a meeting of the Board of Directors of the Bharat Publications, Limited. On 27th March, 1950, he held a press conference at Delhi and went back to Calcutta on the 28th. He came to Delhi again on the 1st of April, following, with a view to attend the meetings of the two committees of the Hindu Mahasabha spoken of above, which were scheduled to be held on the 1st and 2nd April, 1950. Before the meeting could be held, the President, General Secretary and Organizing Secretary of the Hindu Mahasabha were externed from Delhi on the 1st of April, 1950, and on the same day an order was served upon the petitioner directing his detention under the Preventive Detention Act, in which it is stated as follows:

> "You came to Delhi on March 27, 1950, and held a press conference in which you gave a highly exaggerated and communal version of happenings in Bengal and East Bengal. It is understood that since after the press conference your activities have continued to be of a nature inciting communal passions . . . . . Your activities in the present atmosphere in Delhi where a communal riot took place on March 19, 1950, as a result of the intemperate statements made in a public meeting, are likely to create hatred between different communities which may lead to disturbance of public peace and order."

In the absence of any evidence to the contrary, I must assume that the facts stated in the grounds are all true and that the petitioner did give an exaggerated version of the happenings in East Bengal at the press conference held on the 27th March, 1950, although no report of this conference was allowed to be published under orders of the District Magistrate. I may also take it that there was a communal disturbance at Delhi of some magnitude on the 19th of March, 1950, and that in these circumstances the presence of the petitioner in this city was not considered desirable; but even then a doubt legitimately arises in one's mind as to the necessity or propriety of making use of the provisions of the Preventive Detention Act against the petitioner. As said above, he is not an inhabitant of this place and does not normally carry on his activities in Delhi. He resides habitually in West Bengal and came to Delhi only to attend certain meetings. If as the District

1. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 (S.C.).

Magistrate thought his presence at that time in Delhi might lead to disturbance of communal peace, there were certainly ample powers under the ordinary law which he could exercise for the purpose of preventing the mischief. There are provisions in the Criminal Procedure Code which could be invoked for such purposes. As a matter of fact, the persons who were expected to take leading part in the same were externed from Delhi. It is somewhat difficult to see why a different treatment was meted out to the petitioner and he was consigned to detention in jail for an indefinite period of time. There could be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient. Though I am unable to hold definitely that there is want of good faith on the part of the authorities, the case is certainly not free from suspicion. I can only hope that the authorities will take care to see that no instances occur which might savour of injustice or oppression through misuse of those extraordinary powers which the Parliament has vested in the executive in the interests of the State itself. With these observations, I concur in the order made in this case that the application should be dimissed.

Agent for Petitioner : *Ganpat Rai.*

Agent for Opposite Party : *P. A. Mehta.*

G.R./V.S. ——— *Application dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

The New Piece Goods Bazaar Co., Ltd., Bombay .. *Appellant**

v.

The Commissioner of Income-tax, Bombay .. *Respondent.*

Income-tax Act (XI of 1922), section 9 (1) (iv)—Municipal property tax under City of Bombay Municipal Act and urban immoveable property tax under Bombay Finance Act—If allowable deductions.

The municipal property tax paid under City of Bombay Municipal Act and the urban immoveable property tax paid under the Bombay Finance Act, 1932, are in the nature of annual charges as they are in the nature of an annual levy and are assessed on the annual value of the property each year. The liability being annual and the property being subjected to it, the provisions of section 9 (1) (*iv*) of the Income-tax Act are attracted and the taxes are allowable deductions under those provisions.

K. M. Munshi, Senior Advocate, Supreme Court (*N. P. Nathvani*, Advocate, Supreme Court, with him), for Appellant.

M. C. Setalvad, Attorney-General for India (*H. J. Umrigar*, Advocate, Supreme Court, with him), for Respondent.

The Judgment of the Court was delivered by

Mehrchand Mahajan, J.—This is an appeal against a judgment of the High Court of Judicature at Bombay in an income-tax matter and it raises the question whether municipal property tax and urban immoveable property tax payable under the relevant Bombay Acts are allowable deductions under section 9 (1) (iv) of the Indian Income-tax Act.

The assessee company is an investment company deriving its income from properties in the city of Bombay. For the assessment year 1940-41 the net income of the assessee under the head "property" was computed by the Income-tax Officer in the sum of Rs. 6,21,764 after deducting from gross rents certain payments. The company had paid during the relevant year Rs. 1,22,675 as municipal

* Civil Appeal No. 66 of 1949. 26th May, 1950.

property tax and Rs. 32,760 as urban property tax. Deduction of these two sums was claimed under the provisions of section 9 of the Act. Out of the first item a deduction in the sum of Rs. 48,572 was allowed on the ground that this item represented tenants' burdens paid by the assessee, otherwise the claim was disallowed. The appeals of the assessee to the Appellate Assistant Commissioner and to the Income-tax Appellate Tribunal were unsuccessful. The Tribunal, however, agreed to refer two questions of law to the High Court of Judicature at Bombay, namely :—

"(1) Whether the municipal taxes paid by the applicant-company are an allowable deduction under the provisions of section 9 (1) (*iv*) of the Indian Income-tax Act;

(2) Whether the urban immoveable property taxes paid by the applicant-company are an allowable deduction under section 9 (1) (*iv*) or under section 9 (1) (*v*) of the Indian Income-tax Act."

A supplementary reference was made covering a third question which was not raised before us and it is not therefore necessary to refer to it. The High Court answered all the three questions in the negative and hence this appeal.

The question for our determination is whether the municipal property tax and urban immoveable property tax can be deducted as an allowance under clause (*iv*) of sub-section (1) of section 9 of the Act. The decision of the point depends firstly on the construction of the language employed in sub-clause (iv) of sub-section (1) of section 9 of the Act, and secondly, on a finding as to the true nature and character of the liability of the owner under the relevant Bombay Acts for the payment of these taxes.

Section 9 along with the relevant clause runs thus :—

"9. (1) The tax shall be payable by an assessee under the head 'income from property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, ... subject to the following allowances, namely :—

(iv) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge; where the property is subject to an annual charge not being a capital charge, the amount of such charge; where the property is subject to a ground rent, the amount of such ground rent; and, where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital;
. . . ."

It will be seen that clause 4 consists of four sub-clauses corresponding to the four deductions allowed under the clause. Before the Amending Act of 1939, clause 4 contained only the first, third and fourth sub-clauses. Under the first sub-clause interest is deductible whether the amount borrowed on the security of the property was spent on the property or not. There is no question of any capital or other expenditure on the property. The expression "capital charge" in the sub-clause cannot connote a charge on the capital, that is, the property assessed. That would be a redundancy as the opening words themselves clearly indicate that the charge is on the property. We are therefore of opinion that capital charge here could only mean a charge created for a capital sum, *i.e.*, a charge to secure the discharge of a liability of a capital nature.

In 1933 the Privy Council decided the case of *Bijoy Singh Dudhuria* v. *Commissioner of Income-tax, Calcutta*[1]. It was not an assessment under section 9 but an assessment on the general income of an assessee who was liable to pay maintenance for his step-mother which had been charged on all his assets by a decree of Court. It was not a liability voluntarily incurred by him but one cast on him by law. The Privy Council held that the amount paid by him in discharge of that liability formed no part of his real income and so should not be included in his assessment. Though the decision proceeded on the principle that the outgoings were not part of the assessee's income at all, the framers of the Amending Act of 1939 wanted, apparently, to extend the principle, so far as the assessment of property was concerned, even to cases where obligatory payments had to be made out of the *assessee's income* from the property charged with such payments, and the second sub-clause, namely,

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1. (1933) 65 M.L.J. 285 : L.R. 60 I.A. 196 : I.L.R. 60 Cal. 1029 (P.C.).

"where the property is subject to an annual charge not being a capital charge, the amount of such charge" was added. It is this sub-clause which the appellant invokes is support of its claim to deduction of the municipal and urban property taxes in the present case. In view of the opening words of the newly added sub-clause, the expression "capital charge" also used therein cannot have reference to a charge on the property, and we think it must be understood in the same sense as in sub-clause (1); that is to say, the first sub-clause having provided for deduction of interest where a capital sum is charged on the property, this sub-clause provides for a deduction of annual sums so charged, such sums not being capital sums, the limiting words being intended to exclude cases where capital raised on the security of the property is made repayable in instalments.

In *Commissioner of Income-tax, Bombay* v. *Mahomedbhoy Rowji*[1], a Bench of the Bombay High Court considered the meaning of these words. As regards "annual charge", Beaumont, C.J., observed as follows:

"The words, I think, would cover a charge to secure an annual liability".

Kania, J., as he then was, said as follows:

"I do not see how a charge can be annual unless it means a charge in respect of a payment to be made annually."

This construction of the words has been followed in the judgment under appeal.

In *Gappumal Kanhaiya Lal* v. *Commissioner of Income-tax*[2] (the connected appeal before us), the Bench of the Allahabad High Court agreed with the construction placed on these words in the Bombay case, *i.e.*, the words "annual charge" mean a charge to secure an annual liability. It is therefore clear that there is no conflict of judicial decisions as to the meaning of the phrase "annual charge" occurring in section 9 (1) (*iv*) and the meaning given is the natural meaning of these words.

As to the phrase "capital charge", Beaumont, C.J., in the case above referred to took the view that the words mean a charge on capital. Kania, J., however, took a different view and observed that he was not prepared to accept the suggestion that a document which provides for a certain payment to be made monthly or annually and charged on immoveable property or the estate of an individual becomes a capital charge. In the Allahabad judgment under appeal these words were considered as not meaning a charge on capital. It was said that if an annual charge means a charge to secure the discharge of an annual liability, then, capital charge means a charge to secure the discharge of a liability of a capital nature. We think this construction is a natural construction of the section and is right.

The determination of the point whether the taxes in dispute fall within the ambit of the phrase "annual charge not being a capital charge" depends on the provisions of the statutes under which they are levied. Section 143 of the City of Bombay Municipal Act, 1888, authorises the levy of a general tax on all buildings and lands in the city. The primary responsibility to pay this property tax is on the lessor (*vide* section 146 of the Act). In order to assess the tax provision has been made for the determination of the annual rateable value of the building in section 154. Section 156 provides for the maintenance of an assessment book in which entries have to be made every official year of all buildings in the city, their rateable value, the names of persons primarily liable for payment of the property tax on such buildings and of the amount for which each building has been assessed. Section 167 lays down that the assessment book need not be prepared every official year but public notices shall be given in accordance with sections 160 to 162 every year and the provisions of the said sections and of sections 163 and 167 shall be applicable each year. These sections lay down a procedure for hearing objections and complaints against entries in the assessment book. From these provisions it is clear that the liability for the tax is determined at the beginning of

1. I.L.R. (1943) Bom. 628. 2. I.L.R. (1944) All. 780.

each official year and the tax is an annual one. It recurs from year to year. Sections 143 to 168 concern themselves with the imposition, liability and assessment of the tax for the year. The amount of the tax for the year and the liability for its payment having been determined, the Act then prescribes for its collection in the chapter "The collection of taxes". Section 197 provides that each of the property taxes shall be payable in advance in half-yearly instalments on each first day of April and each first day of October. The provision as to half-yearly instalment necessarily connotes an annual liability. In other words, it means that the annual liability can be discharged by half-yearly payments. Procedure has also been prescribed for recovery of the instalments by presentment of a bill, a notice of demand and then distress, and sale. Finally section 212 provides as follows:

"Property taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land revenue, if any, due to the Provincial Government thereupon, be a first charge . . . . upon the said building or land . . . ."

It creates a statutory charge on the building.

Urban immoveable property tax is leviable under section 22 of Part VI of the Bombay Finance Act, 1932, on the annual letting value of the property. The duty to collect the tax is laid on the municipality and it does so in the same manner as in the case of the municipal property tax. Section 24 (2) (*b*) is in terms similar to section 212 of the Bombay Municipal Act. It makes the land or the building security for the payment of this tax also. For the purposes of section 9 of the Indian Income-tax Act both these taxes, namely, the municipal property tax as well as the urban immoveable property tax are of the same character and stand on the same footing.

Mr. Munshi, the learned counsel for the appellant, contended that both the taxes are assessed on the annual value of the land or the building and are annual taxes, although it may be that they are collected at intervals of six months for the sake of convenience, that the income-tax itself is assessed on an annual basis, that in allowing deductions all payments made or all liabilities incurred during the previous year of assessment should be allowed and that the taxes in question fell clearly within the language of section 9 (1) (*iv*). The learned Attorney-General, on the other hand, argued that although the taxes are assessed for the year the liability to pay them arises at the beginning of each half-year and unless a notice of demand is issued and a bill presented there is no liability to pay them and that till then no charge under section 212 of the Act could possibly arise and that the liability to pay being half-yearly in advance, the charge is not an annual charge. It was also suggested that the taxes were a capital charge in the sense of the property being security for the payment. We are satisfied that the contentions raised by the learned Attorney-General are not sound. It is apparent from the whole tenor of the two Bombay Acts that the taxes are in the nature of an annual levy on the property and are assessed on the annual value of the property each year. The annual liability can be discharged by half-yearly instalments. The liability being an annual one and the property having been subjected to it, the provisions of clause (iv) of sub-section (1) of section 9 are immediately attracted. Great emphasis was laid on the word "due" used in section 212 of the Municipal Act and it was said that as the taxes do not become due under the Act unless the time for the payment arrives, no charge comes into existence till then and that the charge is not an annual charge. We do not think that this is a correct construction of section 212. The words "property taxes due under this Act" mean property taxes for which a person is liable under the Act. Taxes payable during the year have been made a charge on the property. The liability and the charge both co-exist and are co-extensive. The provisions of the Act affording facilities for the discharge of the liability do not in any way affect their true nature and character. If the annual liability is not discharged in the manner laid down by section 197, can it be said that the property cannot be sold for recovery of the whole amount due for the year? The answer to this query can only be in the affirmative, *i.e.*, that the property is liable to sale.

In *Commissioner of Income-tax, Bombay* v. *Mahomedbhoy Rowji*[1], Beaumont, C.J., while rejecting the claim for the deduction of the taxes, placed reliance on section 9 (1) (v) which allows a deduction in respect of any sums paid on account of land revenue. It was observed that land revenue stands on the same footing as municipal taxes and that as the Legislature made a special provision for deduction of sums payable in regard to land revenue but not in respect of sums paid on account of municipal taxes that circumstance indicated that the deduction was not allowable. For the same purpose reference was also made to the provisions of section 10 which deal with business allowances and wherein deduction of any sum paid on account of land revenue, local rates or municipal taxes has been allowed. In the concluding part of his judgment the learned Chief Justice said that it was not necessary for him to consider what the exact meaning of the words was and that it was sufficient for him to say that it did not cover municipal taxes which are made a charge on the property under section 212 of the Bombay Municipal Act. Without determining the exact meaning of the words used by the statute it seems to us it was not possible to arrive at the conclusion that the taxes were not within the ambit of the clause. It is elementary that the primary duty of a Court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention. Again reference to clause (v) of the section is not very helpful because land revenue is a charge of a paramount nature on all buildings and lands and that being so, a deduction in respect of the amount was mentioned in express terms. Municipal taxes, on the other hand, do not stand on the same footing as land revenue. The law as to them varies from Province to Province and they may not be necessarily a charge on property in all cases. The Legislature seems to have thought that so far as municipal taxes on property are concerned, if they fall within the ambit of clause (iv), deduction will be claimable in respect of them but not otherwise. The deductions allowed in section 10 under the head " Income from business " proceed on a different footing and a construction of section 9 with the aid of section 10 is apt to mislead.

Kania, *J.*, in the above case in arriving at his conclusion was influenced by the consideration that these taxes were of a variable character, *i.e.*, liable to be increased or reduced under the various provisions of the Municipal Act and that the charge was in the nature of a contingent charge. With great respect, it may be pointed out that all charges in a way may be or are of a variable and contingent nature. If no default is made, no charge is ever enforceable and whenever there is a charge, it can be increased or reduced during the year either by payment or by additional borrowing.

In *Moss Empires, Ltd.* v. *Inland Revenue Commissioners*[2], it was held by the House of Lords that the fact that certain payments were contingent and variable in amount did not affect their character of being annual payments and that the word "annual" must be taken to have the quality of being recurrent or being capable of recurrence.

In *Cunard's Trustees* v. *Inland Revenue Commissioners*[3], it was held that the payments were capable of being recurrent and were therefore annual payments within the meaning of Schedule D, case III, rule 1 (1), even though they were not necessarily recurrent year by year and the fact that they varied in amount was immaterial. The learned Attorney-General in view of these decisions did not support the view expressed by Kania, J.

Reliance was placed on a decision of the High Court of Madras in *Mamad Keyi* v. *Commissioner of Income-tax, Madras*[4], in which moneys paid as urban immoveable property tax under the Bombay Finance Act were disallowed as inadmissible under section 9 (1) (iv) or 9 (1) (v) of the Indian Income-tax Act. This decision merely

1. I.L.R. (1943) Bom. 628.
2. (1937) A.C. 785.
3. (1948) 1 A.E.R. 150.
4. (1943) 2 M.L.J. 364 : I.L.R. (1944) Mad. 399.

followed the view expressed in *Commissioner of Income-tax, Bombay* v. *Mahomedbhoy Rowji*[1], and was not arrived at on any independent or fresh reasoning and is not of much assistance in the decision of the case. The Allahabad High Court in *Gappumal Kanhaiya Lal* v. *Commissioner of Income-tax*[2], (the connected appeal) took a correct view of this matter and the reasoning given therein has our approval.

The result is that this appeal is allowed and the two questions which were referred to the High Court by the Income-tax Tribunal and cited above are answered in the affirmative. The appellants will have their costs in the appeal.

Agent for Appellant : *M. S. Krishnamoorthi Sastri.*

Agent for Respondent : *P. A. Mehta.*

G.R./V.S. — *Appeal allowed.*

[THE SUPREME COURT OF INDIA].

(Civil Appellate Jurisdiction).

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

The Chief Controlling Revenue Authority and the Superintendent of Stamps .. *Appellants**

v.

The Maharashtra Sugar Mills, Ltd. .. *Respondents.*

Stamp Act (II of 1899), section 57 and the Government of India Act (1935), section 226—Reference under section 57 of the Stamp Act—Nature of power given to the Authority—If can be demanded to be used by the party affected—Section 226 of the Government of India Act if a bar to Court ordering the authority to state a case to the High Court.

The power contained in section 57 of the Stamp Act is in the nature of an obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the stamp duty. The power to make a reference under section 57 of the Act is not for the benefit of the Revenue Authority. It is coupled with a duty cast on him, as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so it is within the power of the Court to direct him to discharge that duty and make a reference.

The order of the High Court to a Revenue Authority to do his statutory duty to state a case would not be in the exercise of original jurisdiction in any matter concerning the revenue. Section 226 of the Government of India Act is not a bar to the exercise of such a jurisdiction.

On appeal from the judgment and order dated the 2nd September, 1947, of the High Court of Judicature at Bombay (Chagla, Acting C. J. and Bhagwati, J.) in Appeal No. 60 of 1946.

C. K. Daphtary, Advocate-General of Bombay (*M. M. Desai*, Advocate, Supreme Court, with him), for Appellant.

M. C. Setalvad, Senior Advocate, Supreme Court (*S. S. Ragnekar*, Advocate, Supreme Court, with him), for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from a judgment of the High Court at Bombay and it relates to the jurisdiction of the Court to direct the Chief Controlling Revenue Authority and the Superintendent of Stamps at Bombay to state a case for the opinion of the Court under section 57 of the Stamp Act.

The respondent company, for its business, borrowed money from the Central Bank of India, Ltd., at Bombay. In order to secure the loan a document was executed on the 22nd of March, 1945, with a stamp of Rs. 16-8-0, on the footing that it was a deed of hypothecation without possession of the goods. When the deed was sent to the Sub-Registrar for registration he impounded the same and sent it to the

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1. I.L.R. (1943) Bom. 628.
2. I.L.R. (1944) All. 780.

* C. A. No. XII of 1950. 27th May, 1950.

Stamp Office. The Assistant Superintendent of Stamps wrote to the respondent that the document was a mortgage with possession, chargeable with duty under Article 40 (*a*) of the Schedule and inquired why it was not duly stamped before execution. The respondent's solicitors in their reply contended that the document was not and was never intended by the parties to be a mortgage with possession. They pointed out that no possession of the property had been given or was intended to be given, except in certain contingencies and therefore the document was properly stamped. In reply the Assistant Superintendent intimated that the document was chargeable with duty of Rs. 56,250 and a penalty of Rs. 5,000 had been imposed. The respondents were asked to pay the amount forthwith. On the 27th July, 1945, the respondent filed a suit against the Central Bank contending that the document was not a mortgage with possession. It was alleged that since a doubt had arisen as to whether the document gave effect to the common intention of the parties the Court's directions were sought for and if the Court found that the document as framed did not give effect to the said common intention of the parties the instrument may be rectified. On 9th August, 1945, the respondent's solicitors informed the Assistant Superintendent that such a suit had been filed and requested that the demand for payment of stamp duty and penalty may not be pressed under the circumstances. In the further correspondence, on behalf of the appellant, the demand was reiterated and resort to the coercive procedure of section 48 of the Stamp Act was threatened. The Collector thereafter sent a letter to the respondents on the 17th January, 1946, demanding payment. On the 25th of January, 1946, the suit filed by the respondent was disposed of by the Court and the rectification as prayed was ordered. The respondent's solicitors immediately intimated the result of the suit to the Assistant Superintendent and sent a copy of the deed showing the rectifications made in the original document. A similar letter was also sent to the Collector of Bombay. On the 1st February, 1946, the respondent's solicitors enquired of the Assistant Superintendent of Stamps whether he was agreeable to make a reference under section 56 (*b*) to the appellant, as the question of liability to pay the stamp duty and penalty involved important questions of law. A petition on behalf of the respondent to the appellant was also filed on the 5th of February in which it was prayed that either the order of the Assistant Superintendent of Stamps be rescinded or in the alternative a case may be referred under section 57 of the Stamp Act for the opinion of the High Court. This petition was rejected on the 4th July, 1946. The respondent thereupon filed a petition in the High Court on the 19th of July, 1946, praying that a writ of *certiorari* may be issued against the appellant, or an order may be made against him under section 45 of the Specific Relief Act, to cancel the levy of the stamp duty and penalty as claimed on behalf of the appellant or in the alternative the appellant may be ordered under section 57 of the Stamp Act to refer the matter to the High Court for its opinion. The matter came for hearing before Mr. Justice Blagden who did not grant the first relief but directed the appellant to state a case under section 57 of the Stamp Act to the Court for its opinion. The appellant filed an appeal but failed. He has now come in appeal to this Court.

Two points have been urged on behalf of the appellant. The first is whether under section 57 of the Stamp Act there is an obligation on the appellant to state a case, and if not whether the High Court had jurisdiction to give a direction to that effect. The second point is whether having regard to the terms of section 226 (1) of the Government of India Act, 1935, the High Court had jurisdiction to order the appellant to state the case, it being a matter relating to the revenue. Under this head it is also argued that the matter had proceeded beyond the stage of assessment and had reached the stage of recovery. Therefore, the High Court of Bombay had no jurisdiction to pass the order it did. The material part of section 57 of the Stamp Act runs as follows:

"57. (1) The Chief Controlling Revenue Authority may state any case referred to it under section 56, sub-section (2), or otherwise coming to its notice, and refer such case, with its own opinion thereon:—

* * * * * * *

(*b*) if it arises in the Province of Bombay, to the High Court at Bombay,.........."

Section 226 (1) of the Government of India Act, 1935, runs as follows :

"226. (1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

On behalf of the appellant it is contended that the very words of section 57 of the Stamp Act show that it is a power given to the appellant to state a case and it is not an obligation. The section is framed and worded only to give the benefit thereof to the appellant and it is not for the benefit of any other party. The word "may" used in the section was deliberately used for that purpose. It was pointed out that under section 56 (2) of the Stamp Act if the Collector felt doubt as to the amount of duty with which the instrument was chargeable

"he may draw up a statement of the case and refer it with his opinion for the decision of the Chief Controlling Revenue Authority."

Similarly under section 60 if any Court felt doubt as to the amount of duty to be paid it was given power to draw up a statement of case for the opinion of the High Court. It was argued that both these sections gave only power to the Collector and the Court to make a reference for their own benefit. Section 57, it was argued, was on the same lines for the benefit of the appellant. In none of these, any other party had any right to insist on a reference. It was pointed out that under the Stamp Act a Collector could certify that the document was properly stamped, although it was not sufficiently stamped on a true construction, and when such certificate was given the Controlling Authority could do nothing. He had not even the power to refer that case to the Court to levy a higher stamp duty. For these reasons, it was contended that the scheme of the Stamp Act was materially different from the scheme of the Income-tax Act.

In our opinion the appellant's contentions are unsound. The first contention that section 57 of the Stamp Act gives only a discretion and does not cast a duty on the appellant to make a reference overlooks the fact that the appellant has not to make a reference only when he is in doubt about his decision or conclusion. In his conclusion the party liable to pay the assessed stamp duty is materially interested. The appellant's decision is not necessarily based only on the reading of the entries in the Schedule to the Stamp Act. As in the present case, the question under what item stamp duty is leviable may depend on the true construction of a document. It may also involve the decision of the question, as in the present case, as to what is the effect of the Court's order directing a rectification of the instrument. It does not appear, on principle, sound to hold that these difficult questions should be left under the Stamp Act to the final decision of the appellant, and if the party affected by the assessment has a grievance there is no relief at all in law for him. The construction of a document is not always an easy matter and on the ground that it is a substantial question of law, parties have been permitted to take the matter up to the highest Court. If so, it appears difficult to start with the assumption that because this is a Revenue Act the decision of the appellant should be considered final and conclusive. The provisions of section 56 (2) and section 60 giving power to the Collector and the Court to send a statement of case to the appellant and the High Court respectively, in our opinion, instead of helping the appellant, go against his contention. In those two sections this power is given when the referring authority has a doubt to solve for himself. The absence of the words "feels doubt as to the amount of duty to be paid in respect of an instrument" in section 57 supports the view that the reference contemplated under that section is not for the benefit of the appellant only but enures also for the benefit of the party affected by the assessment. In our opinion, the power contained in section 57 is in the nature of an obligation or is coupled with an obligation and under the circumstances can be demanded to be used also by the parties affected by the assessment of the stamp duty.

Our attention has been drawn in this connection to the decision of the Judicial Committee of the Privy Council in *Alcock, Ashdown & Co., Ltd.* v. *Chief Revenue Authority, Bombay*[1]. In that case a question arose about an assessee's right to ask the Commissioner of Income-tax to state a case for the opinion of the Court under section 51 of the Indian Income-tax Act, 1918. The material part of that section was in these terms :—

"51. (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder, the Chief Revenue Authority may, either on its own motion or on reference from any Revenue officer subordinate to it, draw up a statement of the case, and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary.

(3) The High Court upon the hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Revenue authority shall dispose of the case accordingly, or, if the case arose on reference from any Revenue officer subordinate to it, shall forward a copy of such judgment to such officer who shall dispose of the case conformably to such judgment."

In that case, after the assessment was made and the proceedings went to the Commissioner of Income-tax, the assessee requested that a case may be stated for the opinion of the Court under the aforesaid section, but the Commissioner refused to do so. Thereupon, a Rule was obtained from the High Court calling upon the Chief Revenue Authority, Bombay, to show cause why a case should not be so stated. It was argued before the High Court that the Court had no jurisdiction to order the Commissioner to state a case for its opinion. When the matter reached the Privy Council the objection to the jurisdiction was put more broadly. Before the High Court the only question raised was whether the Authority had a duty, in the circumstances, to state a case. The point raised before the Judicial Committee of the Privy Council, took the form of saying that even if the Authority had a duty, the Court could not require him to exercise it; and for this purpose reliance was placed upon the well-known general purview of the Indian Legislation which excludes matter of revenue from the consideration of the ordinary civil Courts, the principle being exemplified in the case of *Spooner* v. *Juddow*[2], and upon section 106 (2) of the Government of India Act, 1915. The judgment of the Board consisting of Viscount Haldane, Lord Phillimore and Lord Carson was delivered by Lord Phillimore. In the judgment it is stated as follows :

"It is said that, though under this section, the Chief Revenue Authority may, if he thinks fit, draw up a statement of the case and refer it to the High Court he is not bound to do so even on the application of the person to be assessed, if he is satisfied that the application is frivolous or that the reference is unnecessary and that the Authority has in the present case shown that he is satisfied that the application was frivolous and the reference was unnecessary."

This argument was rejected by the High Court. Their Lordships of the Privy Council agreed with the view of the High Court that this was too narrow a construction of the section. They observed :

"Take first the case which is last in the clause. If the assessee applies for a case, the Authority must state it unless he can say that it is frivolous or unnecessary. He is not to wait for the Court to order him to do it; it will be a misfeasance and a breach of the statutory duty if he does not do it."

The judgment did not end by relying only on that portion of section 51 (1) of the Indian Income-tax Act, 1918. It proceeds to state as follows :

"Put that case aside. The rule here is supported upon the earlier part of the section. No doubt that part does not say that he shall state a case, it only says that he may. And as the learned counsel for the respondent rightly urged, 'may' does not mean 'shall.' Neither are the words 'it shall be lawful' those of compulsion. Only the capacity or power is given to the Authority. But when a capacity or power is given to a public authority there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of *Julius* v. *Bishop of Oxford*[3] : 'There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done,

1. (1923) 45 M.L.J. 592 : L.R. 50 I.A. 227 ; I.L.R. 47 Bom. 742 (P.C.).
2. (1850) 4 Moo. I.A. 353.
3. (1880) 5 A.C. 214, 222.

something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.' In their Lordships' view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case."

This reasoning and conclusions, although they have not now the compelling force they had before the 26th of January, 1950, are entitled to great respect. Apart from that, we entirely agree with that line of reasoning and the conclusion. In our opinion, in the present case the power to make a reference under section 57 is not only for the benefit of the appellant. It is coupled with a duty cast on him, as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so it is within the power of the Court to direct him to discharge that duty and make a reference to the Court.

Mr. Daphtary on behalf of the appellant tried to distinguish this case on the ground that the scheme of the Income-tax Act was different from the scheme of the Stamp Act. In our opinion, the observations quoted above and the principles underlying the same are applicable to the duty cast on the appellant under section 57 of the Stamp Act and minor points of distinction between the schemes of the two Acts are immaterial for the present discussion. In the words of Lord Cairns the very nature of the thing empowered to be done by the appellant and the conditions under which he has to fix the amount of the duty, couple the power with the duty to state a case for the opinion of the Court. The provisions of section 51 (1) and (3) run on the same lines as section 59 of the Stamp Act. Mr. Daphtary next pointed out that there was a difference in the scheme of the Act, because when the Collector issued a certificate under section 32, even though his assessment might be faulty and against the interest of the State, the State or the appellant had no remedy. This overlooks the provisions of the section empowering the Collector to issue the certificate. The scheme of the Stamp Act may be briefly noticed. Chapter II contains provisions about the liability of the instrument to duty, of the time of stamping instruments, of values for duty and provisions as to the officer to whom duty is payable. Chapter III which contains only two sections deals with the adjudication as to stamps. The first (section 31) is where an instrument, whether executed or not and whether previously stamped or not, is brought to the Collector with an application to have his opinion as to the duty with which it is chargeable. For obtaining that opinion the applicant has to pay a fee. The Collector may call for information and take evidence. After he has done so, he determines the amount of the stamp duty and certifies under section 32 that the full duty with which it is chargeable has been paid. It is obvious that the party applying is interested in obtaining the opinion and therefore he cannot object to the certificate of the Collector. If the Collector himself is in doubt he has the power under section 56 (2) to ask for the opinion of the appellant. It is therefore clear that in respect of these two provisions under Chapter III no grievance could exist on either side. From section 33 and Chapter IV onwards there are provisions in which the opinion of the Stamp Officer and of the party interested in paying the stamp duty may come in conflict. The sections in Chapters IV, V and VI ending with section 61, deal with situations arising from such difference of opinion. Section 57 (a) falls under this heading. In our opinion, therefore, this contention of the appellant fails.

The next point urged was whether the High Court has jurisdiction to order the Revenue Authority to state a case in face of the provisions of section 226 of the Government of India Act, 1935. The argument was urged in two parts: Firstly, that this being a revenue matter, the jurisdiction of the Court was excluded. Secondly, that the matter had ceased to be in the stage of assessment but had reached the stage of collection of stamp duty. On that ground the present case

was sought to be distinguished from *Alcock's case*[1]. In our opinion this argument of the appellant must also fail. A similar argument based on the wording of the corresponding section 106 (2) of the Government of India Act, 1915, as mentioned above, was urged in *Alcock's case*[1]. On that point their Lordships observed as follows :

"Upon the point thus broadly stated their Lordships have no difficulty in pronouncing a decision. To argue that if the Legislature says that a public officer, even a revenue officer, shall do a thing, and he, without cause or justification, refused to do that thing, yet the Specific Relief Act would not be applicable, and there would be no power in the Court to compel him to give relief to the subject is to state a proposition to which their Lordships must refuse assent."

In dealing with the argument that because of section 106 (2) of the Government of India Act, 1915, the High Court had no jurisdiction to make the order, the Board observed as follows :

"In their Lordships' view the order of a High Court to a Revenue officer to do his statutory duty would not be the exercise of original jurisdiction in any matter concerning the revenue."

In our opinion, in the present case also, the respondent seeks the Court's intervention to make the appellant perform his statutory duty to state a case. That is not exercising the original jurisdiction of the Court in any matter concerning the revenue. It is only asking the appellant to perform his statutory duty. The further argument that the proceedings in this case had passed beyond the stage of assessment and had reached the stage of enforcing payment is again irrelevant because by the relief granted by the High Court no attempt is made to obstruct the Revenue Authority in the discharge of his duties. At one stage an injunction was granted against the appellant but that has been cancelled. In fact, this aspect of the discussion is only academic because if payment is enforced and the opinion of the Court, on the statement of the case is against the appellant, he will have to act in conformity with that opinion under section 59 (2) of the Stamp Act and refund whatever may be held to be recovered in excess.

In our opinion therefore the contentions of the appellant fail and the appeal is dismissed with costs.

Agent for Appellants : *R. S. Narula.*

Agent for Respondents : *Ganpat Rai* for *Tarubhai D. Desai.*

G.R./V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

Mandalapu Paddayya and others .. *Petitioners**

The Constitution of India Act (1950), *Article* 134—*Scope of.*

The Supreme Court of India will not interfere with the course of justice in Criminal cases in the free fashion of a fully constituted Court of Criminal appeal and it will interfere only in special cases of great public or private importance or if injustice of a serious and substantial character has occurred. *Where it is not so the High Court cannot grant a certificate that the case is a fit one for appeal to the* Supreme Court.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioners herein to appeal to the Supreme Court of India against the judgment of the High Court, Madras, dated 9th June, 1950, in R.T. No. 47 of 1950 trial referred by the Court of Session, Guntur division, for confirmation of the sentence of death passed upon accused 4, 6, 9, 15 and 16 in C. C. No. 60 of 1949, dated 14th February, 1950.

K. S. Jayarama Aiyar and *K. Kanniah* for the Petitioners.

The Order of the Court was made by

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1. (1923) 45 M.L.J. 592 : L.R. 50 I.A. 227 : I.L.R. 47 Bom. 742 (P.C.).

* Crl.M.P. No. 1702 of 1950. 11th August, 1950.

Panchapakesa Ayyar, J.—This is a petition filed by accused 1, 2, 5, 6, 8, 9, 10, 12, 13 and 15 in S.C. No. 60 of 1949 on the file of the Sessions Court, Guntur, for a certificate under Article 134 (1) (*c*) of the Constitution of India, that our decision in R.T. No. 47 of 1950 and Criminal Appeal Nos. 139, 140, 141 and 183 of 1950 confirming their convictions under section 147, Indian Penal Code and sections 325 and 149, Indian Penal Code, for rioting and three counts of constructive grievous hurt caused to three persons during the rioting, while setting aside the convictions of some of them for murder, and actual grievous hurt, rioting armed with deadly weapons, and rioting, is a fit one for appeal to the Supreme Court. As no conditions under Article 134 (1) (*c*) have been framed by this High Court, or provisions by the Supreme Court regarding this matter under Article 145, clause (1), referred to in Article 134 (1) (*c*), and as no ruling of the Supreme Court interpreting Article 134 (1) (*c*) has been reported so far, we have to decide this petition on merits, on the facts.

We have heard Mr. Jayarama Aiyar for the petitioners. His main argument is that though this is a case where we have agreed with the finding of the lower Court regarding the partaking of these petitioners in the offence of rioting with the common unlawful object of causing grievous hurt and have only set aside the convictions for murder and the actual causing of grievous hurt, owing to our giving the convicted accused the benefit of the doubt, still the identification of these ten persons as having been among the rioters at that occurrence has not been satisfactorily made out, though it is a vital matter affecting the convictions. It was urged that in our judgment confirming the convictions of these ten petitioners under section 147, Indian Penal Code and under sections 325 and 149 on three counts we had relied mainly on Exhibit P-34 a report sent by accused 4 (acquitted by us) in his capacity as a village munsif, that Exhibit P-34 purports to be a complaint made to the village munsif by accused 9, one of the petitioners herein, and was not proved satisfactorily to be true, and that its contents were not also put clearly to these petitioners in the lower Court, in order to enable them to explain or deny their presence at the rioting therein, the report itself purporting to be a complaint in the counter case and naming these ten petitioners as merely witnesses to the rioting and not as participants in it.

All this argument is based on a misconception about our judgment. We did not rely on Exhibit P-34 for convicting any of the petitioners of the offences of rioting and constructive grievous hurt, which we confirmed. We relied on the evidence of the prosecution witnesses alone for that. After believing that evidence, and holding it to be sufficient regarding the offences we confirmed, we held that it was not quite sufficient to bring home the murder charge to accused 6, 9, 15 and 16, who had been convicted under section 302, Indian Penal Code and sentenced to death, or the charges under sections 302 and 149, Indian Penal Code, to accused 1, 3, 4, and 10, who had been convicted thereunder and sentenced to transportation for life, or the charges of individual acts of grievous hurt to accused 1, 3, 4, 7, 11, 14, 16 and 18, regarding whom the prosecution evidence was not enough to sustain the convictions, and the benefit of the doubt had to be given to them under the law, as urged by Mr. Jayarama Aiyar himself in the course of his arguments before us in those cases. We referred to Exhibit P-34, as Mr. Jayarama Aiyar had argued before us, after his general argument about benefit of doubt regarding the individual acts, that, at the most, only accused 1, 2, 5, 6, 8, 9, 10, 12, 13 and 15 (these ten petitioners), admitted to have been present at the occurrence in Exhibit P-34, should be held to have taken part in the rioting that night and convicted under section 147, Indian Penal Code, the other seven accused not being proved to be guilty of any offence, and that even these ten accused were not proved to be guilty of any other offence. We also referred to Exhibit P-34 as affording some little confirmation of our conclusion, based on the prosecution evidence, of the guilt of the persons whose convictions we confirmed, read with the injuries on accused 1 and 9 showing that these were not mere spectators of the rioting, as pretended in Exhibit P-34, but actual participants in it. We have stated all this in the course of our judgment. We have also stated,

"It is our opinion, *after going through the entire evidence carefully*, and after hearing the learned counsel on both sides, that the individual acts of beating of the deceased, and of P.Ws. 3, 7, and 10 are not proved to have been by any particular accused."

It is for that reason we gave those accused the benefit of the doubt regarding the convictions for murder and the individual acts of grievous hurt, etc., we have added,

"Undoubtedly, the deceased was given by the above ten accused several blows with sticks and succumbed as a result of all these blows. Undoubtedly also, P.W. 10, suffered very grievous injury, by one eye being put out and the other eye too being put out of action practically. P.W. 7 also sustained a grievous hurt. But, even though these crimes are atrocious, we cannot, on the evidence, hold that any particular accused was responsible for the individual acts."

This conclusion we came to because of the difficulty of the prosecution witnesses in identifying each accused who dealt with a particular blow on each of those victims in the state of darkness which prevailed then. The state of darkness need not have prevented their identifying these ten petitioners, whom they knew well before, as having been among the rioters. We had not the slightest doubt that all these ten accused were satisfactorily proved by the prosecution evidence to have taken part in the rioting and to be constructively liable for the three acts of grievous hurt which were perpetrated in the course of the rioting and in pursuance of the common intention of the unlawful assembly. We have discussed the prosecution evidence against each of the 17 accused in detail before arriving at our decision. The fact that we found the evidence to be not quite sufficient to convict seven of the accused, whom we acquitted by giving them the benefit of the doubt cannot, under our law, make the convictions of these ten petitioners, regarding whom the evidence was quite sufficient, illegal or invalid, as urged by Mr. Jayarama Aiyar. We cannot, therefore, certify this case to be a fit one for appeal to the Supreme Court.

There are no reported cases of the Supreme Court under Article 134 (1) (*c*). But there are plenty of cases under section 109 (*c*), Civil Procedure Code, where the clause "is certified to be a fit one for appeal to His Majesty in Council" has been authoritatively interpreted by the Privy Council and the Federal Court. The same interpretation will, in our opinion, apply to Article 134 (1) (*c*) of the Constitution of India till it is authoritatively held otherwise. The Privy Council has held in *Banarsi Prasad* v. *Kashi Kishen Narain*[1], that the clause is clearly intended to meet special cases of great public or private importance; in *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[2], that it is of the utmost importance that a certificate should show clearly upon what ground it is based; and in *Ernest Hugh Canning* v. *Soobran Partap*[3], that a case in which no legal principle is involved and in which there are concurrent findings of fact by the lower Court does not warrant the grant of a certificate that it is a fit case for appeal. The Federal Court has accepted all these principles in *Moolji Jaitha & Co.* v. *Khandesh Spinning and Weaving Mills, Ltd.*[4] No rules under Article 145 (1) (*c*) of the Constitution of India appear to have been made by the Supreme Court. In *Kapil Deo Singh* v. *King*[5], cited by Mr. Jayarama Aiyar himself, the Federal Court, has, following similar Privy Council rulings, held that it will not interfere with the course of justice in criminal cases in the free fashion of a fully constituted Court of Criminal Appeal, and that *it will interfere only where it is shown that injustice of a serious and substantial character has occurred.* The same ruling will, obviously, apply to the Supreme Court, which has taken the place of the Federal Court now. It is impossible for us to say that this is a special case, or one of great public or private importance or that "*injustice of a serious and substantial character*" has occurred to any one of the ten petitioners by our decision, in other words, that it is a fit case for appeal. This petition, therefore, deserves to be and is hereby dismissed.

V. P. S. —————— *Petition dismissed.*

1. (1900) 11 M.L.J. 56: L.R. 28 I.A. 11: 5 C.W.N. 193 (P.C.).
2. (1920) 40 M.L.J. 229: L.R. 48 I.A. 31: I.L.R. 44 Mad. 293 (P.C.).
3. A.I.R. 1941 P.C. 106 (P.C.).
4. (1950) S.C.J. 51.
5. (1950) S.C.J. 143.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Naginlal Hiralal Javeri through authorised agent V. Govinda Menon .. *Appellant**

v.

Pushpa Ben J. Patel and others .. *Respondents.*

Tort—Invitee to a theatre—Occupier of theatre having knowledge of defects—Collapse of a wall in the theatre—Injury caused to invitee and subsequent death—Liability of occupier of premises.

A husband, his wife and some others attended a performance at a theatre when the roof collapsed and caused injuries to all of them as a result of which the husband died. In a suit for damages by the widow for injuries and loss sustained by her on account of the death of her husband, the first defendant owner and the second defendant occupier were made defendants and the second defendant objected to his being burdened with the responsibility for the safety of the building and his equal liability for damages along with the owner.

Held : It was clear that on the evidence a new wall of recent construction had given way, which wall according to the original plan submitted to the authorities of the Places of Public Resort Act and Cinematograph Act was not marked at all which fact was known to second defendant. There was hidden danger in the construction known to the second defendant and since he did not take adequate care to prevent injury to the invitee his liability would be in no way less than that of the owner.

Pritchard v. *Peto*, (1917) 2 K.B. 173, explained.

Principles relating to an occupier of premises discussed.

Appeals against the decrees of the Court of the Subordinate Judge, Mathurai, dated 25th July, 1947, in O.S. Nos. 51 of 1946 and 67 of 1946, respectively.

The Advocate-General (*K. Kuttikrishna Menon*) and *K. P. Raman Menon* for Appellant.

V. Ramaswami Aiyar, *V. Meenakshisundaram* and *P. K. Narayanaswami* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—These appeals arise out of two suits O.S. No. 51 of 1946 and O.S. No. 67 of 1946 on the file of the Court of the Subordinate Judge of Mathurai. Gopalakrishna Talkies is a Cinema Theatre situate in the West Masi Street, Mathurai town. On 23rd May, 1945, the Hindi picture of "Kanoon" was being exhibited in the theatre. The late Jeshubhai D. Patel, his wife and the first plaintiff with three others attended that show at 7 P.M. and occupied the seats in the balcony of the said theatre. After the show started there was rain and heavy gale and the front ornamental wall above the roof of the theatre fell down over the roof and the roof and the truss underneath gave way and collapsed and Patel and his wife along with others received serious injuries. The injured persons were removed to the Government Hospital at Mathurai and unfortunately Patel succumbed to the injuries and died in the Hospital on 25th May, 1945. Pushpa Ben, his widow who was pregnant at the time of the injury, gave birth to a female child later on. The widow, the daughter and the father of the deceased filed O.S. No. 52 of 1946 on the file of the Sub-Court, Mathurai, for damages for loss incurred by them on account of the death of Patel. The widow Pushpa Ben then filed O.S. No. 67 of 1946 for damages for injuries caused to her. The first defendant is the owner of the theatre ; the second defendant was the lessee of the theatre when the accident took place. The first defendant in both the suits contended *inter alia* that the front wall was in existence from the time the theatre was constructed in the year 1934 and 1935, that the said theatre was constructed in compliance with the statutory provisions of the District Municipalities Act, Public Health Act, the Places of Public Resort Act and the Cinematograph Act, that the wall was slightly raised at the request of the second defendant and that the accident was due to an act of God by reason of unprecedented rain and storm in Mathurai on that day. The second defendant generally supported the first defendant, but alleged that the wall was in existence even from the very beginning. The learned Subordinate

*Appeal Nos. 678 and 799 of 1947. 19th July, 1950.

Judge found that the front ornamental wall above the roof of the theatre was newly constructed about the end of 1942 by the first defendant in consultation with the second defendant and on his suggestion. He, however, held that the wall so constructed was an unsafe and faulty structure and a hidden death trap to the occupants of the seats in the balcony of the theatre. He assessed the damages at Rs. 30,000 in O.S. No. 51 of 1946 and at Rs. 3,500 in O.S. No. 67 of 1946 and decreed the suits against both the defendants. The first defendant preferred A.S. No. 655 of 1947 against the decree in O.S. No. 51 of 1946 and A.S. No. 798 of 1948 against the decree in O.S. No. 67 of 1946. The second defendant filed A.S. No. 678 of 1947 against the decree in O.S. No. 51 of 1946 and A.S. No. 799 of 1947 against the decree in O.S. No. 67 of 1946. Pending the appeals the appellant in A.S. Nos. 655 of 1947 and 798 of 1947 became insolvent and the Official Receiver, Mathurai, in whom his properties vested expressed his disinclination to proceed with the appeals. The said appeals were therefore dismissed with costs.

In the appeals filed by the second defendant, we shall first consider the nature and the condition of the wall, which collapsed and caused the damages. The site of the building was owned by Abdul Khader Sahib, who leased it to the first defendant in the year 1917. In 1935 the cinema theatre was constructed by the first defendant. Though according to specifications the walls should be built up of *brick and lime* as a matter of fact, they were built of *brick and mud*. From 11th February, 1938 to 10th February, 1941, the cinema hall was leased out to one Patel. By the end of 1942, as the original gable front was not prominent to give it a better frontal appearance an ornamental facade was built, over the gable front, of a height of over 12 feet on which the words "Sri Gopalakrishna Talkies" were artistically engraved. On 19th October, 1942, the cinema hall was leased out to the second defendant for a period of three years. The executive engineer states in his report that the later construction was not properly bonded into the old gable wall and that a weak cleavage plane had existed at the joint of the old and new construction. He was of the opinion that the ornamental structure was not evidently designed to take extra heavy wind loads, not to speak of storms and that the bonding of the old and new structure was not designed to take up heavy wind stresses. It is also found that the extended wall was built of brick and mud. The learned Judge found that the collapse of the wall was due to this defective and flimsy construction, and this finding has not been canvassed before us.

But Mr. Kuttikrishna Menon, the learned counsel for the second defendant, contended that whatever might be the liability of the first defendant, his client was not liable for damages, as he had no knowledge of the flimsy structure and that he was not guilty of want of any reasonable care. He fairly conceded that in case we should hold that the second defendant was equally liable, the amount of damages awarded would not be unreasonable.

The principles regulating the liability of an occupier to a person permitted to enter his premises and injured therein are well settled, though their application to the peculiar circumstances of each case is not free from difficulty. Entry by permission of the occupior is of two kinds : invitation or licence. The distinction between the two is expressed by Salmond in his book on the "Law of Torts" (10th edition) at page 476 in the following formula :

> "The invitor says : 'I ask you to enter upon my business'. The licensor says : 'I permit you to enter on your own business'."

This somewhat over simplified formula was commented on by Mackinnon, L.J., in *Ellis* v. *Fulham Borough Council*[1]. Asquith, L.J., in *Pearson* v. *Lambeth Borough Council*[2] would prefer to define an invitee in the following manner :

> "It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest, *e.g.*, a shopper has an interest to buy and a shopkeeper an interest to sell."

1. (1937) 3 All Eng. L.R. 454 at 464. 2. (1950) 1 All Eng. L.R. 682.

Whether common interest for this purpose necessarily should be accompanied by some pecuniary gain, immediate or remote, is a question on which no final opinion has yet been expressed by judicial decisions and it is not necessary to attempt to do so in this case, as even on that assumption the plaintiffs would be invitees in the technical sense of the term. The second defendant was running the cinema and the deceased and his wife entered the premises after purchasing tickets. The plaintiffs therefore entered the premises with the consent of the occupier on business in which the occupier and the plaintiffs have a common interest. They are certainly invitees, and therefore, the liability of the second defendant should be ascertained, having regard to that relationship.

The extent and the scope of the liability of an occupier to an invitee is equally well established. In Salmond on the "Law of Torts", 10th edition, at page 478 the learned author says :

> "The class to which the customer belongs includes persons who go not as mere volunteers, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied. And with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know."

The same view is expressed in different language in Halsbury's Laws of England, Vol. 23, (Lord Hailsham's edition) at page 604 as follows :—

> "The duty of the occupier of premises, on which the invitee comes, is to take reasonable care that the premises are safe, and to prevent injury to the invitee from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware or, in other words, to have his premises reasonably safe for the use that is to be made of them."

The question is whether the second defendant was aware or ought to have been aware of the hidden danger and whether he had taken reasonable care to prevent injury to the invitee. The first defendant, as D.W. 1, deposed that the new wall was constructed a month after the second defendant took the lease and that the construction was made on the suggestion of the second defendant. A perusal of his evidence shows that he is attempting to shift the burden to the second defendant, but that in itself is not sufficient for ignoring his entire evidence. The learned Subordinate Judge disbelieved his evidence when he stated that the entire additional structure was put up after the lease, but accepted his evidence that the wall was put up on the second defendant's suggestion and at his instance. The learned counsel for the second defendant contended that the lower Court was wrong in relying upon his evidence when it disbelieved him in regard to other and more important parts of his evidence. We agree with the lower Court that though the first defendant is an interested witness, his statements that the ornamental wall was put up at the intance of the second defendant accords with the probabilities of the case. When B. C. Patel was the lessee from 11th February, 1938 to 10th February, 1941, the first defendant did not put up the ornamental facade, but he found it necessary to build it when he entered into an agreement with the second defendant about the end of 1942. It is therefore very likely that he built it at the request of the second defendant, and when the first defendant says that he did so, at his request, we do not see any reason to reject his evidence.

D.W. 2, V. G. Menon, second defendant's power-of-attorney agent, totally denies. He says that neither the second defendant nor he asked the first defendant to build that wall and that there was no talk about it at any time. We have no hesitation to reject this evidence as it is obviously a deliberate attempt to wriggle out of the second defendant's liability. We have also gone through the cross-examination of this witness and we are satisfied from his laboured and prevaricating answers that he was supporting the second defendant's false case. He also admits in the cross-examination that the new structure was not shown in the plans available for inspection and that he knew that the rules had been contravened by the first defendant.

P.W. 6, an employee under B. C. Patel, says that the front wall was raised by October, November, 1942. D.W. 3, the mason who built the wall, is definite that

he built it at the instance of the first defendant, D.W. 2, and one Sait. He also says that he worked on the wall for about 25 days and that the plastering work was begun on or about November 15th. The account books of the first defendant, Exhibits B-5 and B-6, disclose that expenses were incurred in regard to this construction on the 12th October and also on the 23rd October. On a consideration of the entire evidence we hold that the ornamental facade was built by the first defendant on the gable front on the suggestion and at the instance of the second defendant, that the work was commenced before the new lease took effect, but completed only after the second defendant took possession, and that the second defendant or his agent knew full well the defects in the structure and also the fact that it was built in disregard of the provisions of the Places of Public Resort Act and the Cinematograph Act. The second defendant, therefore, had knowledge of the hidden danger and did not take any reasonable care to prevent injury to the invitee. He is therefore clearly liable to pay damages to the plaintiffs.

The learned counsel relied upon the decision in *Pritchard* v. *Peto*[1], in support of his contention that the second defendant is not liable. In that case, the plaintiff went to a house owned and occupied by one of the defendants, a married woman, to collect money due to him from her. While he was standing upon the doorstep, a projecting cornice from the top of the house fell on his head and injured him. The house was in apparently good repair, and the defendant did not know of the defect in the cornice. The defect, which was an old one, was due to the action of the weather upon the cement. On those facts the learned Judge held that the plaintiff was not entitled to recover damages, inasmuch as the defendant's duty was to exercise reasonable care to keep the house in such a state of repair as not to expose the plaintiff to any hidden danger of which the defendant was aware or ought to have been aware; and that the plaintiff had not shown that she was aware, or ought to have been aware, of the decay of the cornice. Indeed, in the course of the argument it was admitted that she was ignorant of the defect, but no attempt was made to show that her ignorance was due to neglect of some reasonable precaution. That decision accepts the principles above stated, but on the facts accepts the defendant's plea. That decision is, therefore, of no avail to the appellant. Even so the learned counsel pressed on us that we should confine the liability of the second defendant to the amount of Rs. 13,500 recovered already from him. On our findings we cannot say that his liability as the occupier and lessee is in any way less than that of the owner. The decree of the lower Court is therefore correct.

Both the appeals are dismissed with costs.

K. C. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO, AND MR. JUSTICE VISWANATHA SASTRI.

Depuru Veeraraghava Reddi .. *Appellant* *

v.

Depuru Kamalamma and another .. *Respondents.*

Indian Evidence Act (I of 1872), section 115—Estoppel by representation—Representation by widow as to adoption.

To invoke the doctrine of estoppel by representation it is necessary that in acting upon it, the party to whom it was made shall have altered his position to his prejudice. It invokes a combination of several essential elements, the representation or statement to be acted upon, action on the faith of such statement and in the manner intended and resultant prejudice or detriment to the person acting. Estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine.

It was held that representations made by a widow contained in a statement made to the Revenue authorities as to an adoption made by her on the authority of her husband were not enough to estop her personally from disputing the truth or validity of the adoption in view of the satisfactory explanation as to the reasons which made her make such a statement.

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1. (1917) 2 K.B. 173.

* S.A. No. 1409 of 1946. 1st February, 1950.

Appeal against the decree of the District Court, Nellore, dated 10th December, 1945, in A.S. No. 24 of 1945, preferred against the decree of the Court of the Subordinate Judge, Nellore, dated 20th April, 1944, in O.S. No. 3 of 1941.

The Advocate-General (*K. Rajah Aiyar*) and *A. N. Veeraraghavan* for Appellant.

K. Umamahiswaram for Respondents.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The plaintiff is the appellant in this second appeal. The suit was filed for recovery of possession of the immoveable and moveable properties described in the plaint. The plaintiff's claim was based on his adoption by the first defendant, widow of the deceased Depuru Rami Reddi, who was the original owner of the properties described in the plaint. It is common ground that Rami Reddi left a will, Exhibit P-1, dated 19th July, 1921, disposing of his properties in the manner therein set out. Rami Reddi was the owner of landed properties situated in the village of Mahimalur of which he was also the hereditary village headman. He had landed properties in other villages as well. He died on 25th July, 1921, leaving behind him his two widows, Venkamma and Kamalamma. The first wife, Venkamma had been living apart from Rami Reddi for some years before his death and a separate provision for her maintenance had also been made by Rami Reddi during his lifetime. The will, Exhibit P-1 makes a provision for Kamalammal, the second wife of Rami Reddi and in favour of the child to be born to her who was *enciente* on the date of the execution of the will. There was also reference to succession to the estate by a son to be adopted to him in the event of failure of issue, either male or female, of Rami Reddi. A posthumous female child was born but died after a few days of its birth. The construction of this will, Exhibit P-1, viewed as an authority to his wife to adopt, has been the subject of a difference of opinion between the two Courts which have tried the suit but for the reasons which we shall state presently, it is not necessary to decide whether the view of the trial Court or that of the appellate Court is correct.

The plaintiff's case is that, pursuant to the authority given to the first defendant by Rami Reddi, she adopted him and treated him as her adopted son. He therefore claims that he has succeeded to the estate of Rami Reddi as adopted son. The first defendant denies that she ever adopted the plaintiff. She also pleads that the will, Exhibit P-1, on its true construction and in the events that have happened, did not authorise the adoption. The learned Subordinate Judge held that the adoption was true in fact but invalid in law, and dismissed the suit. On appeal the learned District Judge was of the opinion that Exhibit P-1 was of sufficient amplitude to permit of an adoption being made by the first defendant in the events that have happened but found against the truth of the adoption of the plaintiff by the widow of Rami Reddi. He commented upon the several infirmative circumstances in the case and the serious discrepancies in the evidence adduced by the plaintiff in support of the adoption set up by him and came to the emphatic conclusion that the adoption was not established. Mr. Veeraraghavan for the appellant tried to challenge this finding of fact of the learned District Judge but having considered the whole of the evidence we find it impossible to say that the finding is either erroneous in law or perverse. The case must therefore proceed on the footing that there was no adoption in fact.

The learned Advocate-General who appeared at an earlier stage of the case argued that whatever may be the ultimate decision of the Court as regards the truth or validity of the adoption in a suit between the adopted son and the reversioners to the estate of Rami Reddi, so far as the widow was concerned, she was personally estopped from disputing the truth and validity of the plaintiff's adoption. This plea of estoppel is founded solely on certain admissions stated to have been made by the first defendant soon after the death of Rami Reddi. To these admissions we shall presently refer. Issues 6, 7 and 8 raise the question of estoppel but during the course of the trial before the learned Subordinate Judge, as stated in paragraph 36 of his judgment, the plaintiff's counsel chose not to press the issues

relating to estoppel. There is no trace of this point having been presented to the learned District Judge on appeal and his judgment is silent on this question. Though it may not, strictly speaking, be open to the appellant to raise this point in second appeal, we have heard arguments on this question. We shall now indicate our concluion on this part of the case.

Reliance has been placed on the statements of the first defendant in connection with the appointment of a successor to the office of village headman in succession to Rami Reddi. The second defendant was a relation of the first defendant, the widow of Rami Reddi and had been appointed along with another, as her adviser and the manager of her properties under the terms of the will Exhibit P-1. The present plaintiff is no other than the nephew of the second defendant who was himself issueless. Under the advice of Vakati Narasimha Reddi, the second defendant, and with the object of securing the office of village headman to the plaintiff, then a minor, and enabling the second defendant to act as a proxy for the minor, certain representations were made by the widow to the Revenue authorities in connection with the office of village headman. Exhibit P-2 is a petition and Exhibit P-4 and Exhibit P-22 are the statements of the widow, the first defendant, in connection with the appointment of a successor to her husband to the office of village headman of Mahimalur. In all these three documents there is an admission by the first defendant that she had adopted the plaintiff pursuant to her husband's authority given to her under Exhibit P-1 and this admission is coupled with a request that the plaintiff, then a minor, might be appointed to the office of village headman and the second defendant might be appointed to act for him during his minority. The plaintiff whose right to the office was recognised on the strength of these representations during his minority became a major in 1939 and entered upon the duties of the office himself. Till then the second defendant was acting for him.

There is no doubt that the admissions in Exhibits P-2, P-4 and P-22 shifted the onus of proof with respect to the truth of the adoption on to the first defendant. Normally the burden of proving his adoption would be on the plaintiff who claims to be the adopted son of Rami Reddi. But the admissions of the first defendant that she had adopted the plaintiff shifted the onus on to her on the principle of *Slatterie* v. *Pooley*[1], "that what a party himself admits to be true may reasonably be presumed to be so." Until this presumption is rebutted the fact admitted must be taken to be true. Reliance is placed by the learned Advocate-General on this principle as supporting his plea of estoppel. This is not a case where there is a statement in a deed which all the parties to the deed who are *sui juris* have mutually agreed to admit as true and which is invoked as a basis for the application of the principle of estoppel. In a case like the present where the plaintiff is not a party to any deed and the statement relied upon is unilateral there is no estoppel by deed and the party making the admission may give evidence to rebut the presumption arising from such a statement. If that is not satisfactorily done, the fact admitted must be taken to be established. (*Chandrakunwar* v. *Chaudri Narpat Singh*[2].) With reference to admissions made by one of the parties to a suit, as in this case, the party making the admission is at liberty to prove that such admissions were mistaken or were untrue and is not estopped or concluded by them unless another person has been induced by them to alter his condition. This principle has been laid down by the Judicial Committee in clear terms in the case above cited. The explanation which has been given and which has been accepted by the learned District Judge for the statements contained in Exhibit P-2, Exhibit P-4 and Exhibit P-22 is that the second defendant who was constituted the adviser of the first defendant under the will of Rami Reddi, Exhibit P-1, was interested in the plaintiff who was no other than his own nephew and that he wanted the office of village headman to remain in his own Vakati family after it had fallen vacant by the death of Rami Reddi, his widow, the first defendant, not being fit to hold the office. This is not an unacceptable explanation. The first defendant who is an illiterate marks-

1. 6 M. and W. 664 at 669.
2. (1906) L.R. 34 I.A. 27: I.L.R. 29 All. 184 at 195 (P.C.).

woman stated that all that she was asked to agree to by the second defendant was to the appointment of the plaintiff, then a minor, as a village headman in succession to her husband with the second defendant as a proxy and that she was not responsible for the recitals as to adoption found in Exhibit P-2, Exhibit P-4 and Exhibit P-22.

Admissions are relevant but not conclusive under section 21 of the Evidence Act and their evidentiary value varies with the circumstances attending the admission. In *Venkatapathiraju* v. *Venkatanarasimha Raju*[1], the Judicial Committee observe at page 12 :

"It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position ; and it is not their statements but their relations with the estate, which should be taken into consideration in determining the issue."

To the same effect is the decision of the Board in *Harikishen Singh* v. *Pratap Singh*[2].

Viewing therefore these statements in Exhibits P-2, P-4 and P-22 as admissions of the widow they are evidence against her. But she has given a reasonably acceptable explanation of these statements which has been accepted as satisfactory by the District Judge and in these circumstances we cannot hold that she is estopped or concluded by them unless the plaintiff has been induced by those statements to alter his condition to his prejudice or detriment. Estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine. It involves a combination of several essential elements ; the representation or statement to be acted upon, action on the faith of such statement and in the manner intended and resultant prejudice or detriment to the person acting. To invoke the doctrine of estoppel by representation it is necessary that in acting upon it, the party to whom it was made, should have altered his position to his prejudice—[Halsbury's Laws of England, 2nd Edn., Vol. 13, paragraph 547 and the cases cited in the footnote (*m*).] It may be that when prejudice or damage is made out and the other circumstances are such as to create an estoppel, it is unnecessary to measure the quantum or extent of the prejudice or damage or arrive at the result that it is irreparable.

The learned Advocate-General placed strong reliance on the decision of the Judicial Committee in *Dharam Kunwar* v. *Balwant Singh*[3]. In that case a widow who made the adoption represented that she had her husband's oral authority to make successive adoptions on the death of the previously adopted sons, and on the faith of such representation, the respondent before the Board was given in adoption to the widow. The factum of adoption was established by abundant evidence and indeed was beyond controversy and the only question was as regards the existence of the authority of the husband to make an adoption. The adoptee had in many ways altered his position to his prejudice and had incurred liabilities and assumed responsibilities necessitated by his transition from his natural family to the adopted family. In these circumstances the Judicial Committee held that though such representation and conduct on the part of the widow might not clothe the adoptee with the status of an adopted son under the Hindu law, still the widow herself was personally estopped from disputing the truth and validity of the adoption. In that case, the widow had asserted her authority to adopt in the most solemn manner in a deed of adoption executed by her and her conduct both before and after that assertion had been of an unequivocal character. It was held that she could not be allowed to change her story without grave injustice to the respondent who had acted in reliance upon her deliberate and repeated representations. In the present case the factum of adoption itself has not been proved by anything like reliable evidence. There is no evidence of any representations made by the widow to the plaintiff or his parents on the faith of which the plaintiff was transferred from his natural family to the adoptive family. The evidence as regards the factum of adoption adduced by the plaintiff has been rightly found to be wholly

1. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 (P.C.).
2. (1938) 2 M.L.J. 234 (P.C.).
3. (1912) 23 M.L.J. 200 : L.R. 39 I.A. 142 : I.L.R. 34 All. 398 (P.C.).

unreliable. There is no plea or proof of any detriment or prejudice to the plaintiff by the statements made by the first defendant in Exhibits P-2, P-4 and P-22 with a view to secure for him the office of village headman. The securing of the office of village headman was advantageous and beneficial to the plaintiff on account of the emoluments, recognised and unrecognised attached to that office. No onerous obligation was cast upon him by reason of the statement as the learned Advocate-General would contend. The elements necessary to constitute an estoppel are wholly lacking in this case and we are unable to uphold the contention of the learned Advocate-General that the first defendant is debarred from disputing the truth and validity of the plaintiff's adoption.

In this view we need not express any opinion as regards the construction of Exhibit P-1.

For these reasons we agree with the conclusion of the learned District Judge and dismiss the second appeal with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, CHIEF JUSTICE, AND MR. JUSTICE BALAKRISHNA AYYAR.

Navaneethammal .. *Petitioner* *

Madras Buildings (Lease and Rent Control) Act (XV of 1946), Sections 6 (c) and 7 (2)—Rent in arrears —Adjustment of advance with landlord towards arrears—Whether could be pleaded—Circumstance when such a plea will be proper.

Where a tenant who committed default in payment of rent relied on the fact that the landlord had with him two months advance of rent which he could adjust towards default and accumulation of arrears under section 6 (*c*) of the Madras Buildings (Lease and Rent Control) Act.

Held: That to invoke the provisions of sub-section (*c*) of section 6 the tenant should have exercised the option and called upon the landlord to make the adjustment and the mere fact that the landlord had with him an advance rent does not mean that the tenant has not committed default within the meaning of section 7 (2) of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of Certiorari calling for the records in H. R. A. No. 1389 of 1949 on the file of the Court of Small Causes, Madras, preferred against the order of the Additional Rent Controller, Madras, in L. Dis. No. 3817, H. R. C of 1949 and to quash the order, dated 25th January, 1950 in the said H. R. A. No. 1389 of 1949.

K. S. Ramabhadra Aiyar and *T. A. Rajagopal* for Petitioner.

The Court delivered the following

ORDER (*Delivered by the Chief Justice*) :—The judgment of the appellate authority is certainly not satisfactory, but we see no reason to interfere by way of a writ of *certiorari*, because there is no error of law apparent on the face of the order. The tenant relied upon payment of rent at intervals longer than a month in support of an agreement that rent had to be paid once in two months. The appellate authority was not satisfied that the agreement had been proved. This finding of his is a finding of fact.

The learned advocate for the petitioner also urged upon us another point not dealt with by the learned Judge, namely, that the landlord had with him two months' rent in advance and he could adjust it towards arrears of rent under section 6 (*c*). But to invoke the provisions of that sub-section of section 6, the tenant should exercise the option and call upon the landlord in time to make the adjustment. There is no evidence in this case of the exercise of such a choice. The mere fact that the landlord had with him an advance rent does not mean that the tenant has not committed default within the meaning of section 7 (2).

The application is dismissed.

K.C. ——— *Application dismissed.*

* C.M.P. No. 3230 of 1950. 3rd April, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

The Commissioner of Income-tax, Madras .. *Applicant.*

v.

V. P. Rao (Deceased) and others .. *Respondents.*

Income-tax Act (XI of 1922), Section 4 (3) (vii)—Remuneration received by assessee for acting as an arbitrator—If exempted from assessment.

Fee or remuneration got by the assessee, a retired High Court Judge, for acting as an arbitrator, would fall within the scope of the word "income" in section 6 of the Income-tax Act. A receipt arising from business, or the exercise of a profession, vocation or occupation will not come within the exception in section 4 (3) (*vii*) of the Income-tax Act. The amounts received as arbitrator were receipts of the assessee arising from his "occupation" as arbitrator in the said proceedings. Receipts got as remuneration by a person, who is not already having the occupation of arbitrator on being appointed as an arbitrator, will be receipts arising from the exercise of the occupation of an arbitrator even though it had been exercised only once. Where the performance of the service as arbitrator and the remuneration for that occupation was agreed upon already before the occupation was taken on, it cannot be said that the remuneration was a windfall or casual income exempt from assessment.

Commissioner of Income-tax v. *Ahmed Badsha Sahib,* (1943) 2 M.L.J. 530 : 11 I.T.R. 590 explained and distinguished.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R. A. No. 66 (Madras) of 1944-45 on its file.

C. S. Rama Rao Sahib for Applicant.

A. Ramachandran for *G. Gopalakrishnan* for Respondents.

The Judgement of the Court was delivered by

Panchapakesa Ayyar, J. :—This is a case referred to us under section 66 (1) of the Indian Income-Tax Act, 1922, by a Bench of the Income-Tax Appellate Tribunal, Madras Bench. At the instance of the Commissioner of Income-Tax, the Tribunal has referred to this Court for decision the following question :

"Whether on the facts and circumstances of the case set out above, the sum of Rs. 3,000 received by the respondent as remuneration for acting as an arbitrator under section 234 of the Madras Local Boards Act of 1920 was a receipt exempt from assessment under section 4 (3) (*vii*) of the Indian Income-Tax Act ?"

The undisputed facts are briefly these : The assessee, Mr. V. P. Rao, was a member of the Indian Civil Service and a Judge of the Madras High Court before he retired from service in June, 1941. He was also a Barrister but never practised at the Bar. After retirement he had also no whole time profession, vocation or occupation. When he was leading the life of a pensioner, in September, 1941, some three and a half months after his retirement, the Madras Government asked him whether he would find it convenient to serve as an arbitrator for enquiring and reporting about a dispute which had arisen between the District Boards of Krishna, and West Godavari in the matter of apportionment of the sale proceeds of the Bezwada-Masulipatam railway, as the Government proposed to take action under section 234 of the Madras Local Boards Act, 1920, and to refer the dispute to an arbitrator for enquiry and report. He was also informed that he would be paid a lump fee of Rs. 3000 for the work and travelling allowance, on the scale admissible for High Court Judges. He replied at once agreeing to serve as an arbitrator, and he was appointed arbitrator by a G. O. dated 23rd September, 1941 which also fixed his lump sum remuneration at Rs. 3000 and travelling allowance on the scale admissible for High Court Judges. He then worked as an arbitrator. Even according to him, the work was quasi-judicial, and the parties to the dispute appeared by learned Counsel, the late Mr. Govindarajachari appearing for the Krishna District Board and the Advocate-General for the West Godavari District Board. Mr. V. P. Rao, received the written statements on both sides, heard evidence and arguments

*Case Referred No. 26 of 1946. 2nd August, 1950.

and submitted his report to the Government and was paid the sum of Rs. 3000, the remuneration promised to him for the work, besides the travelling allowance drawn by him on the scale admissible for High Court Judges. He showed this Rs. 3000, in his return of annual income for the year of assessment 1942-43, along with other income of Rs. 29,444, got as salary for the period he had worked as High Court Judge, pension for the remaining period and income from securities debentures, and other investments. He claimed exemption under section 4 (3) (*vii*) of the Indian Income-tax Act regarding the Rs. 3000, got as remuneration or fee for the arbitration work. The Income-tax Officer held that he was not entitled to exemption from assessment under section 4 (3) (*vii*) and that the Rs. 3000 were taxable. The assessee appealed, and the Appellate Assistant Commissioner held that the amount was taxable as salary or remuneration and was not a casual and non-recurring receipt. The respondent then appealed to the Income-tax Appellate Tribunal. The tribunal held, mainly relying on a ruling of a Bench of this Court reported in *Commissioner of Income-Tax* v. *Ahmed Badsha Sahib*[1], the facts of which they held to be not distinguishable from the facts in this case, that the said sum of Rs. 3000 would fall within the purview of section 4 (3) (*vii*) and would not be taxable, and directed that the total income of the assessee should be reduced by the said Rs. 3000. The Commissioner of Income-tax thereupon applied for the case being referred to this court under Section 66 (1) of the Income-Tax Act.

During the pendency of that application Mr. V. P. Rao died, and his legal representatives were brought on record. They wanted another question to be referred to this Court in addition, namely:

"Whether the Income-tax Appellate Tribunal has no power to award costs and interest in any appeal before it."

This question has not been referred to this Court because the Income-Tax Appellate Tribunal held that all applications for reference under section 66 of the Act must be by substantive applications, and that there is no provision as in the Civil Procedure Code, for the filing of cross-objections; and, further that the respondents had not paid the requisite court-fee for the reference, and that the request was also barred by time, and that the question had not been raised before the Income-Tax Appellate Tribunal when it heard Mr. V. P. Rao's case and there appeared to be also no provision of law for awarding costs or interest to the successful party before the Income-Tax Appellate Tribunal. So we are not concerned with the other question now and the only question before this Court is the question regarding the taxability of the said Rs. 3,000 or the alleged right to be exempted from taxation under section 4 (3) (*vii*) of the Act.

We have perused the entire records and heard the learned counsel on both sides. Before we proceed further, it may be as well to quote section 4 (3) and 4 (3) (*vii*) of the Income-Tax Act for understanding the various contentions to be stated presently; section 4 (3) and section 4 (3) (*vii*) run as follows:

"4 (3):—

Any income, profits or gains falling within the following classes shall not be included in total income of the persons receiving them;

* * * * * *

(*vii*) Any receipts not being capital gains chargeable according to the provisions of section 12 and not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

The learned counsel appearing on behalf of the assessee raised several contentions. The first was that the fee or remuneration of Rs. 3,000 involved in this case would not be "income, profits or gains" chargeable to income-tax under section 6 of the Income-Tax Act; and though they may be "receipts" within the meaning of the exemption clause under section 4 (3) (*vii*) the charging of Tax can only be made on "income, profits and gains" as defined in section 6, and

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1. (1943) 2 M.L.J. 530: 11 I.T.R. 590.

not on any "receipts" mentioned in this exemption clause. He relied on the ruling of the Privy Council in *Commissioner of Income-Tax, Bengal* v. *Shaw Wallace and Company*[1], and the definition of 'Income' there. Their Lordships have remarked in the course of that judgment as follows :

> "The object of the Indian Act is to tax 'income' a term which it does not define. It is expanded, no doubt, into 'income, profits and gains,' but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act, connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as 'capital'."

It was urged, therefore, that this single fee or remuneration got from a solitary act of arbitration performed by Mr. V. P. Rao would not come under the definition of 'Income' given by the Privy Council, as there would be no recurrence of such income like fruits or crops from a tree or harvest. We cannot agree. There are some trees which yield only once like the plantain tree. Besides, the above definition of 'Income' given by the Privy Council has been modified by the Privy Council itself, in a judgment delivered three years later in *Gopal Saran Narain Singh* v. *Commissioner of Income-Tax*[2]. There their Lordships of the Privy Council have held that the word 'income' is not limited by the words 'profits and gains' and that anything which can properly be described as 'income' as taxable under the Income-Tax Act unless expressly exempted. In *Rani Amrit Kunwar* v. *Commissioner of Income-Tax*[3], a case decided by three judges of the Allahabad High Court, Braund, J., has exhaustively discussed the case-law till 1946 and has finally held :

> "In short, the English Income-Tax Act, by its charging provisions, has taxed only those particular types of income which can be brought within the various schedules whereas the Indian Income-Tax Act has charged whatever is income, profits and gains on the proper construction of these expressions."

It is obvious that the fee or remuneration of Rs. 3,000 got by Mr. V. P. Rao for this work of arbitration would fall within the scope of the word 'income' in section 6 : he himself actually showed it in his return of income though he contended that it would be exempt from tax under section 4 (3) (*vii*). It would at any rate, certainly fall within the term 'Profits and gains' in section 6 for nobody can gainsay the fact that he gained or profited by the said fee or remuneration to the extent of Rs. 3,000.

The next contention of the learned counsel for the assessee was that under section 4 (3) (*vii*) even receipts arising from business or exercise of a profession, vocation or occupation would be excluded from the exemption only if they were of a casual and non-recurring nature. Mr. Rama Rao Sahib, for the Commissioner of Income-tax, contended, on the other hand, that the exemption under section 4 (3) (*vii*) would not enure at all for any receipt arising from business or the exercise of a profession, vocation or occupation. His contention was that the exemption would not be given (1) for receipts arising from business or the exercise of a profession, vocation or occupation ; (2) to receipts which were not of a casual and non-recurring nature ; and (3) to receipts which were by way of addition to the remuneration of an employee. We agree with him and hold that a receipt arising from business, or the exercise of a profession, vocation or occupation will not come within this exception. It was observed by Walsh and Ryves, JJ., in *In the Matter of Chuni Lal Kalyan Das*[4],

> "The question is whether that sum is a receipt, not being a receipt arising from business or the exercise of a profession, vocation or occupation which was of a casual and non-recurring nature. In answer to that question one first has to determine the grammatical construction of the exemption. In so doing one has to bear in mind that it is an exemption, and therefore, of a negative nature, and inasmuch as it does not correspond with any provision contained in any similar legislation in England, and has not apparently been the subject of any decision in India, we have to interpret it as a matter of first impression guided only by the arguments of counsel on either side. In our view, the passage

1. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 : 3 I.T.R. 237 (P.C.).
I.L.R. 59 Cal. 1343 (P.C.).
2. (1935) 69 M.L.J. 190 : L.R. 62 I.A. 207 :
3. (1946) 14 I.T.R. 561 (at 571).
4. (1924) I.L.R. 47 All. 368.

beginning with the word 'not' and ending with the word 'occupation' is an exception upon an exception, that is to say, the word 'which' relates only to receipts which are not receipts arising from business or the exercise of a profession, vocation or occupation. If the argument on behalf of the assessee were adopted, the result would be to strike out that qualifying passage from the section, and to make all receipts, whether arising from business or not, which are of a casual and non-recurring nature, within the exemption."

We agree with the above observation.

Mr. Rama Rao Sahib for the Commissioner of Income-tax agreed that the Rs. 3,000, in this case were not receipts arising from business and were not also receipts by way of addition to the remuneration of Mr. V. P. Rao as an employee. He also conceded that the receipts did not arise from the exercise of a profession or vocation, as Mr. V. P. Rao was not by profession an arbitrator. Nor was his vocation arbitration. Mr. Rama Rao Saheb said that 'Vocation' would mean, the calling in which a person passes his life adopting the definition in *Partridge* v. *Mallandaine*[1], and he conceded that Mr. V. P. Rao was not passing his life in arbitration. But he strongly contended that the remuneration of Rs. 3,000 was a receipt arising from Mr. V. P. Rao's occupation as an arbitrator in the said proceedings, and so he could not claim exemption from taxation under section 4 (3) (*vii*) of the Act. He further contended that the said fee or remuneration was also not of a casual and non-recurring nature, and that for this reason also that would not be exempt from taxation under section 4 (3) (*vii*). He gave the definition of 'occupation' as 'being occupied with, or engaged in something' relying on the Oxford Dictionary. The learned counsel for the assessee urged vehemently that the word 'occupation' would mean the trade or calling by which a person seeks his livelihood as stated in Mr. Sampath Aiyangar's commentary on the Indian Income-tax Act, and that it would mean much the same thing as 'vocation'. We cannot agree. No doubt, 'occupation' is used sometimes in the same sense as vocation. But it is used more often in the other sense mentioned by Mr. Rama Rao Saheb. In the New English Dictionary edited by E. A. Baker, M. A. D., one of the meanings given for 'occupation' is "the state of being employed or engaged in some way". In the Law Lexicon of British India, by Mr. Ramanatha Aiyar, 1940 Edition, the meaning given for 'occupation' is 'the principal business of one's life; vocation, calling, trade; the business which a man follows to procure a living or obtain wealth; that which occupies or engages one's time or attention; etc.' It is obvious that this arbitration business in which Mr. V. P. Rao was engaged for some months, occupied and enagaged his time and attention for those months and that he took up the business in order to obtain wealth namely Rs. 3,000, though not to seek his livelihood, as he was evidently having a comfortable living even from his pension and investments. If Mr. V. P. Rao himself were asked during the period he was engaged in these arbitration proceedings what he was occupied with he would have said "with the arbitration proceedings between the two Local Boards". So, we have no doubt whatever that the Rs. 3,000, in question were receipts of Mr. V. P. Rao arising from his "occupation" as an arbitrator in the said proceedings.

The next contention of the learned counsel for the assessee was that, even so, the receipts could not be said to have arisen from the exercise of an occupation. His argument has evidently been taken over from the judgment of the income-tax Appellate Tribunal which seems to have thought that the receipts arose from Mr. V. P. Rao's occupation as an arbitrator but that there was a substantial distinction between the meaning of the word 'from' and the meaning of the words 'from the exercise of' and that the words 'exercise of' connoted the existence of a profession or vocation or occupation that a person already pursues, and that, if the person did not follow the profession or vocation or occupation of an arbitrator a solitary receipt like this from arbitration proceedings engaged in by him could not be said to have arisen from the exercise of an occupation. We cannot agree. The words 'from the exercise of' in section 4 (3) (*vii*) cannot be given the meaning given to it by the Income-tax Appellate Tribunal and by the learned counsel for the

1. (1886) 18 Q.B.D. 276.

assessee but must be given the natural meaning in the ordinary English idiom. Very few people speak of receipts arising from the exercise of a business, and only speak of receipts arising from business; whereas the usual phrase for receipts from a profession, vocation or occupation is "receipts arising from the exercise of a profession, vocation or occupation". If the argument of the Income-tax Appellate Tribunal in its judgment is correct, all the three words, profession, vocation and occupation would mean much the same thing, and the use of the three different words in the Act would be otiose. That is also one of the reasons why we disagree with the meaning sought to be given to the word 'occupation' by the learned counsel for the assessee. In our opinion, there is nothing in the words 'exercise of' to require us to hold that the person exercising the occupation should be of the said profession, vocation or occupation already. The meaning of the word 'exercise' in the New English Dictionary is 'act of using, employing or exerting.' Receipts got as remuneration by a person, who is not already having the occupation of arbitrator on being appointed as an arbitrator will in our opinion, be receipts arising from the exercise of the occupation of an arbitrator even though it had been exercised only once.

It was urged by the learned counsel for the assessee that a Bench of this Court, consisting of Sir Lionel Leach, C.J. and Lakshmana Rao, J., had held in *Commissioner of Income-tax* v. *Ahmed Badsha Sahib*[1], relied on by the Income-tax Appellate Tribunal also that the sum of Rs. 7,000 paid by the Court to an arbitrator as remuneration was not a receipt arising from the exercise of a profession, vocation or occupation; and that there is nothing to distinguish this case from that and to hold that the receipt of the Rs. 3,000 arose from the exercise of a profession, vocation or occupation. We cannot agree. In that case, the arbitrator had not stipulated for, or been promised, or had even expected, any remuneration. He had occupied himself with the work of arbitration as a friend of the family without any desire to obtain wealth or profit or gain, and that made it a hobby and not an occupation; but in this case, Mr. V. P. Rao was offered a definite remuneration, and asked whether he would accept the work for that remuneration and the travelling allowance on the scale admissible for High Court Judges, and he agreed to do the work only in the expectation of that remuneration, and so, the thing became an occupation instead of a mere hobby. The learned Chief Justice in delivering the judgment of the Bench in the *Ahmed Badsha Sahib's case*[1], remarked;

> "Now it is clear that the Rs. 7,000 is not a receipt arising from the exercise of a profession, vocation or occupation. As we have already pointed out, the assessee is a merchant dealing in hides and his agreement to act as an arbitrator was entirely apart from his business. When he agreed to assist in settling the differences of the heirs of the Nawab no stipulation was made for remuneration. He obviously consented to act as he was a friend of the family; but it turned out that the task involved far more time than was anticipated and this was the reason why Gentle, J., decided to grant the arbitrators a reward for their services. There was no obligation to remunerate the arbitrators, and if Gentle, J., had refused to sanction remuneration nothing would have been payable. In our opinion, the facts of this case show that this is a receipt of a casual and non-recurring nature. It has been said that the assessee may act as an arbitrator in another case. That may be so; but he is not a professional arbitrator and it is very unlikely that he will be called upon to act in a case like the one referred to. There can be no rule laid down with regard to what is of a casual and non-recurring nature. Each case must be decided on its particular facts. We think that in the circumstances of this case the Income-tax Appellate Tribunal took the correct view. Therefore the answer to the question referred is that the Rs. 7,000 is not assessable".

Here Mr. V. P. Rao was a retired High Court Judge, and his agreement to act as an arbitrator, at the request of the Government which chose him as a suitable person for that kind of work was in consonance with his judicial equipment and ability. Of course there might have been dozens of others vakils, professors, merchants, etc. who could have done that arbitration work, but that will not make any difference to our view. Mr. V. P. Rao agreed to do this arbitration work between the two Local Boards only because of the promise by the Government to pay him a lump sum remuneration of Rs. 3,000 besides travelling allowance on the scale admissible for High Court Judges. It was not a case where no remuneration had been fixed, or was expected, and where a lump-sum was given finally as a kind of un-

1. (1943) 2 M.L.J. 530: 11 I.T.R. 590.

expected windfall of a casual or accidental nature. It will be interesting to note in this connection, the obiter of Rowlatt, J., in *Ryall* v. *Hoare*[1], later on approved by the Court of Appeal in England. The learned Judge says ;

> "Again, take the case of a person who is appointed to perform some services, which might possibly be by way of an office, a person appointed not carrying on any trade or any business, but who happens to be appointed as a retired Judge was appointed some years ago to hold a very important arbitration in connection with the London water appointed with a lump sum remuneration to do a particular piece of work, or to take a humbler instance, which is more familiar perhaps to us here, the case of a Judge's Marshall, who gets a little appointment for a week or two in the experience of everybody (many, certainly, who hear me now) he suffers a deduction of Income-tax when his modest emolument is paid to him."

Though it is only an obiter, it is an obiter of an eminent judge and has been approved by the Court of Appeal, and we agree with the reasoning underlying it. In *Corbett Dale* v. *Feebery*[2], Lawrence, J., held that the payment made to a Football player, out of the gate collections and sale of tickets and further contributions by the Football League would amount to remuneration for employment, and would be taxable, and could not be regarded merely as a casual gift, or windfall or a mere personal testimonial.

In *Ahmed Badsha Sahib's case*[3], it is obvious that the payment was a casual gift or personal testimonial for good work, where there was no stipulation to pay, or promise to pay or obligation to pay or an expectation of payment, when the work was taken on. That would explain the difference in the view taken in that case. In *Hobbs* v. *Hussey*[4], Lawrence, J., held that a sum of money received by a Solicitor's Clerk, who had never carried on the profession of an author, for the serial rights in his life story published in a newspaper called the *People* was assessable to income-tax as it was in essence remuneration for the performance of services by him. In this case also, the true nature of the transaction was the performance of service by Mr. V. P. Rao as an arbitrator, and the remuneration for that occupation was agreed already before the occupation was taken on.

In *Commissioner of Income-tax* v. *Indra Sen Raizada*[5] Braund, J., has remarked as follows :—

> "I should, for myself, be very unwilling to try to lay down any general definition of what a 'business' 'profession' 'vocation' or 'occupation' is, because it is a matter which, to my mind, must necessarily depend in every case upon the circumstances of the assessee, the particular things he does, and the degree to which, and the object with which, he does them. A Philatelist collects stamps for his own entertainment. A stamp dealer collects them for his profit. A country gentleman maintains a garden for his pleasure, while a market gardener or a florist does so for his profit. And yet, in neither case would it be right to say that either the desire for, or an indifference to, profit, as the case might be, was an exhaustive test, for business and pleasure may well be combined. And still less is it possible to my mind to say that an actual profit would necessarily convert what was primarily a hobby or a pastime into a business. For I do not doubt that many stamp and curio collectors entertain a secret hope that they may one day by good chance and to their profit acquire a rare and valuable specimen. And I think they would be suprised to know, if that were to happen, that they had been carrying on a 'business'. The truth, I think, in this, as in so many other cases, is that no exhaustive test can be applied but that all surrounding circumstances must be considered and commonsense applied. If there is one test which is, as I think, more valuable than another, it is to try to see what is the man's own dominant object—whether it was to conduct an enterprise of a commercial character or whether it was primarily to entertain himself. If the latter was his real objective, I do not think that the circumstance that his hobby might possibly yield him a reward is conclusive of this question whether what he was doing constitutes a 'business' 'profession' 'vocation' or 'occupation' within the meaning of this Act."

It is obvious that Mr. Ahmed Badsha acted as an arbitrator in the *Ahmed Badsha Sahib's case*[3], primarily to entertain himself and not in the expectation of any gain of a pecuniary nature and that Mr. V. P. Rao, in the present case, took on the work of arbitration primarily because of the pecuniary emoluments offered, and not to entertain himself.

It has been held by the Privy Council in *Income-Tax Commissioner, Madras* v. *S. L. Mathias*[6], that there can be no general presumption that an exemption from

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1. Reports of Tax Cases (Vol. 8), page 521 at 526.
2. Reports of Tax cases (Vol. 23) page 777.
3. (1943) 2 M.L.J. 530 : 11 I.T.R. 590.
4. Reports of Tax Cases (Vol. 24) page 153.
5. I.L.R. (1940) All. 274 : 8 I.T.R. 187 a page 218 (F.B.).
6. (1939) 1 M.L.J. 45 : L.R. 66 I.A. 23 : I.L.R. 1939 Mad. 178 (P.C.).

the provisions of a sub-section of the Indian Income-tax Act is intended as a complete exemption from tax, and that an assessee will be liable to be taxed regarding the income which is not strictly proved to be not taxable under an exemption.

In view of all the above considerations, we are satisfied that the Rs. 3,000 in question in this case arose from the exercise of the occupation of arbitrator by Mr. V. P. Rao, and that therefore, the assessee cannot claim exemption under section 4 (3) (*vii*) of the Act and the sum would be taxable, as urged by the Commissioner of Income-tax. That would, by itself, be sufficient to reverse the finding of the Income-tax Appellate Tribunal and to declare the sum to be taxable. But for completeness we consider also the contention of the learned counsel for the Income-tax Commissioner that the receipt of Rs. 3,000 would not also be of a casual and non-recurring nature and could not therefore be exempted on that ground also, though we restrict our finding to the expression 'casual' and do not want to go into the more complicated matter of the 'non-recurring nature' as distinguished from 'non-recurring occurrence.'

As remarked by the Bench in the *Ahmed Badsha Sahib's case*[1], no rule can be laid down with regard to what is of casual and non-recurring nature, and each case must be decided on its particular facts. In the present case, we have no doubt whatever that the receipt of Rs. 3,000 from this arbitration work by Mr. V. P. Rao was not casual. Mr. Rama Rao Sahib argues that the word 'casual' can only be applied to 'accidental or fortuitous receipts; occurring without stipulation, contract, calculation or design'. We agree. It must be in the nature of an unforeseen windfall, like the finding of an article of value, or money won in a bet, and the getting of an unexpected gift or legacy, and not, as in this case, the realisation of a sum of Rs. 3,000 promised and agreed on and expected. The getting of a sum of money by a cloth and grain merchant, who had given up that business, as commission or brokerage on the sale of immoveable property was held in *In the matter of Chunni Lal Kalyan Das*[2], to be of not a casual and non-recurring nature and to be therefore taxable. In *Brocklesby* v. *Marricks*[3], Finlay, J. held that where the parties chose to enter into a contract for "remuneration in respect of services" the sum paid under the contract would be taxable. There, an architect in practice, was on a social occasion told by the owner of an estate that he wished to sell his property. Later on he arranged a meeting between the owner and a client, the outcome of which was that the client purchased the estate on behalf of his company. Subsequently the appellant entered into an agreement, which was recorded in correspondence, with the purchasing company, whereby he undertook to endeavour to dispose of the estate and, in conjunction with the company, to negotiate with the parties concerned on the terms that the company should pay him one-fourth of the net profits of the sale. The estate was sold soon afterwards and the appellant received from the company his share of the net profits thereof. He took no part in the negotiations for the acquisition or the sale of the estate; he was not consulted in regard thereto; and did no work in connection with the estate as a surveyor or architect beyond the preparation of a plan which was not in fact used. Finlay, J., remarked:

"It is not a case where there has been a purely voluntary service rendered and then something given in respect of that. It is a case in which, induced very probably by the voluntary service, the parties chose to enter into a contract for remuneration in respect of services. I think that that was the conclusion at which the Commissioners arrived. I think they rightly thought that this was a case assessable under case VI, and accordingly it results that the appeal, in my opinion, fails and must be dismissed".

In *Ryall* v. *Hoare*[4], the bankers of a company refused to allow its overdraft to be increased except upon the joint and several personal guarantee of its directors of whom the respondents were two. In consideration of such a guarantee the company granted to each of the directors a commission of 2 per cent. on the whole amount guaranteed. The respondents contended that the commissions arose from a casual, unsought and exceptional transaction and were not chargeable to

1. (1943) 2 M.L.J. 530 : 11 I.T.R. 590.
2. (1924) I.L.R. 47 All. 368.
3. Reports of Tax Cases (Vol. 18), page 576.
4. Reports of Tax Cases (Vol. 8), page 521.

income-tax. It was held by Rowlatt, J., that the commissions were not casual profits or gains and had been properly assessed to income-tax and the judgment was confirmed by the Court of Appeal. Here too we are satisfied that the receipt of Rs. 3,000 by Mr. V. P. Rao as remuneration for his services as arbitrator was not casual, accidental or exceptional, and so on that ground also it could not be exempted from income-tax under section 4 (3) (vii).

In this view, we do not think it necessary to go into the more complicated question as to whether the receipt of Rs. 3,000 by Mr. V. P. Rao could be also termed to be 'a receipt of a non-recurring nature' and into the contention of Mr. Rama Rao Sahib that the receipt was also not of a non-recurring nature because though it did not actually recur it might have recurred as Mr. V. P. Rao might in view of the remuneration of Rs. 3,000 for this arbitration have undertaken other arbitrations of a like nature.

In view of our finding that the receipt of Rs. 3,000 by Mr. V. P. Rao as remuneration for the arbitration proceedings taken on by him arose from the exercise of the occupation of an arbitrator by him and that it was not a receipt of a casual nature we answer the question referred to us under section 66 (1) as follows:

"On the facts and circumstances set out, the sum of Rs. 3,000 received by the respondent as remuneration for acting as an arbitrator under section 234 of the Madras Local Boards Act of 1920, was not a receipt exempt from assessment under section 4 (3) (vii) of the Indian Income-tax Act."

As the assessee has failed in his contentions before us he will pay the usual costs in this case to the Commissioner of Income-tax. Advocate's fees Rs. 250.

K. S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE BALAKRISHNA AYYAR.

Vemana Venkama Naidu and others .. *Appellants**

v.

Sayed Vilijan Chisty and others .. *Respondents.*

Specific Relief Act (I of 1877), section 41—Scope and applicability—Mahomedan suing for possession treating sale by his mother during his minority as void—Power of Court to make an order for compensation in favour of the alienee.

The language of section 41 of the Specific Relief Act is very wide and gives a large discretion to the Court to make an order for compensation if the ends of justice require such compensation to be awarded where the Court adjudges that a deed is void. Where a minor as plaintiff sues to recover possession of property sold by his unauthorised guardian professing to act on his behalf, he seeks an adjudication that the sale is void. Without such adjudication a decree for possession could not be passed for it is the basis for the decree. It is here that section 41 of the Specific Relief Act comes into play and invests the Court with discretionary power to direct payment of compensation.

Where a Mahomedan sues after attaining majority for partition and possession of his share of the properties of his deceased father sold by his mother during his minority and it is found that the sale was to discharge a mortgage and to pay off a decree debt of the father, the circumstances are such that empower a Court to award compensation to the alienee under section 41 of the Specific Relief Act.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in O.S. No. 38 of 1945.

C. A. Vaidyalingam, P. Ramachandra Reddi and *K. Ramachandra Rao* for Appellants.

B. Pocker for Respondents.

T. Venkatadri (Court guardian) for sixth Respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—Defendants 1, 3 and 4 are the appellants. Plaintiffs, who are Muslims, sued for partition and recovery of possession of certain lands

*Appeal No. 58 of 1947. 4th August, 1950.

on the ground that they had been improperly sold when they were minors, by their mother acting as their guardian, to the predecessor-in-title of defendants 1 to 4. The plaintiffs' father, Syed Khaja *alias* Abbas, was entitled along with three brothers and a sister, to a 4/7ths share of certain properties. All the sharers including the plaintiffs' father mortgaged their 4/7ths share under Exhibit D-3, dated 23rd August, 1915, in favour of Papa Naidu, the predecessor of defendants 1 to 4, for Rs. 4,500. This mortgage was renewed after the death of the plaintiffs' father by their mother, acting on her own behalf and as guardian of her minor children, as well as the other sharers in the property, under Exhibit D-4, dated 16th May, 1927, for Rs. 7,860. A sum of Rs. 680-13-0 out of the consideration for Exhibit D-4 went in discharge of a decree which had been obtained by a creditor against the father of the plaintiffs and another sum of Rs. 871 in discharge of a prior mortgage, Exhibit D-5, executed by the plaintiffs' father and other sharers. The plaintiffs' mother, acting on her own behalf and as guardian of the plaintiffs, then minors, along with the other sharers, sold the mortgaged property under Exhibit D-1, dated 16th March, 1932, to the predecessor-in-title of defendants 1 to 4 in discharge of the mortgage, Exhibit D-4. On 21st August, 1943, the plaintiffs filed this suit *in forma pauperis* for partition and recovery of possession of 4/21th share of the properties conveyed by their mother under Exhibit D-1. The Court below has passed a decree in favour of the plaintiffs for joint possession of 221/3024 share of the lands with mesne profits for three years prior to suit. The plaintiff were also directed to pay Rs. 400 to defendants 1 to 4 with interest at 6 per cent. the said sum representing the plaintiffs' share of the liability for their mortgage debt, Exhibit D-5, discharged by the vendee. Defendants 1, 3 and 4 have preferred this appeal against the decree.

The sale-deed, Exhibit D-1, having been executed by the mother of the minor plaintiffs acting as their guardian, was void under the Mahomedan Law, and wholly inoperative to convey any title to the property to the vendee; see *Imambandi* v. *Mutsaddi*[1]. The plaintiffs are therefore entitled to a partition of their shares of the lands sold by their mother. It is however contended by Mr. Ramachandra Rao, the learned advocate for the alienees, here appellants, that the plaintiffs are bound to restore or make compensation for the benefit received by them from the predecessor-in-title of defendants 1 to 4, the benefit consisting in the discharge of their father's debts, particularly the mortgage debt, Exhibit D-4, for Rs. 4,500 which sum, with subsequent interest, was charged on the suit lands. He relies on the provisions of section 41 of the Specific Relief Act, and on certain decisions of this Court in support of his contention. Mr. Pocker for the plaintiffs, who are respondents, contends that the sale, Exhibit D-1, was wholly void and unenforceable and that the plaintiffs are therefore entitled to an unconditional decree for partition and possession of the lands, leaving defendants 1 to 4 to enforce their rights as creditors or mortgagees in a separate suit of their own. He maintains that it is only where a person who is *sui juris* seeks to set aside a sale to which he was a party on some ground rendering it voidable at his option, that section 41 applies. He argues that the section has no application to a case where a sale is wholly void as being a sale of the minors' property effected by an unauthorised guardian, a stranger to the minors in the eye of the law, though in fact their own mother. It was also contended that the present suit was not one for cancellation of the sale deed executed by the mother of the plaintiffs, but one ignoring the sale as a nullity and treating the vendee as a trespasser for recovery of possession. Section 41 of the Specific Relief Act was, according to him, inapplicable to the present case.

Section 41 of the Specific Relief Act is in these terms:

"On adjudging the cancellation of an instrument, the Court may require a party to whom such relief is granted to make any compensation to the other which justice may require."

The language of the section is very wide and gives a large discretion to the Court to make an order for compensation if the ends of justice require such compensation

1. (1917) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).

to be awarded where the Court adjudges that a deed is void. This section has been the subject of repeated judicial interpretation in several decisions of this Court and the other High Courts. We shall refer in detail only to the recent decisions of this Court.

In *Raghavayya* v. *Subbayya*[1], Coutts-Trotter and Seshagiri Aiyar, JJ., held that a plaintiff seeking to recover possession of property conveyed by him during his minority was entitled to a decree, subject, however, to repayment of the price by way of compensation to the disappointed vendee. Section 41 of the Specific Relief Act was relied upon by the learned Judges in support of this conclusion. In *Venkataramayya* v. *Punnayya*[2], Reilly, J., held that a minor who, representing himself to be a major, executed a sale-deed of his property and who, on attaining majority seeks a declaration of its invalidity, could be directed to repay the consideration paid to him by the disappointed vendee, in the exercise of the Court's power under section 41 of the Specific Relief Act. The learned Judge held that this power could be exercised even though the sale was not effected for any necessity or benefit of the minor and irrespective of the way in which the purchase money was applied. Whether the rule so broadly stated is in consonance with authority and the language of section 41 of the Specific Relief Act it is not necessary for us to determine, for, in this case, the purchase money, or at any rate, the bulk of it, went to satisfy the debts binding on the minor's estate. *Abdul Majid Saheb* v. *Ramiza Bibi*[3], decided by Madhavan Nair, J., arose out of a suit by Mahomedans for recovery of property alienated by their mother as their guardian during their minority. The alienation was, of course, void, but the plaintiffs were given a decree for possession on condition that they should refund the amount by which they and their estate were benefited. The learned Judge, after observing that relief by way of compensation would be granted only if justice required it, concluded as follows :—

"The minors' estate was benefited by the use of the purchase money obtained from the vendee and so it is equitable when the transaction is set aside as regards their share, that they should pay the proportionate amount of the purchase money."

The learned Judge relied upon section 41 of the Specific Relief Act in support of his conclusion. *Rahima Bee* v. *Mannan Bee*[4], decided by Wadsworth, J., was again a case of alienation of a Mahomedan minor's property by her mother for the purpose of discharging a liability which arose in connection with the management of the minor's estate. The learned Judge followed the decision of Madhavan Nair, J., above cited and held that the Court was empowered under section 41 of the Specific Relief Act to require the minor plaintiff to surrender the benefit which had been obtained for the minor as a result of the impugned sale. The learned Judge was also inclined to the view that in such a case the plaintiff

"should not be allowed both to approbate and to reprobate, to get the benefit of this transaction and at the same time treat it as void."

In view of the well-established right of the minor to avoid a transfer of property executed by him while he was a minor, it is difficult to see how the doctrine of "approbate and reprobate" could apply to the case. We would prefer to rest our conclusion on the language of section 41 of the Specific Relief Act and not on the doctrine of "approbate and reprobate". In *Hanumantharao* v. *Sitaramayya*[5], before Madhavan Nair, O.C.J. and Krishnaswami Aiyangar, J., a minor who had sold his properties without any misrepresentation as to his age, to purchasers who were not aware of his minority, sued to recover the properties sold by him. The Court upheld the right of the minor to recover possession of the properties, the sales being void, but on condition of the plaintiff refunding to the several purchasers the amounts of consideration received from them. The learned Judges held that,

"The statutory discretion vested in the Courts of this country by section 41 is of a wider amplitude than the corresponding rule of equity administered in England, where there is no such statutory

1. (1917) 7 L.W. 124.
2. (1925) 23 L.W. 521.
3. A.I.R. 1931 Mad. 468 : 33 L.W. 312.
4. A.I.R. 1936 Mad. 140.
5. (1939) 2 M.L.J. 195 : I.L.R. (1939) Mad. 203.

counter part. That discretion is, of course, not to be arbitrary, but sound and reasonable and guided by well-settled judicial principles. But once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion, the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere."

The other High Courts have also taken the same view. In *Rang Ilahi* v. *Mahbub Ilahi*[1], the Lahore High Court decreed a suit by Mahomedan minors for possession of their property usufructuarily mortgaged by their mother as guardian on condition of their paying compensation to the mortgagee. The Bombay High Court has also held that in setting aside a sale made on behalf of a minor by his unauthorised guardian, the Court may, under section 41 of the Specific Relief Act, make it a condition that the minor should refund the amount by which the estate and himself were benefited. *Dattaram* v. *Vinayak*[2], *Limbaji Raoji* v. *Rahi Raoji Hajare*[3]. See also *Jagar Nath Singh* v. *Lalta Prasad*[4].

Mr. Pocker, for the respondent, argues that it was not obligatory upon his clients to have the sale-deed executed by their mother set aside and that his suit was merely one for possession, ignoring the sale. He relied on a decision of the Judicial Committee and two decisions of this Court which will presently be examined. Section 39 of the Specific Relief Act empowers the Court to adjudge a written instrument void and order its cancellation at the instance of a party who may be injured by the instrument, if left outstanding. That the person seeking cancellation need not himself be a party to the instrument is shown by illustrations (*b*) and (*c*) to section 39. Whether a minor executes a sale himself or whether an unauthorised guardian executes a sale-deed on his behalf, the result under the Mahomedan law would be the same. The sale would be void for the reason that the person professing to sell had not the legal competency to bring about a valid sale. The decision of the Judicial Committee in *Mohiri Bibi* v. *Dhurmadas Ghose*[5], relied upon by the respondent, is itself an authority against him on this point. Dealing with the question of a claim for compensation by a mortgagee from a minor in a suit for cancellation of the mortgage, the Judicial Committee after referring to sections 38 and 41 of the Specific Relief Act, observed :

"These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case, justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

These observations of the Judicial Committee have been applied by the Courts in India and compensation to disappointed alienees from minors or unauthorised guardians of minors purporting to act on their behalf, has been awarded in suits by minors for recovery of possession of the property alienated. It is true that the Judicial Committee in rejecting the claim for compensation in that case also relied on the following passage from the judgment of Romer, L.J., in *Thurstan* v. *Nottingham, etc., Building Society*[6] :

"The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void."

This observation was based not with reference to the power of the Court to award compensation under section 41 of the Specific Relief Act, but with reference to the exercise of their general equitable jurisdiction by Courts. That the rules adopted by English Courts in the matter of restitution or prevention of unjust enrichment of one party at the expense of another do not rest where they were left in 1902, but have been liberalised by the genius of the common law, that is to say, by the learned Judges of the English Courts interpreting and expounding the common law, would be apparent from a perusal of the latest decision of the House of Lords in *The Fibrosa case*[7]. We are not bound to follow the dictum of Romer, L.J., cited by the Judicial

1. (1925) I.L.R. 7 Lah. 35.
2. (1903) I.L.R. 28 Bom. 181.
3. A.I.R. 1925 Bom. 499.
4. (1909) I.L.R. 31 All. 21.
5. (1903) L.R. 30 I.A. 114 : I.L.R. 30 Cal. 539 (P.C.).
6. (1902) 1 Ch. 1, 13.
7. (1943) A.C. 32.

Committee in preference to the clear statutory provision in section 41 of the Specific Relief Act which authorises the award of compensation even where an English Court of Equity functioning in the year 1900 might not have awarded it.

Mr. Pocker placed strong reliance on two decisions of this Court, one of Wadsworth, J., in *Kunhibi* v. *Kulliani Ammal*[1], and the other of Gentle, C.J. and Horwill, J., in *Ramachandrayya Naidu* v. *Abdul Khader Chisti*[2]. In both these cases the suit was filed by the mortgagee of a Mahomedan minor's property to enforce a mortgage executed by the minor's *de facto* guardian. The mortgage was clearly void on the authority of *Imambandi* v. *Mutsaddi*[3], and this Court held that the mortgagee's suit should be dismissed even though the mortgage loan might have been taken to pay a debt binding on the minor. The reason for this conclusion was thus stated by Wadsworth, J., in *Kunhibi* v. *Kulliani Ammal*[1] :

> "A minor whose property has been made subject to a void mortgage by an unauthorised person is entitled to ignore that mortgage and the mortgagee is entitled to claim no benefit thereunder in law as against the minor. To hold that the minor as defendant to a suit on a void mortgage is bound to pray for its cancellation and to restore the benefit received, would be to give to the mortgagee a right to enforce his void contract by compelling the minor to pray for cancellation ; that is to say, the person who has entered into a void contract with some person not authorised to bind the minor, would be given a weapon whereby he could force the minor to honour the contract in part."

The decision of the Division Bench cited above does not contain any independent reasons and purports to follow the decision of Wadsworth, J. It seems to us that there is a distinction between a case where a creditor sues to enforce the liability of a minor on a mortgage executed by the minor himself or by an unauthorised guardian professing to act on his behalf, and a case where the minor himself sues to recover possession of property sold by him or by his *de facto* guardian, treating the sale as void. To decree the suit of the creditor against the mortgaged property or the minor's estate would be to enforce the terms of the very contract which section 11 of the Contract Act has declared to be void and unenforceable. In a case where a minor as plaintiff sues to recover possession of property sold by him or by his unauthorised guardian professing to act on his behalf, he seeks an adjudication that the sale is void. Without such an adjudication a decree for possession in favour of the minor could not be made. It is true that it is not necessary for the minor to sue to set aside the sale within the period of three years limited by Article 91 or Article 44 of the Limitation Act. At the same time, an adjudication by the Court that the sale is void as against the minor is the foundation of a decree for possession in his favour. It is here that section 41 of the Specific Relief Act comes into play and invests the Court with a discretionary power to direct payment of compensation. The position of a minor defendant using his minority as a shield against a creditor or a mortgagee is differentiated in the decisions from his position as a plaintiff using his minority as a weapon of attack. We need not resolve the doubt that has been expressed in some of the decisions of this and other High Courts whether the principle of section 41 of the Specific Relief Act would not apply also to a case where the minor is a defendant ; see *Ajudhia Prasad* v. *Chandan Lal*[4] (which says it would) ; *Khangul* v. *Lakha Singh*[5] and *Hanumantharao* v. *Sitharamayya*[6] (which poses the question but does not answer it). In the present case, it is the minor that comes into Court as a plaintiff and the maxim that he who seeks equity must do equity clearly applies.

For these reasons we hold that both on authority and the language of section 41 of the Specific Relief Act, we have power to award compensation if we consider it just and equitable to do so in the circumstances of this case. The following facts are relevant in this connection. There was a mortgage liability on the estate created under Exhibit D-3 by the co-sharers as well as the father of the minors. The minors took the property only subject to this mortgage. The minor's mother, who was a sharer herself, acting on her behalf and on behalf of her minor children

1. (1939) 2 M.L.J. 463.
2. (1947) 2 M.L.J. 100 : I.L.R. (1948) Mad. 270.
3. (1917) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).
4. I.L.R. (1937) All. 860.
5. (1928) I.L.R. 9 Lah. 701 (F.B.).
6. (1939) 2 M.L.J. 195 : I.L.R. (1939) Mad. 203.

as well as the co-sharers of the minor's deceased father, executed Exhibit D-4 in renewal of Exhibit D-3 and discharged Exhibit D-4 by the sale-deed, Exhibit D-1. Clearly the minors have been benefited by the discharge of the liability of their estate for their father's debt. Further, a decree debt against the father of the minors has also been discharged out of the money borrowed under Exhibit D-4. All the sharers besides the minor's mother joined in the execution of the sale-deed, Exhibit D-1, as a proper and reasonable arrangement for the discharge of their debts. In *Ayderman Kutti* v. *Syed Ali*[1], this Court had upheld the right of the *de facto* guardian of a Mahomedan minor to alienate the minor's estate if the transaction must, from its very nature, be beneficial to the minor or if there was urgent and imperative necessity. In 1918 the Judicial Committee upset this view in *Imambandi* v. *Mutsaddi*[2]. There is no suggestion here of any want of *bona fides* on the part of the vendors or the purchasers or of the price being inadequate. We consider therefore that the plaintiffs must be required to pay defendants 1 to 4 a fraction of the debts binding on the estate of their deceased father which have been discharged as a result of the sale under Exhibit D-1, the fraction being proportionate to their fractional share of the whole estate. The result is that in addition to the sum of Rs. 400 which the plaintiffs have been directed to pay by the judgment of the lower Court they would have to pay defendants 1 to 4 a further sum of Rs. 1,026-11-6 as a condition of their recovering possession of their share of the property. Having regard to the fact that the plaintiffs are found liable to pay compensation to defendants 1 to 4 and they have not paid such compensation so far, we think that the most workable order that could be made under the circumstances will be that there would be no liability on the part of the plaintiffs to pay interest to the defendants, and no liability on the part of the defendants to account for any mesne profits to the plaintiffs till the date of this judgment. Interest at six per cent. per annum on the sum awarded to defendants 1 to 4 from this date will have to be paid, and defendants 1 to 4 will have to account for mesne profits in respect of the share of the properties now decreed to the plaintiffs from this date at the rate found by the Court below.

Having regard to the fact that defendants 1 to 4 have in their memorandum of appeal resisted the claim of the plaintiffs to possession of their share of the property alienated by their mother, we think that there should be no order as to costs in this appeal.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

T. E. Ebrahim Saheb .. *Petitioner**

v.

The Regional Transport Authority, Tanjore through the Regional Transport Officer, Tiruchirapalli .. *Respondent.*

Motor Vehicles Act (IV of 1939), section 76—Resolution of Regional Transport Authority declaring a bus stand unsuitable and approving of a new bus stand—Validity—Absence of notice to person affected, namely, the person conducting old bus stand—Effect.

The Regional Transport Authority, Tanjore, by its resolution declared a site where a private bus stand was conducted by the petitioner unsuitable for use as a bus stand and that that bus stand shall cease to be an approved stopping place and approved a new bus stand constructed by the Municipality. The resolution was passed without notice to the petitioner. In an application to quash the resolution,

Held : It is firmly established that any order passed against a person, that is to say, to his detriment, by any *quasi* judicial body contravenes the canons of natural justice if it was passed without notice to him.

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1. (1912) 25 M.L.J. 602 : I.L.R. 37 Mad. 514.
2. (1917) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).

* C.M.P. Nos. 2963 and 3365 of 1950. 18th August, 1950.

Section 76 of the Motor Vehicles Act has no application to the resolution and confers no power to pass the resolution.

Where starting places and termini have been fixed in accordance with rule 27-D of the Motor Vehicles Rules, 1923, and the petitioner's bus stand has been fixed as starting place for all the buses plying for hire between Tanjore and Pudukottai and between Tanjore and Devakottai it cannot be said that by the repeal of the Motor Vehicles Act, 1914, by the Act of 1939, the rules including rule 27-D framed under the provisions of the earlier Act ceased to have any force and the order fixing the bus stand as starting place also ceased to be in force. It is a well-settled rule of interpretation of statutes that where an enactment is repealed and re-enacted with or without modifications, all things lawfully done under the repealed enactment, shall continue to be in force under the corresponding provisions of the later enactment unless of course there is anything in the later enactment repugnant thereto. (*See* section 18, Madras General Clauses Act.) It will be open to the Government to amend the rule and introduce a provision conferring on the appropriate authority the requisite power to alter from time to time the starting places and termini.

It is desirable to make plain by specifically providing for the alteration of starting places and termini for valid reasons and after notice to the parties affected thereby.

There appears to be no provisions in the Motor Vehicles Act or the Rules made thereunder, under which it is open to the Regional Transport Authority to pass an order declaring a particular bus stand, private or public, to be unsuitable for use as a bus stand. Once the Municipality chooses to grant a licence to any person to open or keep open a stand, it is doubtful if it is open to the Regional Transport Authority acting under the Madras Motor Vehicles Act to declare that stand to be unsuitable, though the existence of a private cart stand or bus stand may not by itself prevent the Municipal Council from constructing or providing public Municipal stands; but this has nothing to do with the Motor Vehicles Act.

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records in C. No. 2216 A3/1949, dated 27th February, 1950, on the file of the Regional Transport Authority, Tiruchirapalli and C. No. 3216 A4/1949, dated 31st March, 1950, on the file of the Regional Transport Authority, Tanjore, respectively and quash the proceedings therein.

K. V. Ramachandra Aiyar for Petitioner.

The Advocate-General (*K. Kuttikrishna Menon*) for the Government Solicitor and State Council on behalf of the Respondent.

The Order of the Court was made by

The Chief Justice.—These two applications are connected and relate to the same matter. The petitioner in the two applications is one T. E. Ebrahim Sahib. He is the lessee of a site in Ward No. 6 in Tanjore Town which has been used as a bus stand in accordance with licences granted from time to time by the Tanjore Municipality. The stand is situated near the railway station and it is common ground that from several years past it has been the only bus stand in the town and it has been the place from and at which all bus traffic to and from places such as Kumbakonam, Pattukottai, Tiruvayar, etc., was starting and terminating. Sometime in 1947, there appears to have been a complaint that the bus stand was narrow and inconvenient and thereupon the Municipality discussed a proposal to construct a new bus stand at another suitable place. The Regional Transport Authority also appears to have convened meetings to consider the question of shifting the bus stand, but the subject was dropped in May, 1948. Subsequently there appear to have been again complaints and at the instance of the Tanjore Municipality, the Government passed G. O. No. 231 on 19th January, 1950, directing the Regional Transport Authority to consider the Municipality's representation regarding the unsuitability of the existing bus stand of the petitioner. The subject was placed before the Regional Transport Authority at its meeting on 21st February, 1950 and it passed on that day a resolution that the existing bus stand would be declared unsuitable from 1st April, 1950. This resolution was communicated to the petitioner and he filed C. M. P. No. 2963 on 24th March, 1950, praying for the issue of a writ of *certiorari* to call for the papers from the Regional Transport Authority, Tiruchirapalli, and quash the proceedings of 21st February, 1950, above mentioned. He also prayed for an *interim* order of stay of all proceedings pending disposal of the main petition. On 27th March, 1950, this Court issued a rule *nisi* and notice on the application for stay. This fact was intimated to the

respondent authority both by the petitioner and by his Advocate, but the respondent met and passed on 31st March, 1950, a further resolution which runs thus :—

"Perused and recorded. No direction has so far been received from the High Court, Madras. Resolved not to act on the representation of Janab Muhammad Ibrahim or his vakil. As resolved already by this authority on 21st February, 1950, and communicated to the parties on 27th February, 1950, the site within Tanjore Municipality where the private bus stand is conducted by Janab T.B. Ibrahim Sahib is hereby declared to be unsuitable for use as a bus stand and that this bus stand shall cease to be the approved stopping place and also the approved starting and terminus of motor buses from 1st April, 1950.

The bus stand newly erected by the Tanjore Municipal Council in the approved site in T. S. No. 1468 of Ward III in accordance with the proceedings dated 21st February, 1950, of the Regional Transport Authority, Tanjore, is hereby fixed as the approved stopping place and also as the approved starting and terminus places of Motor buses (stage carriages) from 1st April, 1950.

The Regional Transport Officer will inform forthwith all permit holders of Motor buses (stage carriages) in writing of the new approved stopping as well as starting and terminus points from 1st April, 1950 and make other necessary arrangements.

Regional Transport Office, Tiruchi,
Dated 31st March, 1950."

The petitioner seeks to quash this resolution in C. M. P. No. 3365 of 1950. It was contended for the petitioner that both the resolutions of the respondent dated 21st February, 1950, and 31st March, 1950, respectively are void and passed without jurisdiction and contrary to the principles of natural justice, as they were passed without notice to the petitioner and without giving him an opportunity of presenting his case.

Though there was a specific averment in the affidavit filed by the petitioner in C. M. P. No. 2963 that the order of the respondent authority was made without any previous notice or intimation or hearing, the counter-affidavit filed on behalf of the Regional Transport Officer did not traverse this allegation. In para. 4 there is a reference to proceedings in August, 1948, in respect of which prior notice is stated to have been given to the petitioner, but there is no statement that notice of the two meetings at which the impugned resolutions were passed was given to the petitioner and that the petitioner was given an opportunity to be heard. Though it may be difficult to define exactly the principles of natural justice, it is now firmly established that any order passed against a person, that is to say, to his detriment, by any *quasi* judicial body contravenes the canons of natural justice, if it was passed without notice to him. The Judicial Committee dealing with an order of removal of a person from the membership of a Devasthanam committee observed thus :

"Any order made in such a matter in disregard of the requirements of natural justice, such for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself, would clearly be voidable or void." (See *Balakrishna Udayar* v. *Vasudeva Aiyar*[1].)

The maxim *audi alteram partem* sums up this rule. In this case it cannot be denied that the orders in question seriously affected the petitioner. It was incumbent therefore on the authority to have given due notice before passing the orders. As it has failed to do this the orders must be quashed on this sole ground.

We do not wish, however, to dispose of these applications merely on this ground. The power of the respondent to pass the resolutions in question has been discussed at some length by the learned counsel for the petitioner and by the learned Advocate-General on behalf of the respondent and as the subject of discussion relates to a matter of public importance, namely, public transport, we desire to deal with it. In the counter-affidavit filed by the Regional Transport Officer, it was stated that the resolutions were passed by the authority in exercise of the power conferred by section 76 of the Motor Vehicles Act. The learned Advocate-General also attempted to maintain that position. Section 76 runs thus :

"The Provincial Government or any authority authorised in this behalf by the Provincial Government, may in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time,

1. (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 793, 800 (P.C.).

and may determine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers".

It appears to us from the plain language of the section that it cannot have any possible reference to resolutions like those in question. As the marginal note clearly indicates, the section deals with provision for parking places and halting stations. The section, as the learned Advocate-General also conceded, falls into two parts. The first part applies to all motor vehicles and not only to public service vehicles. The authority concerned can determine the places at which motor vehicles in general may be parked indefinitely or for a specified period of time. This part has obviously no application to the facts of this case. The second part certainly deals with public service vehicles. Such vehicles can ordinarily stop to take up or set down passengers at prescribed places. We are familiar with bus stops. But there may be places at which for the convenience of the public, the public service vehicles may have to halt for a longer time than is just necessary for the taking up and setting down of passengers. There may be places where though no passenger intends to alight and no passenger is actually present to be taken up, yet, the vehicle should stop for some time on account of various reasons which we need not now consider. Such places may be correctly called halting stations, and the authority concerned can determine such places. But these places cannot mean the permanent bus stands, like for instance, the petitioner's bus stand which is a sort of a radiating centre of all the bus traffic for the town. We have no hesitation in holding that the resolutions in question do not fall within the scope of the powers of the Regional Transport Authority under section 76 of the Motor Vehicles Act.

Reference was then made to rule 268 of the Madras Motor Vehicles Rules (1940) made in exercise of the powers conferred by several sections of the Motor Vehicles Act of 1939. It is in the following terms:

"In the case of public service vehicles (other than motor cars) if starting places and termini have not been fixed in accordance with the provisions of any statute, the transport authority may, after consultation with such other authority as it may deem desirable, fix starting places and termini between which such vehicles shall be permitted to be used within its jurisdiction. A list of such places shall be supplied by such authority to every holder of a permit for such vehicles. When such places have been fixed, every such vehicle shall start only from such places".

This rule certainly empowers the Transport Authority, after consultation with any other authority as it may deem desirable, like for instance, the local authority (the Municipal Council or District Board) to fix starting places and termini between which public services vehicles other than motor cars shall be permitted to be used. The contention of Mr. Ramachandra Aiyar, the learned counsel for the petitioner, is that the respondent will be entitled to do so only in one contingency, namely, if starting places and termini have not been fixed in accordance with the provisions of any statute. His contention is that starting places and termini have been fixed in accordance wit rule 27-D of the Motor Vehicles Rules, 1923. On 3rd April, 1934, the District Magistrate, Tanjore, passed an order under this rule fixing the petitioner's bus stand as the starting place for all the buses plying for hire between Tanjore and Pudukkottai and between Tanjore and Devakottai. On 3rd June, 1937, the District Superintendent of Police, Tanjore, declared this bus stand as the starting place and the terminus of all buses plying from and to Tanjore and prohibiting the use of any other bus stand. This order of his purported to be under rule 27-D of the Motor Vehicles Rules, 1923. That Rule ran as follows:

"The Commissioner of Police in the City of Madras and District Superintendent of Police elsewhere may fix starting places and termini between which motor buses shall be permitted to be let or plied for hire within their respective jurisdiction.

When such places have been fixed, every motor bus shall start on its forward and return journeys only from such places. The departure of motor buses from the said places shall be regulated in accordance with the directions of the police officers at such places".

It cannot be denied that the order of the District Superintendent of Police in 1937 was passed in accordance with the provisions of Rule 27-D as it stood at the time. The petitioner, therefore, contends that starting places and termini have been

fixed in accordance witht the provisions of the prior statute and therefore the respondent cannot purport to fix new starting places and termini under rule 268 of the present rules. To meet this contention the learned Advocate-General was driven to the extreme position of contending that as the Indian Motor Vehicles Act, 1914, was repealed by the Motor Vehicles Act, 1939, the rules including rule 27-D framed under the provisions of the earlier Act ceased to have any force and consequently the order of the District Superintendent of Police made in pursuance of the power conferred by rule 27-D of the old rules ceased to be in force. No authority in support of this contention, which is likely to have far-reaching consequences, was cited to us. In fact the learned Advocate-General admitted that the Government Department did not proceed on that assumption with regard to all the orders and notifications issued and things done under the old rules. It is a well accepted rule of interpretation of statutes that where an enactment is repealed and re-enacted with or without modification, all things lawfully done under the repealed enactment shall continue to be in force under the corresponding provisions of the later enactment unless of course there is anything in the later enactment repugnant thereto, *see* section 18 of the Madras General Clauses Act.

It is true that as the rule stands at present, there is likely to be an impasse, if the starting places and termini already fixed become unsuitable and have to be shifted. We agree with the learned Advocate-General that there should be power to alter the starting places and the termini for good and proper reasons. Such alteration should be after notice to the parties affected thereby. It will be open to the Government to amend the rule and introduce a provision conferring on the appropriate authority the requisite power to alter from time to time the starting places and termini.

One other construction of rule 268 which may obviate the necessity of an amendment such as that indicated above suggested itself to us, though this aspect was not placed before us by the learned Advocate-General. Rule 268 speaks of fixing starting places and termini from the standpoint of the public service vehicles. These places are places between which such vehicles shall be permitted to be used. A list of such places has to be supplied by the Authority to every holder of a permit for such vehicles. The fixing of the places appears therefore to be in respect of the vehicles. Now these vehicles are always run under permits granted by the prescribed authority. These are either temporary or only of a limited duration. It may be that if the holder of a permit of a public service vehicle has been intimated of particular starting places and termini for his vehicle, it may not be open to the Transport Authority to alter them during the subsistence of the particular permit. Once the period of the permit elapses, the Transport Authority would have the power to fix different starting places and termini and intimate them to the holder of the fresh permit or the renewed permit, as the case may be. This will only mean that the starting places and termini once fixed will be in force without alteration in respect of any vehicle so long as the permit for the vehicle continues. After that period, it will be open, when granting a fresh permit, to fix new starting places and termini. This is a plausible interpretation of rule 268. In spite of this we think it is desirable to make matters plain by specifically providing for the alteration of starting places and termini for valid reasons and after notice to the parties affected thereby.

There appears to be no provision in the Motor Vehicles Act or the rules made thereunder under which it is open to the Regional Transport Authority to pass an order declaring a particular bus stand, private or public, to be unsuitable for use as a bus stand. The maintenance of public and private bus stands within municipalities will be governed by the provisions of the Madras District Municipalities Act, sections 270-B to 270-E. Section 270-B deals with public cart stands which includes stands for motor vehicles and section 270-E with private stands. Once the Municipality chooses to grant a license to any person to open or keep open a stand, it is doubtful if it is open to the Regional Transport Authority acting under the Madras Motor Vehicles Act to declare that stand to be unsuitable, though the existence of a private cart stand or bus stand may not by itself prevent the

Municipal Council from constructing or providing public municipal stands; but this has nothing to do with the Motor Vehicles Act.

For the reasons stated above, we quash the two orders of the Regional Transport Authority dated 21st February, 1950, and 31st March, 1950, as prayed for by the petitioner. The rules *nisi* already issued will be made absolute.

The respondent will pay to the petitioner costs in C. M. P. No. 2963 of 1950.

K.S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Minor Ramalingam Reddi by next friend Vanajakshi Ammal (2nd Appellant) and another .. *Appellants**

v.

Babanambal Anmal .. *Respondent.*

Hindu Law—Minor—Contract for sale of property by the guardian—If enforceable against the minor—Tests for enforceability.

A Contract for the sale of the property of a minor entered into by his mother and guardian for the purposes considered necessary and proper in Hindu Law would be binding on the minor from the time when the contract is entered into and is capable of being enforced against him.

Subramanyam v. *Subba Rao,* (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.), relied on.

Ramakrishna Reddiar v. *Chidambara Swamigal,* (1927) 54 M.L.J. 412 and *Raghunathan* v. *Ravutha Kanni,* (1938) 2 M.L.J. 277 : I.L.R. (1938) Mad. 928, commented upon.

[Authorities discussed.]

A contract for the sale of property is an essential preliminary to the sale itself and its enforceability against the minor has to be judged by the same tests as are applicable to a transfer of the ward's property by the guardian.

Appeal against the decree of the District Court of South Arcot in A. S. No. 309 of 1945, preferred against the decree of the Court of the District Munsiff of Cuddalore, in O. S. No. 126 of 1944.

T. R. Srinivasan and *S. Gopalratnam* for Appellants.

T. S. Nagaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 1 and 3, a Hindu minor and his mother, are the appellants in this second appeal, the 2nd defendant, an infant brother of the 1st defendant having died *pendente lite*. The plaintiff, a Hindu widow, sued for specific performance of a contract for sale of 3 acres, 7 cents of dry land entered into between her and the defendants and embodied in a compromise Exhibit P-3, dated 19th January, 1944, and filed in S.C.S. No. 65 of 1943. The land belonged to the plaintiff's deceased husband who sold it to her father on 9th January, 1940. In S. C. S. No. 65 of 1943 the present defendants 1 and 2, the grandsons and legal representatives of the vendee represented by their mother, the present 3rd defendant, as their next friend sued the present plaintiff for rent, alleging an oral lease under which the plaintiff's deceased husband had been let into possession of the land. In defence to that suit the plaintiff denied the tenancy and stated that she was in possession under an agreement for reconveyance of the land entered into between the parties to the original sale dated 9th January, 1940. The dispute between the parties was settled by a compromise, Exhibit P-3, arrived at as the result of mediation. Exhibit P-3, dated 19th January, 1944, provided *inter alia* (1) that the plaintiff should pay Rs. 2,700 to the defendants within two months, with interest at 6 per cent. of which Rs. 700 was to be taken in adjustment of the claim in S. C. S. No. 65 of 1943 and Rs. 2,000 as the price of the suit land; (2) that on receipt of Rs. 2,000 from the plaintiff the 3rd defendant as guardian of her minor sons, defendants 1 and 2 should convey the land to the plaintiff; (3) that time was

* S.A. No. 1010 of 1947. 14th April, 1950.

to be of the essence of the agreement; and (4) that on default of payment plaintiff should surrender possession of the land to the defendants. The Small Cause Court granted leave to the 3rd defendant to compromise the suit on behalf of the minor defendants 1 and 2 on the above terms which, in its opinion, were beneficial to the minors. A decree was also passed in S. C. S. No. 65 of 1947, on the compromise so far as it related to that suit.

The amount of Rs. 700 with interest was paid in time and satisfaction of the small cause decree was recorded. Plaintiff's case was that she sent the sum of Rs. 2,000 with interest at 6 per cent. per annum to the 3rd defendant on 15th March, 1944, and wanted a conveyance to be executed in her favour, but the 3rd defendant declined to do so. The plaintiff deposited in Court Rs. 2,000 with interest at 6 per cent. on 18th March, 1944, and filed this suit for specific performance which has been decreed by the Courts below.

Mr. T. R. Srinivasan, the learned advocate for the appellant, argued that an agreement for sale of the property of a Hindu minor entered into on his behalf by his guardian, even assuming the agreement to be beneficial to the minor, was not capable of being specifically enforced against him for want of mutuality. He relied upon the decisions of this Court in *Narayana Rao* v. *Venkatasubba Rao*[1], *Ramakrishna Reddiar* v. *Chidambara Swamigal*[2], *Venkatachalam Pillai* v. *Sethurama Rao*[3] and *Singara Mudali* v. *Ibrahim Baig Saheb*[4] which purported to follow the well-known decision of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[5]. The result of these and the other decisions is stated in Mayne's Hindu Law (11th Edition), paragraph 236, as follows:

"It is not within the competence of a manager of a minor's estate or of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase or for the sale of immoveable property; and as the minor is not bound by the contract, there is no mutuality and the minor cannot obtain specific performance of contract. Nor is he liable to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immoveable property since the amount can only be treated as having been paid as security for the performance of a contract which in law is no contract at all".

The first proposition is based on the decisions cited above and the second is based on the authority of *Raghunathan* v. *Ravutha Kanni*[6].

This doctrine of "mutuality" found its place in English decisions "rather from a desire for symmetry than from its inherent utility" and was discarded by the Specific Relief Act which defined and amended the law relating to Specific Relief Act in India. *See* Whitley Stockes Anglo-Indian Codes, Vol. I, page 931. Even in England the want of mutuality did not stand in the way of specific performance of a contract by the grant of an injunction, *James Jones and Sons* v. *Tankerville*[7]. The objection on the score of mutuality may also be waived—Fry on Specific Performance, 6th Edn., paragraph 468. In Leake on Contracts (8th Edn.) at pages 410 and 411, the rule is thus stated:

"A contract which is voidable by an infant is binding on the other contracting party until avoided; the privilege of avoidance being that of the infant only . . . . An infant may sue upon the contract during his minority . . . . . But a Court of Equity will not in general grant specific performance at the suit of the infant, because the remedy is not mutual until he has come of age".

That this doctrine of "mutuality" is a conventional rule evolved gradually by the decisions of the English Courts of Equity and does not rest on any logical or fundamental principle appears from the following passage in Pollock on Contracts (12th Edn., by Professor Winfiled) at pp. 46 and 47:

"An infant is not absolutely incapable of binding himself, but is generally speaking, incapable of absolutely binding himself by contract. His acts and contracts are voidable at his option, subject to certain statutory and other exceptions . . . . . Where the obligation is incident to an

1. (1919) 38 M.L.J. 77.
2. (1927) 54 M.L.J. 412.
3. (1932) 64 M.L.J. 354: I.L.R. 56 Mad. 433 (F.B.).
4. (1946) 2 M.L.J. 103.
5. (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.).
6. (1938) 2 M.L.J. 277: I.L.R. (1938) Mad. 928.
7. (1909) 2 Ch. 440 and 443.

interest (or at all events to a beneficial interest) in property it cannot be avoided while that interest is retained. An infant's express contract may be valid if it appears to the Court to be beneficial to the infant".

In *Salisbury* v. *Hatcher*[1], Knight Bruce, V.C., observed :

"In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is required in order to call a Court of Equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants, who when the bill was filed were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract the enforcement of it in this Court is a matter of judicial discretion."

Learned Judges of the English Courts have found it difficult to define precisely the metes and bounds of this doctrine of mutuality.

It is true that in India a minor has himself no capacity to enter into a contract, and a contract entered into by him is void. Section 11 of the Contract Act; *Mohori Bibee* v. *Dharmodas Ghose*[2]. When, however, the guardian of a minor enters into a contract on his behalf there is no want of capacity at all. If the law were otherwise, no sale or mortgage of a minor's property could be effected by a guardian however necessary or beneficial to the minor the transaction might be. The decisions in *Ramakrishna Reddiar* v. *Chidambara Swamigal*[3], *Venkatachalam Pillai* v. *Sethurama Rao*[4] and *Raghunathan* v. *Ravutha Kanni*[5], in so far as they proceed on the basis that an executory contract entered into by the guardian of a Hindu minor is void, are, with all deference unsupportable. Under section 30 of the Guardians and Wards Act, a disposal of the ward's property in excess of the guardian's powers is only voidable at the instance of the person affected thereby. A guardian's contract is not hit at by section 11 of the Contract Act and its enforceability depends on the rules of Hindu Law defining his powers and the provisions of the Specific Relief Act regulating the grant of relief by way of specific performance. Section 21 of the Specific Relief Act dealing with contracts which cannot be specifically enforced, does not include a guardian's contracts among them. Distinguishing a guardian's contract from a contract entered into by the minor himself the Judicial Committee in *Subramanyam* v. *Subba Rao*[6], cited with approval the following passage from Pollock and Mulla's Contract Act, 7th Edn., at pages 70 and 71 :

"It is however different with regard to contracts entered into on behalf of a minor, by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the decision of the Judicial Committee (*Mohori Bibee* v. *Dharmodas Ghose*[2]), that the contract can be specifically enforced by or against the minor if the contract is one which it is within the competence of the guardian, to enter into on his behalf so as to bind him by it and further, if it is for benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all".

This decision of the Judicial Committee goes much further than Varadachariar, J., in *Zebunnissa Begum* v. *Mrs. Danagher*[7] who felt bound by *Mir Sarwarjan* v. *Fakhruddin Mahomed*[8] to assume that a guardian's executory contract cannot be specifically enforced by or against the minor, though His Lordship was prepared to hold that a minor could sue for rents due under a lease deed granted by his guardian. Dealing with a contract of sale entered into by the mother and guardian of a Hindu minor on his behalf, the Judicial Committee observed in *Subramanyam* v. *Subba Rao*[6] as follows :

"The contract in the present case was binding on the respondent (minor) from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent (the minor), and not his mother (guardian) was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent, and not by or against his mother".

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1. (1844) Y. and C.C.C. 54.
2. (1903) L.R. 30 I.A. 114 : I.L.R. 30 Cal. 539 (P.C.).
3. (1927) 54 M.L.J. 412.
4. (1932) 64 M.L.J. 354 : I.L.R. 56 Mad. 433 (F.B.).
5. (1938) 2 M.L.J. 277 : I.L.R. 1938 Mad. 928.
6. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.).
7. (1935) 70 M.L.J. 477 : I.L.R. 59 Mad. 942.
8. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232.

It was held in that case that a vendee who had been put in possession of the minor's property under his guardian's contract of sale was entitled to be maintained in possession of the property agreed to be sold as against the minor, by resort to the doctrine of part-performance, even though no conveyance had been executed. Section 53-A of the Transfer of Property Act dealing with part-performance postulates a valid contract between the parties for the transfer of immoveable property.

The doctrine of mutuality as developed by English decisions with its deceptive appearance of symmetry and simplicity, but having no foundation in reason or logic, was imported in India by the decision of the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[1], delivered by Lord Macnaughten. Though his Lordship's opinion must command the respect due to that great master of the law, I may be forgiven for remembering that occasionally " dormitat Homerus ". *Mir Sarwarjan* v. *Fakhruddin Mahomed*[1] is "mutaulity" run riot, if I may be permitted to say so. This decision was relied upon the arguments before the Board in *Subramanyam* v. *Subba Rao*[2]. In the judgment of this Court in *Subramanyam* v. *Subbarao*[3], reversed on appeal by the Judicial Committee, reference had been made to the decisions of this Court where specific performance had been refused of a guardian's contract for sale of the ward's property on the grounds of want of mutuality in suits by or against the minor. Yet their Lordships in *Subramanyam* v. *Subbarao*[2], upheld the contention that a guardian's contract for sale of the immoveable property of the ward was specifically enforceable, if the contract was beneficial to the minor. Principles laid down for the protection or benefit of minors had been applied in this country to their prejudice by invoking this artificial doctrine of mutuality. If the guardian has made an advantageous contract for the sale or lease of the property of the ward there is no reason why the ward should be disabled from enforcing it against the other party to the contract. I submit that the doctrine of " mutuality " illogical in form and in substance unjust, has now been discarded by the very tribunal which was responsible for its introduction in India and it need no longer cast its spell on Indian Courts and sterilise contracts of sale entered into by a guardian on behalf of his ward for the latter's interest or benefit. The statement in Mayne's Hindu Law, 1950 Edn., paragraph 236, which does not take account of *Subramanyam* v. *Subbarao*[2], decided early in 1948, cannot therefore be accepted as an authoritative statement of the law. I need not refer to the decisions of the other High Courts beyond noticing that in *Mulla* v. *Muhammad Shariff*[4], *Srinath Bhattacharya* v. *Jatindra Mohan*[5] and *Sohan Lal* v. *Atal Nath*[6] those Courts took the same view of the effect of *Mir Sarwarjan* v. *Fakhruddin Mahomed*[1] as this Court did in the decisions already cited.

The present case is not, however, a case of a contract for the purchase of immoveable property on behalf of a minor by his guardian. It was with reference to such a contract that the Judicial Committee held that a guardian had no power to bind the minor and the minor was not entitled to specific performance of the contract in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[1]. Assuming that this decision survives today in full force, there is no necessity to extend the principle of this decision to contracts for sale of a ward's property by his guardian. It is obvious that the question which is vital to sales by a guardian, namely, necessity, cannot arise in a contract for the purchase, not for the sale of immoveable property. The decision in *Narayana Rao* v. *Venkatasubba Rao*[7] was a case of a contract for purchase entered into by a guardian and the decisions in *Venkatachalam Pillai* v. *Sethurama Rao*[8] and *Singara Mudali* v. *Ibrahim Baig*[9], related to a contract for reconveyance of land

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1. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
2. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.).
3. (1944) 1 M.L.J. 147 : I.L.R. (1944) Mad. 749.
4. (1926) I.L.R. 8 Lah. 212.
5. (1925) 30 C.W.N. 263.
6. (1933) I.L.R. 56 All. 142.
7. (1919) 38 M.L.J. 77.
8. (1932) 64 M.L.J. 354 : I.L.R. 56 Mad. 433 (F.B.).
9. (1946) 2 M.L.J. 103.

contained in a sale deed of the minor's property executed by his guardian. In all these three cases suits by the minor, instituted after attaining majority for specific performance of the contract of purchase or repurchase, were dismissed on the ground of want of mutuality irrespective of the question of benefit to the minor. In *Ramakrishna Reddiar v. Chidambara Swamigal*[1] and *Raghunathan v. Ravutha Kanni*[2], this Court held that a guardian's contract for sale, though supported by necessity or benefit cannot be specifically enforced against the minor. In the opinion of the learned Judges who decided these two cases, it made no difference whether the guardian's contract bound the minor to sell his property or to purchase the property of the other party to the contract. In *Adinarayana* v. *Venkatasubbayya*[3], it was held that a minor who had attained majority could specifically enforce a contract of sale entered into by his guardian when the purchaser had entered into possession of the property under the contract but had not paid the consideration. Even after the decision of the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[4], Courts in India enforced a guardian's contract, for sale of the ward's property if the transaction was supported by necessity or was beneficial to the minor, *Innatunnissa Bibi* v. *Janakinath*[5] and *Babu Ram* v. *Said-un-nissa*[6]. These decisions no doubt related to contracts for sale by guardians appointed under the Guardians and Wards Act with the sanction of the Court, but that circumstance was only evidence of the guardian's authority and the propriety of the sale, and did not affect the question of mutuality. If the law is that a contract for sale of a minor's property by his guardian cannot be enforced however necessary or beneficial the sale might be, it will have a serious effect on Hindu families where the father, and in his absence, the mother, usually act as natural guardians of their minor children and manage their property. It is conceded on all hands that under the Hindu Law a natural guardian has authority to effect a sale of the ward's property for the necessities or benefit of the ward. It would be anomalous to hold that specific performance cannot be had on a contract for sale which usually and normally precedes such a sale by the guardian. In *Subramanyam* v. *Subbarao*[7] the Judicial Committee held that a contract for sale of the ward's property concluded by a guardian competent to act and being for the ward's benefit is enforceable against the minor. The decision in *Ramakrishna Reddiar* v. *Chidambara Swamigal*[1] and *Raghunathan* v. *Ravutha Kanni*[2], cannot, therefore, be accepted as correct statements of the law.

Further questions arise, namely, whether it is within the competence of the guardian of a Hindu minor to enter into a contract for a sale of land so as to bind the minor and whether the contract is for the benefit of the minor in this case. From *Hanuman Prasad's case*[8], down to the recent decisions of the Federal Court in *Sreeramulu* v. *Pundarikakshayya*[9] and *Papayya* v. *Pundarikakshayya*[10] the extent of a Hindu guardian's power to bind his minor ward by contracts and alienations has been the subject of frequent judicial consideration. That under the Hindu Law a guardian has the power to sell or mortgage the estate of his minor ward for the necessities or benefit of the minor, is too well established to require any citation of authority. This Court has taken the view that in respect of liabilities imposed by personal law, a decree could be passed against the minor's estate on a contract by the guardian entered into on behalf of the minor even though no charge had been created on the estate of the minor. See *Ramajogayya* v. *Jagannathan*[11], *Natesa Nattar* v. *Manicka Nattar*[12], *Satyanarayanamurthi* v. *Gopalan*[13], *Ramanathan* v. *Palaniappa*[14], *Annamalai* v. *Muthuswami*[15] and *Sudarsana Rao* v. *Palayya*[16].

1. (1927) 54 M.L.J. 412.
2. (1938) 2 M.L.J. 277 : I.L.R. (1938) Mad. 928.
3. (1940) 1 M.L.J. 251 ; I.L.R. (1940) Mad. 852.
4. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
5. (1917) I.L.R. 22 Cal. W.N. 477.
6. (1913) I.L.R. 35 All. 499.
7. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.).
8. (1856) 6 M.I.A. 393.
9. (1949) F.L.J. 288.
10. (1949) F.L.J. 318.
11. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad 185 (F.B.).
12. (1938) 1 M.L.J. 188.
13. (1939) 2 M.L.J. 279.
14. I.L.R. (1939) Mad. 776.
15. I.L.R. (1939) Mad. 391.
16. (1943) 1 M.L.J. 339 : I.L.R. (1944) Mad 218.

The decisions of this and other High Courts were exhaustively reviewed by their Lordships of the Federal Court in *Sreeramulu* v. *Pundarikakshayya*[1] and *Bapayya* v. *Pundarikakshayya*[2] and though their reasoning and conclusions were not identical, I might summarise them as follows :

All their Lordships agreed that a guardian has no power to bind a minor or his estate by executing a promissory note containing an unconditional undertaking to pay a debt or loan, for, the liability of the minor's estate is conditional upon the guardian's contract being for a purpose necessary or beneficial to the minor. Since a party to a negotiable instrument is liable to a holder in due course until the instrument is duly discharged and since a subsequent holder in due course may recover the amount due from any party to the instrument, even if it was executed without consideration, it was held that a minor would not be liable on such an onerous contract entered into by his guardian. With reference to the liability of a minor in respect of other contracts entered into by a guardian Kania, C.J., stated the rule in these terms :

> "The law as it stands permits a *de facto* manager to borrow money for the necessity or benefit of the minor's estate so as to make the minor's estate liable for the loan when he can do so wthout making out a contract between the minor and the creditor". (Page 294).

Earlier in his judgment His Lordship had stated that the powers of a guardian *de jure* and *de facto* were the same in this respect. According to the learned Chief Justice, the guardian cannot do indirectly what the minor cannot do directly by entering into a contract and the creditor can make the minor's estate liable not on the contract of the guardian, but on the principle of subrogation to the guardian's right of reimbursement or indemnity. This was the view of Wallis, C.J., in *Rama Jogayya* v. *Jagannathan*[3]. Fazl Ali, J., (at page 299) was also of the opinion that the guardian of a Hindu minor could not make contracts on behalf of the minor so as to involve the minor and his estate in obligations or liabilities and the creditor could only look to the right of subrogation. Mukerjee, J., (at pages 311 and 315) took the view that except in the case of necessaries supplied to a minor within the meaning of section 68 of the Contract Act, the creditor cannot obtain a decree against the estate of a minor on the basis of a contract entered into by the guardian and could only avail himself of the right of subrogation. Mahajan, J., (at pages 330 and 341) however, took the view that a creditor had a right of direct recourse against the minor's estate on a guardian's contract without being obliged to depend on a subrogation to the guardian's right of indemnity or reimbursement, whether the contract was one for necessaries supplied to the minor or whether the liability under the contract was one to which the minor's estate was liable under Hindu Law.

The distinction between the liability of a minor's estate under a mortgage or charge created by a guardian and a liability arising out of a contract entered into by him has no foundation in any text of Hindu Law, but has been developed by judicial decisions. This distinction was not drawn by the Judicial Committee in *Hanuman Prasad's case*[4], though the actual case related to a mortgage executed by the mother and guardian of a minor. Their Lordships referred to the "lender" the "loan" and to the loan being "for the benefit of the estate" and concluded by observing :

> "It was obvious that money to be secured on any estate is likely to be obtained on easier terms than on a loan which rests on mere personal security, and that, therefore, the mere creation of a charge, securing a proper debt cannot be viewed as improvident management".

In *Watson and Co.* v. *Sham Lal Mitter*[5], the Judicial Committee held that an agreement by the guardian of a Hindu minor to pay enhanced rent for the property purchased on his behalf was binding on the minor, evidently because it was a proper contract for the guardian to enter into. In another case decided by the Judicial Committee

1. (1949) F.L.J. 288.
2. (1949) F.L.J. 318.
3. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).
4. (1856) 6 M.I.A. 393.
5. (1887) L.R. 14 I.A. 178 : I.L.R. 15 Cal. 8 (P.C.).

at about the same time, *Waghela Rajsangji* v. *Shekh Masludin*[1], the Judicial Committee held that it was " a very improper thing to allow the guardian to make covenants in the name of the ward so as to impose a personal liability upon the ward". The case related to an onerous covenant framed so as to bind the infant to indemnify a vendee against any future claim of the Government to assess rent on the property sold. The Judicial Committee held that the minor had the right to say that he was not bound by such a covenant. It appears from pages 561—562 of the report that the Judicial Committee regarded the argument of Mr. Mayne that it was competent for the guardian to make the property of the minor a security to the creditor against the loss in the event of the Government exacting rent " as worthy of great consideration." But they held that the talukdari estate offered as security could not be charged by reason of the prohibition in section 12 of the Ahmedabad Talukdari Act. In *Indur Chunder Singh* v. *Radha Kishore Ghose*[2], a Kabuliyat containing a covenant for renewal was executed by the mother and grandmother of the minor in their own right and not in their capacity as guardians dealing with the estate of a minor. The only relevant sentence in the judgment of the Judicial Committee ran as follows :

> " The contention that the minor and widow of Gopi Mohan Ghose had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained."

Taken out of its context, this passage is apt to mislead. The managers of the infant's estate had taken a renewal of a lease which had expired and surrendered possession to the lessor before the expiry of the period of the renewed lease. The lessor brought a suit for recovery of the rent due under the contract for the period covered by the renewed lease against the minor on attaining majority. The Judicial Committee held that the contract of the adoptive mother and guardian was not binding on the adopted son and the lessor's suit for rent was dismissed on the ground that the guardian had no authority to bind the minor by an onerous covenant imposing a liability for rent on the minor. *Zamindar of Polavaram* v. *Maharajah of Pithapuram*[3], in which I was among the counsel for the respondent, proceeded on the submission of Mr. De Gruyther, K.C., that the respondent was entitled to a decree for enforcement of the vendor's charge for unpaid purchase money. This submission was accepted by the Judicial Committee and a mortgage decree was passed. A personal decree against the general assets of the minor appellant could not also be claimed at the same time, at any rate, before the charged properties were exhausted. The finding of the High Court that the defendant was not personally liable was not challenged before the Judicial Committee. The recent decision of the Judicial Committee in *Subramanyam* v. *Subbarao*[4], clarifies the whole position and declares the law to be that a contract for the sale of the property of a minor entered into by his mother and guardian for the purposes considered necessary and proper in Hindu law would be binding on the minor from the time when the contract is entered into and is capable of being enforced against him.

The argument *in terrorem* that the minor's interest would be seriously prejudiced if contracts entered into by a guardian for the sale of his property were specifically enforced has no effect upon me, for, whether it is an executory contract or an executed transfer by way of sale or mortgage, the enforceability of the contract or the transfer against the estate of the minor would depend upon whether the transaction is justified by necessity or benefit of the minor. If the guardian's contract is unsupported by necessity or benefit to the minor, it would be in excess of his powers as guardian and the contract would be unenforceable against the estate of the minor on that ground. A contract for the sale of property is an essential preliminary to the sale itself and its enforceability against the minor has

1. (1887) L.R. 14 I.A. 89 : I.L.R. 11 Bom. 551 (P.C.).
2. (1892) L.R. 19 I.A. 90 : I.L.R. 19 Cal. 507 (P.C.).
3. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).
4. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. 1949 Mad. 141 (P.C.).

to be judged by the same tests as are applicable to a transfer of the ward's propery by the guardian.

According to the finding of the learned District Judge, in this case there was a contract for reconveyance to the plaintiff's husband even when the original sale was effected by him in 1940 in favour of the grandfather of defendants 1 and 2. In entering into the compromise, Ex. P-3 dated 19th January, 1944, agreeing to convey the property which had devolved on the minors, their mother and guardian merely confirmed the prior arrangement. The Court had sanctioned the compromise as being beneficial to the minors. The agreement to pay the minors Rs. 700 in satisfaction of the claim in the small cause suit was, to use the language of the Court below "inextricably connected" with the agreement to convey the land on receipt of Rs. 2,000. The compromise, Ex. P-3, is not sought to be avoided as a whole. The minors have received and retained the sum of Rs. 700 paid in pursuance of the compromise and entered satisfaction of their claim in small cause suit 65 of 1943. They do not impugn the compromise as a whole as beyond the authority of their guardian. They cannot be permitted to approbate the guardian's bargain by retaining the money paid under it and reprobate it by the plea that the contract for the conveyance of land was beyond the scope of their guardian's authority. See *Sohan Lal* v. *Atal Nath*[1] and per Cornish, J., in *Zeebunnissa Begum* v. *Mrs. Danagher*[2].

This case has given me more than usual anxiety not because of doubts in my mind as to what my conclusion should be, but because I have a natural feeling that any criticisms which I make of prior decisions might savour of a wish not to reconcile myself to precedents that are binding upon me. I would have felt bound, in spite of the pressure on judicial time in this Court, to place this case before His Lordship the Chief Justice, for directions as to its being heard by a Full Bench but for the recent decision of the Judicial Committee in *Subramanyam* v. *Subba Rao*[3] which in my opinion, furnishes authoritative guidance and indeed, rules this case. I hold that the guardian's contract for sale was within her authority, that it was necessary and beneficial to the minor and that the vendee should be given a decree for specific performance.

Two minor points raised in the course of the arguments remain to be noticed. I cannot agree with the lower appellate Court that though a period of two months was fixed under the compromise Ex. P-3 for payment of the money and the execution of the conveyance and time was expressly made the essence of the contract, still the principle enunciated in *Jamshed Khadsram* v. *Burjorji Dhunjibhai*[4], can be invoked and the stipulation as regards time disregarded as not being of the essence of the contract. I also consider that there was no proper tender of the purchase money by the plaintiff before the expiry of the time fixed for payment under the contract of sale. As however the full price had been deposited into Court before the expiry of the time fixed for payment by the contract Ex. P-3, a suit for specific performance had also been filed within that period, the purchaser would be entitled to a decree for specific performance. Having regard to the fact that the plaintiff has not substantiated her plea of a tender before suit and an improper rejection thereof by the defendant, I direct that the parties do bear their respective costs throughout.

No leave.

K. S. *Appeal dismissed.*

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1. (1933) I.L.R. 56 All. 142.
2. (1935) 70 M.L.J. 477 : I.L.R. 59 Mad. 942.
3. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. 1949 Mad. 141 (P.C.).
4. (1915) 30 M.L.J. 186 : L.R. 43 I.A. 26 : I.L.R. 40 Bom. 289 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

S. Chokkalingam Pillai and another .. *Appellants**

v.

M. S. S. M. Ganesa Shanmugasundaram Pillai .. *Respondent.*

Evidence Act (*I of* 1872), *section* 116—*Threat of eviction by title paramount—Defence to action for rent—Conditions.*

In order to constitute an eviction by a person claiming under paramount title, it is not necessary, that the tenant should be put out of possession or ejectment should be brought. A threat of eviction is sufficient and if the tenant in consequence of such threat, attorns to the claimant, he can set this up as an eviction by way of defence to an action for rent, subject to his proving the evictor's title. But there is no eviction if the tenant gives up possession voluntarily. If the owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession, the threat to put him out of possession amounts in law to eviction. The threat by the third party as well as the submission to it by the tenant who attorns to him must be real and *bona fide*. For a threat of eviction by title paramount to constitute a good defence to an action for rent, the party evicting must have good title and the tenant must have quitted against his will.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in A. S. No. 194 of 1945, preferred against the decree of the Court of the District Munsiff, Tirunelveli in O. S. No. 486 of 1943.

K. V. Ramachandra Aiyar and *V. Meenakshisundaram* for Appellants.

P. N. Appuswami for Respondent.

The Court delivered the following

JUDGMENT : This second appeal arises out of a suit for ejectment and for rent. So far as the first relief is concerned, it is admitted that the lease under which the plaintiff claims and on the basis of which he has granted a sub-lease to the defendant has expired. The second relief is however the practical relief with reference to which a decree must be given in favour of the plaintiff, if he is to succeed in his contention of estoppel against his tenant, the defendant. The Courts below have dismissed the suit on the ground that there was a determination of the lease in favour of the defendant by the determination of the title of the plaintiff as the lessee from the original owner.

In appeal it is contended that in holding against the estoppel under section 116 of the Indian Evidence Act, pleaded by the plaintiff, the Courts below have erred in the view that they have taken that there was a threat of eviction by title paramount from the original owner against the defendant. It is urged that there could be no determination of the lease in favour of the defendant so long as the interest of the plaintiff himself as the defendant's lessor did not terminate in the manner contemplated by section 111 (*c*) of the Transfer of Property Act.

The material facts are that there was a scheme suit in respect of the property which belonged to the trust, the original owner, in which the plaintiff as a lessee from one of the trustees then in management, one Kanthimathinatha Pillai was impleaded but was given up at the trial, that afterwards the new trustees appointed by the scheme framed in that suit served two notices on the defendant, Ex. P-9, dated 6th January, 1943, and Ex. D-3 dated 17th May, 1943, in both of which they asserted their title as trustees under the scheme, and in the latter of which they impeached the title of Kanthimathinatha Pillai to grant the lease to the plaintiff as he was only one of several trustees and not the managing trustee at the time, and called upon the defendant to vacate the premises, threatening him in default with proceedings for eviction, and that thereafter the defendant executed Ex. D-4 dated 23rd June, 1943, a rent deed, in favour of the managing trustee appointed under the scheme. These facts, it is contended for the appellant, do not constitute sufficient threat of eviction by title paramount such as would justify the attornment by the defendant to the managing trustee under the scheme so as to put an end

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* S. A. No. 2184 of 1946. 15th March, 1950.

to the relationship of lessor and lessee between himself and the defendant. The appellant further points out that the judgment and decree in the scheme suit do not at all declare the invalidity of the lease in favour of the plaintiff by Kanthimathinatha Pillai but leave the question of the validity of his lease open. He also contends that the learned Subordinate Judge has made the mistake of supposing that there was a prior judgment, Ex. D-7 which by the way related to a lease of other property in favour of another person in which Kanthimathinatha Pillai, had been declared by the High Court in the second appeal to which that judgment relates, not entitled to grant leases as he was only one of several trustees and not the managing trustee. It is not contended for the respondent that the learned Judge has not made this mistake. What is contended is that although the scheme judgment and decree did not pronounce upon the validity or invalidity of the lease in favour of the present plaintiff, the title of the plaintiff must be taken to have come to an end, because in fact Kanthimathinatha Pillai was only one of several trustees and not the managing trustee and could not therefore grant the lease to the plaintiff. It is also contended for the respondent that the question whether there was in fact a threat of eviction by title paramount is a question of fact with the lower appellate Court's finding on which I ought not to interfere.

What exactly constitutes a threat of eviction by title paramount which results in the determination of a lease has been considered in several cases of which it is necessary for me to mention only the rulings in *Jogendralal Sankar* v. *Moheshchandra Sadhu*[1], *Rajkrishna Prasadlal Singh Deo* v. *Baraboni Coal Concern, Ltd.*,[2], *Alaga Pillai* v. *Ramaswami Thevan*[3], *Valia Muhammad* v. *Sevakutti Koyi*[4], and *Krishna Prasad Singh* v. *Adyanath Ghata*[5]. What emerges from the relevant case-law on the subject is neatly stated by Sarkar on Evidence in his commentary to section 116 of the Indian Evidence Act. It is sufficient for me to say that in order to constitute an eviction by a person claiming under paramount title, it is not necessary that the tenant should be put out of possession or ejectment should be brought, and that a threat of eviction is sufficient, and if the tenant, in consequence of such threat, attorns to the claimant, he can set this up as an eviction by way of defence to an action for rent, subject to his proving the evictor's title, but there is no eviction if the tenant gives up possession voluntarily. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession, the threat to put him out of possession amounts in law to eviction. The threat by the third party as well as the submission to it by the tenant who attorns to him must be real and *bona fide*. For a threat of eviction by title paramount to constitute a good defence, the party evicting must have good title and the tenant must have quitted against his will.

Applying these considerations to the present case, I am fairly clear that there was a sufficiently effective threat of eviction by title paramount to justify the defendant's attornment to the newly appointed managing trustee under Ex. D-4. That the lease in favour of the plaintiff must be held to be invalid is the concurrent view of both the Courts below, and although the judgment of the appellate Court was partly influenced by its misconstruction and misconception of Ex. D-7, I am not in all the circumstances of the case prepared to interfere with the finding of the Courts below in favour of the respondent, which is supported by sufficient evidence.

In the result, the second appeal fails and is dismissed but in the circumstances without costs.

V.S. *Appeal dismissed.*

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1. (1928) I.L.R. 55 Cal. 1013.
2. (1934) I.L.R. 62 Cal. 346.
3. (1925) 49 M.L.J. 742 : A.I.R. 1926 Mad. 187.
4. (1933) 66 M.L.J. 355.
5. (1943) I.L.R. 22 Pat. 513.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Tulabandu Basavayya *alias* Chinna Basavayya .. *Petitioner**

v.

Sri Sri Satyabhigna Theerthaswamulu Varu (deceased) Trustee and worshipper of Sri Ramachandraswami and Head of the Uttaradi Mutt by his power-of-attorney agent Markapuram Srinivasacharyulu and another .. *Respondent.*

Madras Estates Land Act (I of 1908, *as amended by Act II of* 1945), *section* 3 (2) (d)—*Explanation* (1) —*Inam when an estate.*

The question whether an inam grant satisfies the terms of Explanation (1) to section 3 (2) (*d*) of the Madras Estates Land Act must be decided primarily on a construction of the original grant, if it is forthcoming, or, from the title deed issued at the time of the inam settlement. If it is shown therefrom that the grant in terms was of a named village excluding minor inams and communal porambokes and not merely of an extent of lands situated in a village falling short of the remaining area of the village, Explanation (1) would be attracted. Madras Act II of 1945 had not the effect of converting minor into major inams but was merely intended to restore the conception of minor inams as it prevailed before the decisions in *Adamma* v. *Satyadhyana Thirtha Swamivaru,* (1943) 2 M.L.J. 289 and *Soori Reddi* v. *Agnihothrudu,* (1943) 2 M.L.J. 528. Even after the Amending Act, if it is shown that an inam grant did not comprise the entire area of a village other than lands granted on service or other tenure and communal porambokes, the inam would not be an estate within section 3 (2) (*d*).

Where lands are granted to the Swamigal of a Mutt for the *Nitya Naivedya Deeparadhana* of a particular deity and which are described as Devadayam lands and confirmed free of any quit rent at the time of the inam settlement, it cannot be said that the lands are held on service tenure, and therefore taken out of the category of "ryoti" land under section 3 (16) (*e*) of the Act. The lands vest in deity as owner, the Mutt Swamigal being merely the manager for the time being. There is no grant to any person as remuneration for any designated service to be rendered by him and his successors, to the deity.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tenali, dated 29th August, 1947, in C. M. A. No. 8 of 1946 (O. S. No. 318 of 1944, District Munsiff's Court, Tenali) etc.

K. Kotayya and *K. Ramamurthi* for Petitioner.

B. V. Ramanarasu for Respondents.

The Court delivered the following

JUDGMENT.—These three civil revision petitions arise out of three suits instituted in the Court of the District Munsiff of Tenali, by the head of the Uttaradi Mutt as trustee of a religious endowment, for the recovery of lands in the possession of the defendants in the respective suits. The averments in the pleadings, the issues raised and the evidence adduced are common to the three suits which were tried together and decided by a common judgment, both original and appellate. The lands in suit are situate in Devarapalle agraharam. The plaintiff's case was that the defendants in each of the three suits were his lessees whose term had expired but who, nevertheless, continued in possession of the lands under an untenable claim of permanent occupany rights. The defendant contended that the lands in the suit were "ryoti" lands situated in an "estate" and that they had therefore acquired occupancy rights therein under section 6 (1) of the Madras Estates Land Act, hereinafter referred to as the Act. They also pleaded that the civil Court had no jurisdiction to try the suits. The learned District Munsiff upheld the plea of the defendants and returned the plaints in the three suits for presentation to the revenue Court. On appeal the learned Subordinate Judge reversed that decision and directed the lower Court to proceed with the trial of the three suits holding that the lands in question were not ryoti lands and that the suits for the ejectment of the tenants of those lands were cognizable by the civil Court. The defendants in the three suits have preferred these civil revision petitions against the decision of the appellate Court.

*C. R. P. Nos. 1407, 1408 and 1622 of 1947. 14th February, 1950.

The point involved in these civil revision petitions and on which the rights of the parties depend, is whether the lands in suit are "ryoti" lands as defined in section 3 (2) (*d*) of the Act, and that question again depends upon whether the Devarapalle agraharam granted in inam to the predecessor-in-title of the plaintiff is an "estate" as defined in the Act. According to the plaintiff this point is concluded in his favour by the decision of a Bench of this Court in *Ademma* v. *Satyadhyana Thirtha Swamivaru*[1], which dealt with other lands of the same character situated in the same village. The plaintiff was a party to that decision but not the defendants, and therefore there is no question of *res judicata*. According to the defendants, Madras Act II of 1945 was enacted in order to supersede the decision in *Ademma* v. *Satyadhyana Thirtha Swamivaru*[1] and the matter is now *res integra* to be decided on the evidence in this case.

Section 3 (2) (*d*) of the Act declares that an inam grant is an "estate" if the grant was of a village and had been made, confirmed or recognised by the British Government. It is a matter of common knowledge that whole inam villages or major inams as they were called, were alone brought under the purview of the Act but not grants of portions of a village styled as minor inams. In many cases it was found that though the grant was stated to be of a named village described by boundaries, small areas situated therein which had already been granted away on service or other tenure, were not included in the grant. In some cases poramboke lands set apart for the use of the village community were excluded from the inam grant of a village. Inam villages of this description were also regarded as "estates" and the tenants of "ryoti" lands in such villages were considered to have acquired permanent rights of occupancy under the Act. In *Narayanaswami Naidu* v. *Subramanyam*[2], the distinction between major and minor inams was brought out in these terms:

> "The definition in sub-section (2), clause (*d*) (of section 3) was obviously intended to exclude from the definition of 'estate' what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as 'whole inam villages'. The existence of 'minor inams' in whole inam villages is very common and if these inam villages do not come within the definition of 'estate' almost all the agraharam, shrotriem and mokhasa villages will be excluded. This certainly cannot have been the intention of the legislature. These minor inams are generally granted for services to be rendered to the village or to the owner."

Besides the minor inams granted on service or other tenure referred to in the passage above cited, there might be communal porambokes such as streets, pathways, house-sites, threshing floors, tanks, cremation grounds, etc., which might have been excluded from the inam grant of the village. Even if porambokes of this kind had been included in the grant, the inamdar would hold them only as trustee for the community and not as his absolute property. Therefore the law was understood to be that the omission of these minor inams and communal porambokes from grants of an inam village, did not make the grant any the less a grant of the village if the rest of the area of the village had been granted to the inamdar. The decisions in *Ademma* v. *Satyadhyana Thirtha Swamivaru*[1] and *Soori Reddi* v. *Agnihothrudu*[3] took the view, for the first time, that a grant of anything less than the entire area of a village, as for instance, by the exclusion of minor inams or porambokes from the grant, would make the inam a minor inam and therefore take it outside the purview of the Act. Evidently, the decision in *Narayanaswami Naidu* v. *Subramanyam*[2] was not placed before the learned Judges of the Division Bench that decided the two later decisions above referred to.

The Legislature promptly superseded these two decisions by passing Act II of 1945 which added Explanation (1) to section 3 (2) (*d*) of the Act in these words:

> "Where a grant as an inam is expressed to be of a named village, the area which forms the subject matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes."

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1. (1943) 2 M.L.J. 289.
2. (1915) 29 M.L.J. 478: I.L.R. 39 Mad. 683, 685.
3. (1943) 2 M.L.J. 528.

It is the effect of the Amending Act on this case that falls to be decided. Explanation (1) to section 3 (2) (*d*) states that if an inam grant is expressed to be of a named village then, notwithstanding the non-inclusion of minor inams or communal porambokes in the grant, the inam would be an estate. The question whether an inam satisfies the terms of Explanation (1) to section 3 (2) (*d*) must be decided primarily on a construction of the original grant, if it is forthcoming, or, from the title deed issued at the time of the inam settlement. If it is shown therefrom that the grant in terms was of a named village excluding minor inams and communal porambokes and not merely of an extent of lands situated in a village falling short of the remaining area of the village Explanation (1) would be attracted. Madras Act II of 1945 had not the effect of converting minor into major inams but was merely intended to restore the conception of minor inams as it prevailed before the decisions in *Ademma* v. *Satyadhyana Thirtha Swamivaru*[1] and *Soori Reddi* v. *Agnihothrudu*[2]. Even after the Amending Act if it is shown that an inam grant did not comprise the entire area of a village other than lands granted on service or other tenure and communal porambokes, the inam would not be an estate within section 3 (2) (*d*). If for instance in a pre-settlement inam grant by a Zamindar (which is the present case) some lands, cultivated, uncultivated or waste, situated in a village had been retained by the zamindar for his own use or enjoyment and the entire remaining area had been granted in inam, the inam would not be an "estate" within section 3 (2) (*d*) as amended by Explanation (1). As pointed out in *Venkanna* v. *Lakshmipathiraju*[3], from the use of the word *Agraharam* in a grant, it cannot be implied that the grant was of the whole village when there are "other lands in the village" not included in such grant. The expression "other lands in the village" meant lands other than minor inams and communal porambokes, which however, were not included in the grant. This decision was given after the enactment of Explanation (1) to section 3 (2) (*d*) of the Act and it applies to the present case as I shall presently show.

The original grant as well as the inam title deed not being available to show whether the grant was expressed to be of a named village, we have to look to the other evidence to find out the nature and extent of the inam grant. The evidence consists of an extract from Ram's register prepared some time about the year 1800, the inam statement and extract from the inam register of 1861, and two maps of 1892 and 1920 respectively. In Ram's register the village is described as Devarapalle agraharam and the year of the inam grant is stated to be fasli 1173. No further particulars are stated as regards the area of the village or the extent of the inam grant. There is no reference to any minor inam. This register was taken into consideration at the time of the inam settlement and formed part of the material on which the conclusion of the Inam Commissioner was based as would appear from the extract of the inam register filed in this case. The inam statement and the extract from the inam fair register, however, furnish valuable and authentic information about the nature and extent of the original grant and it is to these documents that I attach great importance. The inam settlement of this village took place in 1861. The original grant had been lost even then. Neither the area nor the boundaries specified in the original grant could therefore be ascertained and the column appropriate to these particulars according to the original grant was not filled up in the inam register. The gudikat (total extent) of the village was stated to be 6-6 kuchelas or 158 acres, 22 cents out of which an extent of one kuchela or 25 acres 10 cents was savaram or seri land under Government, i.e., ryotwari land, an extent of 0. 4 kuchela or 5 acres 6 cents was a minor inam and the balance of 128 acres 6 cents was the extent of the inam granted to the predecessor of the plaintiff. It appears from pages 320 and 321 of the Krishna District Manual that the zamindar who made the inam grant fell into arrears of peishcush and the Government attached and sold his lands and purchased them in 1846. Among the lands so purchased by the Government must have been this extent of 1 Kuchela or 25 acres 10 cents retained

1. (1943) 2 M.L.J. 289.
2. (1948) 2 M.L.J. 528.
3. (1946) 1 M.L.J. 300.

by the zamindar as his savaram or seri, that is to say, as his own private land in the village of Devarapalle agraharam. After the purchase by the Government it became a ryotwari land and it is described in the inam settlement as savaram land under the Government and in the inam register as seri. It follows that the inam grant in this case was of an area comprised in a village which was less than its total area (excluding minor inams) by 25 acres 10 cents representing the savaram or seri land. In other words the grant was not of a village even under Explanation (1) to S. 3 (2) (*d*) of the Act. Exhibits D-3 and D-4 are plans prepared in 1892 and 1920 to show blocks of zamindari lands or inam lands within zamindaris, which were under wet cultivation, locally known as mamool wet. Evidently these plans were prepared in order to fix the lands which are entitled to a right of irrigation from existing sources before the Government undertook the construction of new irrigation works of the Krishna river system. These maps do not throw any light on the nature or extent of the original grant. There is no evidence that Devarapalle agraharam is designated as a village in the revenue accounts or that there are separate revenue accounts for the village, maintained by a karnam. I therefore agree with the opinion of the learned Subordinate Judge, that neither at the time of the original grant nor subsequently was the extent of 128 acres in Devarapalle agraharam granted to the plaintiff's predecessor treated as a village.

In this view it is unnecessary to consider at length the other contentions raised by the learned advocate for the respondent but I shall briefly advert to them.

Mr. Ramanarasu argued that the extent of 5 acres 6 cents shown as minor inam in the inam register extract was a personal inam and could not be said to be lands held on "service or other tenure" within the meaning of Explanation (1) to section 3 (2) (*d*) of the Act. There is no authority on this point beyond a passing observation of Panchapagesa Sastri, J., in *Suryanarayana* v. *Venkatadu*[1], to the effect that personal inams might fall within the category of lands held on service or other tenure within the meaning of Explanation (1) to section 3 (2) (*d*) of the Act. In this case, the minor inam in question of the extent of 5 acres 6 cents was originally granted by the zamindar and it is probable that he reserved a right of resumption or a right of reverter on failure of the grantee's heirs. Consequently it might be said that there was some kind of tenure in respect of the original grant of the inam though not a service tenure. It is, however, unnecessary to express a final opinion on this point in view of my decision on the main question.

The last contention of Mr. Ramanarasu, the learned counsel for the respondent, was that the lands in question which were granted to the Uttaradi Mutt Swamigal for the Nitya Naivedya Deeparadhana of Sri Ramachandraswami and which were described as Devadayam lands and confirmed free of any quit rent at the time of the inam settlement, were lands held on service tenure and therefore taken-out of the category of "ryoti" lands under section 3 (16) (*c*) of the Act. This contention is wholly untenable. The lands vest in the deity as owner, the Uttaradi Mutt Swamigal being merely the manager for the time being. There was no grant to any person as remuneration for any designated service to be rendered by him and his successors, to the deity. The income of the lands is to be appropriated to the daily worship of the deity and both the income and the corpus belong to and vest in the deity as owner. The deity is a juristic person capable of holding property and the deity cannot be said to be rendering service to itself. The argument of the learned counsel has been consistently rejected in decisions of this Court, both reported and unreported, on which I am unable to lay my hands at the moment. I agree with the judgment of the learned Subordinate Judge and dismiss these civil revision petitions with costs.

V.S. *Petitions dismissed.*

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(1) (1949) 1 M.L.J. 590.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Patur Venkataseshayya .. *Appellant**

v.

Dubagunta Subrahmanyam and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 120 and 62—Applicability—Suit for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of a site purchased in the name of the defendant by the defendant and the plaintiff's father—Limitation.

The plaintiff's suit was for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of a site purchased by the first defendant and the father of the plaintiff in the name of the first defendant only. The properties sold were two items, one sold in August, 1938, and the other in February, 1939. The suit was laid on 8th December, 1944.

Held, on account of the jural relationship between the parties a resulting trust can be postulated and any claim based on such relationship must be treated as excluded from Article 62 and must be brought under Article 120 of the Limitation Act. It cannot be said that where an account is not called for the suit must necessarily be treated as one falling under Article 62 and therefore not being within Article 120.

Case-law discussed.

It cannot be said that a suit filed within six years from the date of plaintiff's knowledge of the sales by the plaintiff will be in time.

O. R. M. O. N. S. P. Firm v. *Nagappa Chettiar*, (1941) 1 M.L.J. 393 : L.R. 67 I.A. 448 : I.L.R. 1941 Mad. 175 (P.C.), explained.

Ramaseshayya v. *Tripurasundari Cotton Press, Bezwada*, (1925) 50 M.L.J. 520 ; I.L.R. 49 Mad. 468 (F.B.) and *Hussain Ali* v. *Baqair Ali*, (1945) 2 M.L.J. 422 : I.L.R. (1946) Mad. 423, considered.

Accordingly the claim in respect of the sale of February, 1939, is within time though in respect of the sale of August, 1938, it is barred.

Appeal against the decree of the Court of the Subordinate Judge of Nellore, in A. S. No. 234 of 1946, preferred against the decree of the Court of the District Munsiff of Nellore in O. S. No. 860 of 1944.

K. Umamaheswaram and *B. Srinivasamurthi* for Appellant.

D. Narasaraju and *K. B. Krishnamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant before me was the plaintiff in the original suit which has been dismissed by the trial Court as well as on appeal. The suit was for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of a site in Mambalam purchased by the first defendant and the father of the plaintiff in the name of the first defendant only. The properties sold are two items, one sold in August, 1938, and the other in February, 1939. The suit was laid on 8th December, 1944. The Courts below have applied Article 62 of the Indian Limitation Act to the suit claim and held it to be beyond time. They have also held that even if Article 120 applied the suit would be in time with reference to the plaintiff's share of the proceeds of sale of February, 1939, only and not with reference to the share of the proceeds of sale of August, 1938, and that the reliance placed by the plaintiff upon Exhibits P-4 and P-4 (*a*) as saving the bar of limitation with reference to the sale proceeds of August, 1938, was of no avail, for the reasons that the alleged acknowledgments were in the nature of statements addressed not to the plaintiff but to a third party, and that they were not sufficiently clear as acknowledgments of a subsisting liability within section 19 of the Indian Limitation Act.

It is common ground that Article 120 of the Indian Limitation Act cannot apply to the case unless the applicability of Article 62 stands excluded. The choice is between these two Articles only, and there is no other Article of the Limitation Act for me to consider. Mr. Umamaheswaram contends that the view of the Courts below that Article 62 of the Limitation Act applied to the case is erroneous. His point is that this is not the case of a suit for money had and

* S. A. No. 667 of 1947. 14th March, 1950.

received at all but for the enforcement of an equitable right which his client has to monies in the hands of benamidar. If that is the true jural relations between the parties underlying the suit claim, says counsel, the case falls directly within the ruling of a Full Bench of this Court in *Karanamurthy* v. *Ramanatha*[1]. The argument is sought to be controverted by the learned counsel for the respondent on the ground that the relationship between the parties here is purely and simply that of co-sharers, and that there is no fiduciary or quasi-fiduciary relationship on the part of the defendant towards the plaintiff such as would render Article 120 of the Limitation Act applicable.

Mr. Narasaraju contends that the word "benami" in relation to a case like the present is a misnomer, because this is not a case of the whole property belonging to one standing in the name of another but only of property standing in the name of one person on behalf of himself and another. In itself I do not find anything about the word "benami" which renders it apposite to the one case but not to the other. "Benami" after all means nothing more than name-lending and there may well be name-lending in regard to a part of the property comprised in a deed as well as in regard to the whole of it. Anyhow, whatever the appropriateness of that label may be in relation to the case on hand, there is no doubt but that this is a case in substance, within the meaning of section 82 of the Indian Trusts Act occurring in Chapter IX headed "of certain obligations in the nature of trusts", of property transferred to one person for a consideration paid or provided by another person as to part of such property undivided though it may be by metes and bounds between the parties for whose benefit the transfer has taken place. I do not find any adequate reason for restricting the word "property" which occurs in section 82 to property as a whole and not holding it to be applicable to property in part. The relationship between the parties before me is in essence this: that so far as the interests of the other persons who contributed their portions of the consideration for the purchase of the properties are concerned these interests are held by the first defendant under the sale deed in his favour as for the benefit of those other persons. So also the proceeds of sale attributable so far as may be to such interests. The obligation sought to be enforced is, in my opinion, therefore obviously an equitable obligation traceable to a resulting trust as it is called in English law, the rule as to which is stated by Eyre, C.B., in *Dyer* v. *Dyer*[2], and iterated by Farwell, L.J., in his judgment in the Court of Appeal in Re *Venture*[3], as follows:

"The clear result of all the cases without a single exception, is, that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advances the purchase-money; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffer."

But then, it is contended by Mr. Narasaraju that the law as laid down in *Hussain Ali* v. *Baquir Ali*[4], (Leach, C.J., and Rajamannar, J.) directly governs the present case. To reproduce the facts of that case from the headnote which correctly expresses them;

"The estate of a Mohomedan who died in 1917 included a casurina plantation which was sold in 1921 in accordance with the wishes of the majority of the heirs. The person who sold the property acting with the consent of the majority of the heirs handed over the sale proceeds to the defendant with instructions to distribute the money among the heirs in accordance with their respective interests. The defendant paid some of them but he did not pay the plaintiff. The plaintiff who stated that he did not become aware until 1940 of the fact that the money was in the hands of the defendant, sued to recover his share in the sale proceeds."

On those facts, the Court held that the receipt of the sale proceeds by the defendant for the purpose of distribution among the heirs did not constitute an express trust and that section 10 of the Limitation Act was not applicable to the case. The Court further held, and that is the material part of the decision for the present case, that the suit was governed by Article 62 and not by Article 89, 120 or 123

1. (1946) 1 M.L.J. 140 : I.L.R. 1946 Mad. 306 (F.B.).
2. (1788) 2 Cox. 93 : 30 E.R. 43.
3. (1908) Probate 218 at 229.
4. (1945) 2 M.L.J. 422 : I.L.R. (1946) Mad. 423.

of the Limitation Act, and that the suit was barred by limitation. In such a case, it is laid down that the starting point of limitation is the date when the defendant received the money and that the date of the plaintiff's knowledge of it is immaterial. That was a case in which the defendant who received the proceeds of the sale from the heir who sold the property with instructions to pay over the proceeds to the co-heirs could well be regarded as a person who did so for the plaintiff's use as well as the use of the other heirs in the parts in which they were entitled to the proceeds. The defendant in the present case does not occupy such a position, and the proceeds that he holds, he holds in the capacity of co-sharer, pure and simpliciter.

The relevancy of a Full Bench ruling of this Court reported in *Yerukola* v. *Yerukola*[1], to such a case has also been debated before me at some length. There, three brothers, members of a joint Hindu family, became separated. Arbitrators were appointed to divide the properties by metes and bounds but only some of them were so divided, and the rest remained in the hands of the different members, who collected outstandings from debtors and rents from tenants. In a suit brought by one of the brothers against the others for partition and account, it was held that the properties remaining undivided were held by the brothers as tenants-in-common, that the Article of the Limitation Act governing the claim for an account and share of the moneys and rents and profits collected was not Article 109 or 127, but Article 120, unless from the facts of the case, it could be inferred that the person receiving the moneys and rents and profits acted as the agent of the others, in which case Article 89 would apply. It was also further held that Article 62 was not applicable as a suit for money had and received would not lie by one tenant-in-common against another who had received more than his share, the appropriate remedy in such a case being an action for an account, in which all just allowances could be made.

Dealing with Article 62, Schwabe, C.J., observes, at page 659 of the Report :

> "Article 62 relates to suits for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. These are technical terms of the law of England used to cover a great variety of cases in which it can be said that the defendant has received money which really belongs to the plaintiff. There is, however, one case in which that form of action would not lie in England and that is by one tenant-in-common against another who has received more than his share."

Then, the learned Chief Justice after tracing the history of an action for account as between tenants-in-common in England proceeds to observe at page 660 of the report as follows :

> "This, in my judgment, is in itself a sufficient ground for holding that Article 62 has no application to this case, it being quite impossible to say that any particular debt or rent or profit, or any part of either, was received for the use of any particular tenant-in-common. Indeed, on partition any of the debts or rents or profits might be awarded *in toto* to any of the tenants-in-common, and further, in this case each of the tenants-in-common was collecting part of the common properties or the income from it and no doubt incurring expenses in so doing. An action for an account would be appropriate ; an action for money had and received would, in my judgment, be quite inappropriate. This view was taken in *Subba Rao* v. *Rama Rao*[2], in which it was held that Article 120 and not Article 62 applied in similar circumstances."

Referring to *Subba Rao* v. *Rama Rao*[2] again and to *Venkata Reddi* v. *Kuppu Reddi*[3] of the Report the learned Chief Justice further observed that it was held there

> "that Article 62 does not apply to transactions in which the defendant is not under a mere duty to hand over the moneys which he has received but has other duties as well in respect of it."

Of the passages quoted above the learned advocate for the appellant stresses the first as in his favour while the learned advocate for the respondent emphasises the second and the third.

Then again in Kumaraswami Sastri, J.'s judgment in the Full Bench case there are two passages in immediate succession to each other to be found at page 674 of the Report on the first of which reliance is placed by the learned counsel for

1. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648.
2. (1916) 30 M.L.J. 341 : I.L.R. 40 Mad. 291.
3. (1920) 13 L.W. 260 at 262.

the appellant, while on the second reliance is placed by the learned advocate for the respondent. The first passage is as follows:

"In *Umardaraz Ali Khan* v. *Wilayat Ali Khan*[1], it was held that a suit brought by some of the heirs to recover from the widow of a deceased Muhammadan a sum of money realised by her on account of a mortgage debt due to the deceased was governed by Article 120 of the second schedule to the Indian Limitation Act."

The second passage runs as follows:

"In *Venkata Reddi* v. *Kuppu Reddi*[2], Article 120 was applied to a suit for partition as regards the income derived from the joint properties. Wallis, C.J., observed:

'The next question is with regard to the period of limitation, within which the plaintiff is entitled to recover the income from the defendants, in respect of the portions of the properties which ought to have fallen to his share, but which were enjoyed by them. It has been contended that the case is governed by Article 62 which applies to a suit *i.e.*, for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The scope of this Article in cases like the present has been considered in *Subba Rao* v. *Rama Rao*[3], where it has been pointed out that it does not apply to transactions in which the defendant is not under a mere duty to hand over the money which he had received, but has other duties as well in respect of it.'"

I have carefully considered the argument on either side in this particular, and I have further looked into the case in *Subba Rao* v. *Rama Rao*[3] myself. That was a case in which the facts as stated in the headnote were as follows:

"The plaintiff and the defendant were co-sharers in a Jaghir of which the latter was appointed by the Government as manager. The former sued the latter in the District Munsiff's Court for his share of the net income due for the year 1912, but the plaint was returned for presentation to the proper Court as the valuation of the suit exceeded the pecuniary limits of the jurisdiction of the said Court; the plaintiff did not re-present the plaint in any Court, but subsequently instituted the present suit in 1913 in the District Court for an account and recovery of his share of income due from the years 1905 to 1907. The defendant pleaded that the suit was barred by limitation and by Order 2, rule 2 of the Civil Procedure Code."

On those facts it was held by the Court (Abdur Rahim and Srinivasa Ayyangar, JJ.), that the suit was not barred either way, and so far as the bar of limitation is concerned, the learned Judges held that the suit was one for an account which was governed by Article 120 and not Article 62 of the Limitation Act. It will be seen from a careful study of the judgment of Abdur Rahim, J., in that case that the learned Judge, referring to Article 62, observes that the action contemplated thereby is a well-known form of action and that the Article applies in cases where a definite sum of money has been received by the defendant, which the law says he must hold for the use of the plaintiff. Then again it will be seen from the judgment of Srinivasa Ayyangar, J., in that case that the learned Judge first defines the jural relationship between the parties as follows:

"The jural relationship between the plaintiff and the defendant is not disputed. Both of them are beneficially interested and are owners beneficially of a certain jaghir. But the defendant is the person who is constituted the manager. As manager he is entitled to collect the rents and revenue of the jaghir and bound to account finally for the collections and disbursements. The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded makes no difference."

Then again referring to *Muhammad Habibullah Khan* v. *Safdar Husain Khan*[4], it is said by the learned Judge that that case seems to be precisely in point and that he would follow it, although he thought the jural relationship between the plaintiff and the defendant was scarcely that of a resulting trust.

From the quotations made by me from that case it seems to me perfectly clear that while where an account is asked for which is itself the essence of an equitable action the case must undoubtedly be treated as falling within Article 120 and as being outside Article 62 it does not follow that where an account is not called for the suit must necessarily be treated as one falling within Article 62 and therefore not being within Article 120. The essence of the matter to my mind appears to be the precise jural relationship between the parties. Where as here on account

1. (1897) I.L.R. 19 All. 169.
2. (1920) 13 L.W. 260.
3. (1916) 30 M.L.J. 341: I.L.R. 40 Mad. 291.
4. (1884) I.L.R. 7 All. 25.

of the relationship a resulting trust can be postulated it follows that any claim based upon such relationship must be treated as excluded from Article 62 and must be brought under Article 120. It is true as pointed out for the respondent that where there are not many items of collection by the defendant which constitute the subject-matter of the action, the term "account" may not seem to be quite so fit and necessary an expression to employ in relation to the relief asked for as otherwise it may be. The inapplicability or applicability of Article 120 in my opinion cannot and does not however depend upon whether there is only one item or there are more items than one constituting the subject-matter of the relief asked for. Nor can it be said that in every case in which after the collection is made nothing more need be done by the defendant than to pay up the share of the amount to which the plaintiff is entitled, the action for such share stands necessarily attracted by Article 62. As I have already observed, the obligation sought to be enforced in the present action is obviously an equitable obligation traceable to a resulting trust as it is known to English law, and the case must be treated as governed by Article 120. The fact that *Subba Rao* v. *Rama Rao*[1], has been referred to in terms of approval by the learned Judges of the Full Bench who decided *Yerukola* v. *Yerukola*[2], or that it has been distinguished in the manner in which it has been done by Wallis, C.J., in the case in *Venkata Reddi* v. *Kuppu Reddi*[3], does not, in my opinion, justify the contention on behalf of the respondent that the present case is governed by Article 62. In addition to the case of *Muhammad Habibullah Khan* v. *Safdar Husain Khan*[4], discussed by Srinivasa Ayyangar, J., in *Subba Rao* v. *Ram Rao*[1], I may also draw attention to the case in *Umardaraz Ali Khan* v. *Wilayat Ali Khan*[5], already referred to in the passage quoted from Kumaraswami Sastri, J.'s judgment in the Full Bench case in *Yerukola* v. *Yerukola*[2].

Article 120 being the Article therefore applicable to the case on hand, I am next to consider the argument of Mr. Umamaheswaram that the claim is in time in respect of the proceeds of sale of August, 1938, as well as of February, 1939, because the suit is within six years from the date of his client's knowledge of the sales which according to learned counsel gives his client the right to sue and is therefore the *terminus a quo* of column of 3 of Article 120. In support of this, reliance is placed by learned counsel upon the ruling of the Privy Council in *O. Rm. O. M. Sp. (Firm)* v. *Nagappa Chettiar*[6]. The first paragraph of the headnote to the report of the Privy Council decision no doubt points out that the decisions in India have established a rule of limitation under Article 120 by which the plaintiff in cases to which the rule applies cannot be debarred of his remedy unless with the knowledge of his rights he has been guilty of delay. The true spirit of this part of the headnote is liable to be misunderstood unless attentions is also directed to what is said in the second paragraph, namely,

> "Therefore where an action is brought on the ground of fraud, misconduct or mistake on the part of the defendant, the right to sue is deemed to accrue under that article at the time when the plaintiff comes to know of the fraud, misconduct or mistake in question and time will begin to run against him only from the date of knowledge."

Here we are not concerned with any case of fraud, misconduct or mistake on the part of the defendant. The proposition in its generality which is sought to be extracted by the learned counsel for the appellant from that part of the judgment which has reference to the first paragraph of the headnote cannot be countenanced, as the judgment of Sir George Rankin has to be read and appreciated as a whole in connection with the facts of the case which have reference to the second paragraph of the headnote. The proposition relied on has to be taken in conjunction with and cannot at all be divorced from the facts and circumstances of the case which led to the observation of His Lordship at page 405 which alone enters into the first paragraph of the headnote to the ruling.

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1. (1916) 30 M.L.J. 341 : I.L.R. 40 Mad. 291.
2. (1922) 42 M.L.J. 507 . I.L.R. 45 Mad. 648 (F.B.).
3. (1920) 13 L.W. 260,
4. (1884) I.L.R. 7 All. 25.
5. (1897) I.L.R. 19 All. 169.
6. (1941) 1 M.L.J. 393 : L.R. 67 I.A. 448 : I.L.R. (1941) Mad. 175 (P.C.).

Reliance is next placed by the learned advocate for the appellant on the ruling of a Full Bench of this Court reported in *Ramasashayya* v. *Sri Tripurasundari Cotton Press, Bezwada*[1], which contains the observation at page 479, that,

"It is quite true that in cases where the party aggrieved is ignorant of the facts the time will only begin to run, not when the money was in fact received by the defendant, but when the plaintiff first became aware of it."

The soundness of the observation has been discussed in *Hussain Ali* v. *Baquir Ali*[2], to which reference has already been made by me in the foregoing. Leach, C.J., in delivering the judgment of the Court in this latter case observes thus at page 425 of the Report:

"That case was decided by the Full Bench and the other members of the Court concurred in the judgment delivered by the learned Chief Justice. If for the purposes of that case it was necessary for the Court to consider and decide the question whether knowledge was a factor we should be bound to follow the judgment of Coutts-Trotter, C.J., but it is obvious that it was not necessary for the Court to consider this question, and the passage in the judgment on which the plaintiff relies can only be regarded as constituting an *obiter dictum*. The judgment gives no indication on what the assertion was made and nothing has been said in the course of the arguments which convinces us that it is right. As the Privy Council has on more than one occasion had to point out, the Court is not concerned with the hardship of the case. It must have regard only to the wording of the statute."

I respectfully agree with these observations, and although in the case in which they were made Article 62 was the Article held to be applicable which is not the one that can apply to the present case I am of opinion that the same considerations cannot but enter into the application of Article 120, which is the relevant Article here, to the case on hand.

Nor am I impressed by the argument that the bar of Limitation in regard to the claim for the plaintiff's share of the proceeds of sale of August, 1938, stands saved by the acknowledgment to be found in Exhibits P-4 and P-4 (*a*). I have carefully considered the language of the alleged acknowledgment, and I have come to the conclusion that although the Courts below may have been wrong in the view taken by them that an acknowledgment addressed to a third party is of no avail to save limitation, they are right in their view that the language does not contain anything so unequivocal as is requisite for an effective acknowledgment under the Indian Limitation Act.

The result is that the decree of the Courts below must be modified by decreeing to the plaintiff a half of the suit claim with interest being his share of the proceeds of sale of February, 1939, with reference to which alone the present suit must without doubt be treated as in time if Article 120 is to be applied, as I have held that it must be, to the present case. The parties will pay and receive proportionate costs right through.

K. S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Balasundara Pavalar .. *Petitioner.**

Bail—Second application for, pending an appeal when earlier application has been dismissed.

Even during the pendency of an appeal, different conditions and circumstances may arise which may necessitate or justify the granting of bail even though an earlier application for bail has been dismissed. The proper way of looking at the maintainability or otherwise of a second application for bail pending an appeal is to consider it in the same way as a second application for stay of execution of a decree pending an appeal under Order 45, rule 1, of the Code of Civil Procedure. There is no provision in the Code of Civil Procedure, which prohibits the filing of successive applications for stay or for successive interlocutory applications pending a suit. Section 11 and the general principles of *res judicata* do not apply to such applications; but Courts are very reluctant if not loath, to grant the same relief when once the same has been rejected on an earlier occasion. There is no prohibition against the entertaining of a second application for bail pending an appeal, when an earlier application has been rejected.

1. (1925) 50 M.L.J. 520: I.L.R. 49 Mad. 468 (F.B.).
2. (1945) 2 M.L.J. 422: I.L.R. [1946 Mad. 423.

* Crl. M. P. No. 1695 of 1950. 30th August, 1950.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing release of the petitioner herein on bail pending C. A. No. 494 of 1950, preferred to the High Court against the judgment of the Assistant Sessions Judge of Kumbakonam of the Court of Session of the West Tanjore Division in S. C. No. 35 of 1950.

V. V. Srinivasa Aiyangar, P. S. Sarangapani Ayyangar and *V. R. Venugopal* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the State.

The Order of the Court was made by

Govinda Menon, J.—The petitioner herein was the fourth accused in S.C. No. 35 of 1950 on the file of the Court of Session of the West Tanjore Division and he was convicted under section 401, Indian Penal Code and sentenced to three years' rigorous imprisonment by the learned Sessions Judge. Criminal Appeal No. 494 of 1950 is against the said conviction and sentence. This appeal came on for admission before our learned brother Panchapakesa Sastri, J., on 28th July, 1950, and notice has been issued to the Public Prosecutor under section 422 of the Criminal Procedure Code. Along with the appeal petition, Criminal Miscellaneous Petition No. 1548 of 1950 had also been preferred by the petitioner praying that he might be released on bail pending disposal of the appeal. The learned Judge rejected the bail application and refused to enlarge the petitioner on bail. The present application has been presented on the 8th of this month praying that the petitioner may be enlarged on bail pending the disposal of the appeal. Crl. M. P. No. 1548 of 1950 was unsupported by any affidavit setting forth the reasons which might induce the Court to release the petitioner on bail. The present application is based upon an affidavit wherein various reasons are alleged as to why the petitioner should not be kept in custody pending disposal of the appeal. When it came on before our learned brother Somasundaram, J., on 11th August, 1950, he referred the matter to this Bench because in his opinion it is doubtful whether the Court has jurisdiction to grant bail on a second application when an earlier application for the same relief had been refused. That is how the petition comes up before this Bench.

According to the learned Judge, before conviction and during the enquiry or trial an accused person can file successive applications for bail since there is no prohibition against the filing of such applications. The provisions of law governing the applications for bail pending trial or enquiry are contained in sections 497 and 498 of the Criminal Procedure Code whereas the power under which an appellate Court can release an appellant on bail pending disposal of his appeal is found in section 426 of the Criminal Procedure Code. The learned Judge also referred to a decision of this Court in *Subramania Iyer* v. *The King Emperor*[1], where the view has been expressed that an order on an application refusing bail by this Court pending the trial of an accused person in a lower Court is not a "judgment" within the meaning of clause 15 of the Letters Patent. The learned Judge also opined that such an order would not be a judgment under section 369 of the Code of Criminal Procedure. Such being the case, in the opinion of the learned Judge section 369, Criminal Procedure Code, would not be a bar to a fresh application. The learned Judge did not express any opinion as to whether a subsequent application for bail is an attempt to review a previous order and as this is a matter of importance, the reference has been made to this Bench.

Chapter XXXIX of Criminal Procedure Code deals with the practice and procedure to be followed in the matter of bail. Section 496, Criminal Procedure Code, lays down in what cases bail can be taken; section 497 sets out when bail may be taken in cases of non-bailable offences; and section 498 relates to the power to direct admission to bail or reduction of bail as well as the power of the High Court to direct any person to be admitted to bail, in any case. Sections 499

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1. (1908) 19 M.L.J. 478.

to 502 deal with the procedure to be followed after a Court has directed the release of an accused person on bail. Section 426 occurs in Chapter XXXI of the Code relating to appeals and its provisions empower an appellate Court to suspend the sentence or release an appellant on bail. Section 426, clause (1), states that pending an appeal by a convicted person, the appellate Court may for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended, and, if he is in confinement, that he be released on bail or on his own bond. Clause (2) empowers the High Court to release a convicted person on bail even if no appeal is pending in the High Court but an appeal is pending before a Court subordinate to it. It is now firmly well-established by a long course of decisions that though section 476 (1) now enables an appellate Court to release a convicted person on bail for reasons to be recorded by it in writing, so far as the High Court is concerned the power to grant bail is much wider in scope than what is contained in that section, because the second part of section 498 lays down that the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail. This means that the restrictions contained in section 497 are not applicable to a High Court or Court of Session, which latter Courts have the power, unfettered by the restrictions contained in section 497, to release an accused person, whether convicted or pending trial, on bail. It is not disputed by the learned Public Prosecutor that even during the pendency of an appeal, in the High Court, the power to release the appellant on bail need not be confined to the more restrictive provisions of section 426 (1) but can be exercised in accordance with the wide language of the second part of section 498.

The question, therefore, is whether a convicted person whose appeal petition has once been rejected, can renew that application for the same relief pending his appeal. Somasundaram, J., seems to think that in such a case there can be no fresh circumstances arising for a second bail application when an earlier one has been rejected on the ground that it is inexpedient to release the appellant on bail. In our opinion, even during the pendency of an appeal, circumstances justifying the grant of bail may vary and arise under different conditions. For example at the time when an application for bail is moved, the Court may think that there are no grounds for releasing the petitioner from custody pending the appeal. But it is possible that some time later, before the appeal comes up for disposal, the appellant may suffer from illness which might necessitate his treatment in hospitals or other places where better facilities are available than can be got in a jail dispensary. In such a case, it is plain that there are fresh circumstances arising than were in existence at the time of the dismissal of the earlier application. It might also be that the convicted person may have to be released on bail because of the serious illness of a near relative, which did not exist at the time the earlier application was rejected. One can visualise other circumstances also. Therefore, in our opinion, even during the pendency of an appeal, different conditions and circumstances may arise which may necessitate or justify the granting of bail even though an earlier application for bail has been dismissed. It seems to us therefore that the non-maintainability of a second application for bail cannot be rested on the fact that the same set of conditions would continue and enure during the whole period when an appeal is pending before the High Court.

The learned counsel for the petitioner Mr. V. V. Srinivasa Ayyangar, rests his argument on three different grounds. The first of them is that in the absence of a specific provision in the Criminal Procedure Code prohibiting a second application for bail, it cannot be said that a second application is not maintainable because any such non-maintainability should be the necessary result of statute law; and in the absence of such a provision, a second application would lie. Secondly the learned counsel contends that an order rejecting a bail application is not a final decision or a judgment on a question of fact or law. The only provision of the Code which enacts about the finality of the judgment of a Criminal Court is section 369, wherein it is enacted that save as otherwise provided by the Code or

by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same except to correct a clerical error. In the Charter of the High Court, or in its Letters Patent, there is no provision allowing it to alter a judgment or review the same. Therefore the learned counsel contends that since an order refusing bail is not a judgment as contemplated by section 369, Criminal Procedure Code, there is nothing which prevents a Court from reconsidering the application for bail though, on the grounds alleged on an earlier occasion, the same relief has been refused. We may also refer in this connection to section 403, Criminal Procedure Code, relating to the finality of previous acquittals or convictions. Section 403, Criminal Procedure Code, enacts that a person once convicted or acquitted, shall not be tried again for the same offence, nor on the same facts for any other offence. It is unnecessary to extract the provisions of section 403, Criminal Procedure Code and the various clauses and ramifications of it for it is nobody's case that section 403 as such has any application to the present case. It has to be remarked that an order on a bail application does not finally determine the guilt or innocence of a person accused or convicted of an offence. All that such an order postulates is that pending an enquiry or trial, and in the case of a convicted person, pending an appeal by him, it is not absolutely necessary that his liberty should be curtailed. In a case where the enquiry or trial is pending the Court may feel that the materials before it are not sufficient to warrant a charge that the accused person is *prima facie* guilty of the offence complained against him. In such a case, the Court can release him on bail. It might also be that even if there are materials for concluding that *prima facie* a case has been made out against an accused person, though the trial has not reached its final stages, the Court may feel that the health of the person accused warrants his being set at liberty; or the Court may feel that there are other grounds than those already mentioned which would justify his liberty being restored to him pending final decision. In a case where an appeal is pending from a conviction, the question as to whether *prima facie* the appellant is guilty does not arise, for a competent Court had already pronounced on his guilt and unless that is set aside, the presumption is that the appellant is guilty of the offence. But an appellate Court is empowered under section 426, and in the case of a High Court or Court of Session, under section 498, to release an appellant for reasons other than the *prima facie* nature of his guilt. It seems to us therefore that an order on a bail application is nothing more than an interlocutory and tentative expression of the conclusion as to whether a person should be set at large pending trial, or disposal of his appeal, and nothing more. It is more or less analogous to an application under Order 41, rule 5, of the Code of Civil Procedure where, pending an appeal an appellate Court is empowered to stay the execution of a decree passed by a Court of first instance against which an appeal is pending before the Superior Court. It has never been doubted that an appellate Court can entertain more than one application for stay. But usually when once an application for stay has been rejected, the same Court would not think of granting stay except under a complete change of circumstances or, where further reasons, which were not in existence at the time the earlier stay application was rejected, are proved to the satisfaction of the Court. In our view the proper way of looking at the maintainability or otherwise of a second application for bail pending an appeal is to consider it in the same way as a second application for stay of execution of a decree pending an appeal under Order 41, rule 5, Code of Civil Procedure. There is no provision in the Code of Civil Procedure, which prohibits the filing of successive applications for stay or for successive interlocutory applications pending a suit. Section 11 and the general principles of *res judicata* do not apply to such applications. But Courts are very reluctant, if not loath, to grant the same relief when once the same has been rejected on an earlier occasion.

On an *a priori* view of the matter it seems to us that there is no prohibition against the entertaining of a second application for bail pending an appeal, when

an earlier application has been rejected. But is there anything in the Code itself which prevents the recurrence of applications for bail? Our attention has not been invited to any provision of law to that effect. Section 497 (5), Criminal Procedure Code, is to the effect that a High Court or Court of Session and, in the case of a person released by it, any other Court, may cause any person who has been released under this section to be arrested and may commit him to custody. In view of that it is clear that when once bail has been granted, this section enables the Court that has granted the bail, under changed conditions, whenever such appears, to cancel the bail and commit the person to custody. In *Sanyasayya Naidu* v. *The Public Prosecutor*[1], a Bench consisting of Coutts-Trotter, C.J. and Srinivasa Iyengar, J., has held that under section 497 (5) Courts are given power to arrest any person released on bail and therefore Courts have ample jurisdiction to exercise their discretion and order the re-arrest of any person out on bail, if circumstances warrant or demand such a course. Byers, J., in *The Crown Prosecutor* v. *Krishnan*[2], doubts the correctness of the opinion of Coutts-Trotter, C.J., enunciated in the above case[1], but holds that the High Court has the power under section 561-A of the Criminal Procedure Code to cancel the bail allowed by it and re-arrest an accused person and commit him to custody. According to the learned Judge although section 497 (5) can have no application to the case of an accused person who has been released on bail under section 498 of the Code, it is open to the High Court in the exercise of its powers under section 561-A to discontinue the order granting bail and commit the person to custody. It is not necessary for us to canvass the correctness or otherwise of the reasoning of the learned Judge in which he dissents from the view enunciated by Coutts-Trotter, C.J., though in our opinion we are not satisfied that the learned Judge was right in holding that section 497 (5) does not give such a power to the High Court or to a Court of Session. But in any case we agree with the learned Judge that even if section 497 (5) does not apply the High Court or Court of Session has the power under section 561-A to cancel a bail order already made and re-arrest and commit the accused person to custody. If that were so, can it be said that an appellate Court which has once refused bail, cannot reconsider a fresh application atleast for reasons other than those which have already been put forward and rejected? Such a reconsideration will be prohibited only if the order already rejecting the bail application amounts to a judgment under the Criminal Procedure Code. It need hardly be stated that the Criminal Procedure Code does not define the word "judgment" as is done in the Code of Civil Procedure. One of us had occasion to refer to it recently in the case reported in *Surya Rao* v. *Sathiraju*[3]. Reference was made there to the definition of "judgment" in Halsbury's Laws of England, Hailsham Edition, Vol. IX, paragraphs 260 to 264 as meaning a final order in a trial terminating in the conviction or acquittal of the accused. That this is the meaning of the word "judgment" even under the Criminal Procedure Code is evident from the decisions quoted therein, *viz*., *Emperor* v. *Maheswara Kondayya*[4] and *Kuppuswami Rao* v. *The King*[5] as well as from the dictum of Sulaiman, J., in *Hori Ram Singh* v. *The Crown*[6]. If by the word 'judgment' is understood a final order in a trial terminating in the conviction or acquittal of the accused, it necessarily follows that a tentative order directing the release of an accused person pending the hearing of his appeal by an appellate Court cannot be termed a "judgment" under the Code. Therefore section 369, Criminal Procedure Code, can have no application to a bail application.

We have taken some pains to find out whether there is any procedure laid down under the English Criminal Appeal Act, 1907, relating to the granting of bail when an earlier application for bail has been rejected. In the rules framed for the conduct and procedure of appeals under the Criminal Appeal Act, 1907, sub-rule (*m*) of rule 29 is as follows:—

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1. (1924) 22 L.W. 156.
2. (1945) 1 M.L.J. 187.
3. (1948) 1 M.L.J. 396.
4. (1908) I.L.R. 31 Mad. 543.
5. (1947) F.L.J. 110 : (1948) 1 M.L.J. 103 (F.C.).
6. (1939) I.L.R. 21 Lah. 400.

"At any time after an appellant has been released on bail under the Act, the Court of Appeal may, if satisfied that it is in the interest of justice so to do, revoke the order admitting him to bail, and issue a warrant . . . . . for his apprehension and order him to be committed to prison."

See page 287 of Archbold's Criminal Pleading, Evidence and Practice, Thirty-first edition. There are also provisions such as sub-rule (*j*) wherein power is given to re-arrest an appellant when the Court is satisfied that he is about to depart out of England or in any manner fails to observe the conditions of his recognisances on which he was released on bail. The rules framed under the Court of Criminal Appeal Act, 1907, do not in specific terms prohibit a subsequent application for bail when an earlier application has been rejected.

By way of analogy we may refer to certain decisions of this Court laying down the law that where a complaint has been dismissed under section 203 or a person has been discharged under section 253 in a warrant case, the case can again be proceeded with on a fresh complaint because there is no prohibition against such a procedure. In *Emperor* v. *Chinna Kaliappa Goundan*[1], a majority of three Judges of a Full Bench consisting of five Judges laid down that the dismissal of a complaint under section 203 does not operate as a bar to the re-hearing of the complaint by the same magistrate, even when such order of dismissal has not been set aside by a competent authority. That this is settled law is clear from the subsequent cases which have followed it, *viz.*, *Emperor* v. *Maheswara Kondayya*[2], where a Bench of this Court applied the principle to the discharge of an accused person under section 253, Criminal Procedure Code and laid down that it is competent to a magistrate who has discharged an accused person under section 253, Criminal Procedure Code, to take fresh proceedings against the person so discharged in respect of the same offence without such order being set aside by the High Court. It is further laid down that the principle of *autrefois acquit* can have no application where the accused is discharged under section 253 as there can be no trial when the accused is discharged. Incidentally one of the learned Judges, Pinhey, J., has held that an order of discharge is not a judgment as it is not an order in trial terminating either in the conviction or the acquittal of the accused. We may also refer to *Ponnuswami Goundan*, In re[3], which followed the majority view in *Emperor* v. *Chinna Kaliappa Goundan*[1].

If an order dismissing a complaint under section 203 or an order discharging an accused person under section 253, cannot be said to be a final adjudication and a final expression of opinion amounting to a judgment, still less has it to be held that an interlocutory order on a bail application will be a judgment.

The Allahabad High Court in *Chotey Lal* v. *Tinkey Lal*[4], had to consider a point as to whether an order under section 528, Criminal Procedure Code, is a judgment or not. Ganga Nath, J., held that section 369 does not apply to an order of transfer under section 528, because it is not in the nature of a judgment. An order of transfer cannot be regarded as an order in the nature of a judgment and hence can be altered after it is once passed and signed. According to the learned Judge an order in the nature of a judgment is one which is passed on full enquiry and after hearing both parties.

As a matter of practice it is very seldom that in an application for bail pending the hearing of an appeal by a convicted person that notice is given to the Public Prosecutor and he is heard. We have referred to these decisions regarding transfer petitions and discharge orders as not being judgments by way of analogy, because if orders on those matters cannot be termed to be judgment, in our opinion an order on a bail-application is much less a judgment.

But it has been pressed before us that some of the High Courts have expressed the opinion that when an application under section 491 of the Criminal Procedure Code has been considered and rejected by the High Court, a fresh application by the same detenu under the Preventive Detention Act for the same relief cannot

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1. (1905) 16 M.L.J. 79 : I.L.R. 29 Mad. 126 (F.B.).
2. (1908) I.L.R. 31 Mad. 543.
3. (1931) 62 M.L.J. 469 : I.L.R. 55 Mad. 622.
4. A.I.R. 1935 All. 815.

be entertained. In *Emperor* v. *Malhari Chikate*[1], a Full Bench of the Bombay High Court ruled that under section 491, Criminal Procedure Code, a detenu cannot make successive applications for a writ of *habeas corpus* and that it is not open to him to ask for a review of an order already made under section 491. The learned Judges referred to the decision in *Kisori Lal* v. *The Crown*[2]. To the same effect are the decisions in *Haridas* v. *Provincial Government, Central Provinces and Berar*[3] and *Satish Gopal Gurha* v. *Rex*[4]. In the *Nagpur case*[3], a Bench of that Court held that an order passed under section 491 of the Criminal Procedure Code is a judgment within the meaning of section 369, because it finally determines the legality or the propriety of the detention and the question whether the applicant is entitled to be released and as such, cannot be altered or reviewed except to correct a clerical error. Section 491 makes no provision for review and a High Court has no inherent power to alter or review a judgment in a criminal case and section 561-A does not modify or alter section 369 of the Code and does not authorise a High Court to review or alter its judgment or order in a criminal case. The Allahabad decision *Satish Gopal Gurha* v. *Rex*[4], which is by a Full Bench mainly based its decision on rule 8, Chapter I of the Rules of the Allahabad High Court which expressly prohibited the presentation of a second application under section 491 when an earlier application has been rejected by a Judge. But the learned Chief Justice makes it quite clear that the dismissal of an application under section 491 will not bar a second application where the further detention of the person has become illegal after the first application was disposed of. On the other hand a more recent decision of the East Punjab High Court in *Ramji Lal* v. *Rex*[5], is to the contrary effect. The majority view of the Full Bench in that case consisting of Mahajan, Teja Singh and Khosla, JJ. (Teja Singh, J., doubting) is to the effect that the rules framed under section 491 (2) do not lay down any prohibition regarding the making of successive applications to the Court. There does not exist a general rule which prohibits the making of successive applications on identical matters and for an identical relief even when a previous application for a similar purpose and object has been dismissed. They further laid down that the decision of an application under section 491 by its dismissal on the merits cannot be held to be a judgment in the sense in which that expression has been used in section 369. That section, therefore, cannot be used as a bar to the determination of successive applications under section 491, even if previous applications have been dismissed.

It is unnecessary for us to express an opinion as to which of the two divergent views mentioned above is correct, because there is sufficient difference between an interlocutory order on a bail application and an order on a *habeas corpus* application which is analogous to an original petition under the Code of Civil Procedure. So far as the determination of matters which form the subject-matter of an original petition under the civil law, the general principle of *res judicata* are applicable. For example, an application under the Guardians and Wards Act, the Indian Succession Act and similar statutes, is initiated as an original petition and orders passed thereon will be subject to the principle of *res judicata*. In passing we may also refer to section 430, Criminal Procedure Code, which speaks of finality of orders on appeal, and this section states that judgments and orders passed by an appellate Court upon appeal shall be final except in the cases provided for in section 417 and Chapter XXXII. These two relate to appeal against acquittal and reference and revision. A distinction has to be drawn between a judgment or an order passed by an appellate Court. A judgment is one which finally acquits or convicts an accused person and any other order passed by an appellate Court disposing of the appeal would include an order of remand or retrial. But it cannot be said that an order passed by an appellate Court would include an interlocutory rejection of an application for bail. It seems to us therefore that the previous order of Panchapagesa Sastri, J., refusing to release the petitioner on bail will not prevent the hearing of the present application.

1. (1947) 50 Bom.L.R. 188 (F.B.).
2. I.L.R. (1945) Lah. 573.
3. I.L.R. (1948) Nag. 953.
4. I.L.R. (1949) All. 455 (F.B.).
5. A.I.R. 1949 East Punjab 67 (F.B.).

On the merits, in our opinion this is a fit case for exercising our discretion and releasing the petitioner pending the appeal. Before Panchapagesa Sastri, J., there were no grounds mentioned in the application except that the petitioner was a playwright and a respectable man and has been unjustly implicated in the case. In the affidavit supporting the present petition it is stated that the mother of the applicant, an old lady aged about 95 years, is now in a very serious state of health and it is necessary that the petitioner should be by her side. Other grounds are also mentioned which we need not rely upon. Moreover, in Criminal Miscellaneous Petition No. 1652 of 1950 the fifth accused in the lower Court who had been sentenced to the same term of imprisonment has been released on bail by our learned brother Somasundaram, J. Such being the case, we feel that the interests of justice do not require the continued incarceration of the petitioner pending disposal of his appeal. The petitioner will therefore be released on bail on his furnishing security in his own bond for Rs. 1,000 with two sureties each for a like amount to the satisfaction of the Stationary Sub-Magistrate of Kumbakonam.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Mahamad Beary and another .. *Petitioners**

v.

T. Hassan Kutty and another .. *Respondents.*

Constitution of India (1950), *Article* 226—*If operates to take away a vested right.*

Section 226 of the Constitution cannot operate to take away a vested right which had accrued to a party prior to the coming into force of the Constitution by reason of the opposite party not having appealed against an adverse order and having allowed it to become final.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C. M. A. No. 5 of 1949 on the file of the Subordinate Judge's Court, South Kanara, and quash the order therein dated 5th April, 1949.

N. Koteswara Rao for Petitioners.

A. Narayana Pai for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an application for the issue of a writ of *certiorari* to quash the order of the Subordinate Judge of South Kanara dated 5th April, 1949, passed in C. M. A. No. 5 of 1949 under section 12 (1) of the Madras Buildings Lease and Rent Control Act. The application has been made under Article 226 of the Constitution of India. A preliminary objection was taken that the application was not sustainable because the order sought to be quashed became final long before Article 226 came into force. The respondent's counsel relied upon the rule of law that a judicial order which has become final according to the state of the law at the time it was passed is not open to interference by way of appeal or revision or other proceedings by virtue of a subsequent amendment of the law. The respondent relied upon two rulings of this Court in *Examiner of Local Fund Accounts* v. *Subramania Mudaliar*[1] and *Abdul Rasak Rowther* v. *Abdul Rahim Rowther*[2]. In the former case there was a new rule providing for the right of appeal against an order relating to a surcharge passed by a Court under the surcharge rules framed under the Madras District Municipalities Act. It was held that no appeal lay against an order made by the Court in an application filed before the enactment of that rule. In the latter case the effect of Madras Act XV of 1943 which amended Act IV of 1938, and gave a right of appeal retrospectively in respect of orders

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* C. M. P. No. 858 of 1950. 24th July, 1950.

1. (1942) 2 M.L.J. 667: I.L.R. (1943) Mad. 501. 2. (1945) 1 M.L.J. 480.

passed from and after 27th October, 1939, was declared to be that the right of appeal so conferred was not available to an order passed before that date. The learned Judges say that the right of appeal conferred by the new enactment could not take away the vested right which had accrued as a consequence of the final order passed before the prescribed date. Applying the principle laid down in these cases to the facts of the present case, it is clear thas the respondent became entitled to the benefit of the final order of the Subordinate Judge passed on 5th April, 1949. It is conceded that on that date there was no further appeal or revision or application by way of *certiorari* open to the petitioners. A subsequent enactment like Article 226 of the Constitution cannot operate to take away a vested right which had accrued to the respondent under the order of the Subordinate Judge above mentioned.

We uphold the preliminary objection and dismiss the application with costs.

V.S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Km. Kr. Kr. Ramanathan Chettiar by partner Km. Kr. Kr. Lakshmanan Chettiar (died) and another .. *Appellants**

v.

N. M. Kandappa Goundan (died) and others .. *Respondents.*

Limitation Act (IX of 1908), section 20 (as amended in 1942)—Amendment to law of limitation—Effect.

It is well settled that the law of limitation being procedural law, its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment. But it is equally well established that if a right to sue had become barred by the provisions of the Act then in force on the date of coming into force of a later enactment, then such a barred right is not revived by the application of the new enactment.

Case-law discussed.

Hence, an "open payment" made prior to the amendment of section 20 of the Limitation Act by the Amending Act XVI of 1942 would not save a claim from the bar of limitation if it was already barred prior to the coming into force of the amendment.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in A. S. No. 156 of 1946, preferred against the decree of the Court of the District Munsiff, Erode, in O. S. No. 293 of 1944.

N. Sivaramakrishna Aiyar and *A. Balasubramania Iyer* for Appellants.

V. Ramaswamy Aiyar for Respondents.

In pursuance of order of reference to a Bench by Satyanarayana Rao, J., dated 20th February, 1950, this appeal coming on for hearing, the Judgment of the Court was delivered by

The Chief Justice.—The facts necessary for appreciating the question of law which arises in this appeal may be briefly stated. The appellant filed a suit to recover amounts due for principal and interest under three promissory notes dated 21st August, 1929, 28th August, 1929 and 4th September, 1929. The suit was filed on 9th August, 1944. The appellant relied upon four endorsements of payment to save the claim from the bar of limitation. The last of such endorsements was made on 9th August, 1941. It has been found by both the Courts below that these endorsements are of "open payments" which would not save the claim from the bar of limitation under section 20 of the Limitation Act as it stood before the Amending Act XVI of 1942. The appeal was argued on that assumption. The contention on behalf of the appellant was that the amending Act applied to the suit and the endorsements would be sufficient within the meaning of section 20 as amended

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* S. A. No. 432 of 1947. 21st April, 1950.

by it. Both the Courts held that the appellant could not rely upon the amending Act, because the claim to recover the amounts due under the suit promissory notes became barred by limitation prior to the coming into force of the amending Act and dismissed the suit as barred by limitation.

The case is directly covered by the decision of Viswanatha Sastri, J, in *Mangapathi Naidu* v. *Krishnaswami Naidu*[1]. An unreported decision of Somasundaram, J., in *Hanumayamma* v. *Venkatanarasimharao*[2], is to the same effect. Satyanarayana Rao, J., before whom the appeal came on originally for hearing however thought that as the question raised was of sufficient importance and of frequent occurrence there should be an authoritative decision by a Division Bench.

We agree with Mr. N. Sivaramakrishna Aiyar, the learned Advocate for the appellant, that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. It is also well settled that the law of limitation being procedural law, its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment. But on an examination of the authorities on the point we find it equally well established that if a right to sue had become barred by the provisions of the Limitation Act then in force on the date of the coming into force of a later enactment, then such a barred right is not revived by the application of the new enactment.

Section 2 of the Limitation Act of 1877 expressly provided as follows :

> " A reference to the Indian Limitation Act, 1871, shall be read as if made to this Act, and nothing herein contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

No doubt a similar provision is not found in the Limitation Act of 1908, but this is probably because of section 6 (*a*) of the General Clauses Act of 1897 which embodies a similar provision. Apart from decided cases it appears to follow on principle that the right of action barred by limitation at the time when a new Act or amendment comes into force cannot be revived by the subsequent change in the law brought about by the new Act or amendment.

The preponderance of decided cases also leads us to the same conclusion. There is a long catena of Privy Council rulings in which we find the same principle enunciated. One of the earliest of such cases is *Appaswami Odayar* v. *Subramania Odayar*[3]. The point is dealt with thus :

> "By section 1, clause 13, of Act XIV of 1859, a suit for a share of the family property not brought within twelve years from the date of the last participation in the profits of it would be barred. This Act continued in force until the 1st July, 1871, when Act IX of 1871 came into force. Consequently, if there was no participation of profits between 1837 and 1871, the suit would be barred, and the later Acts for limitation of suits need not be referred to. If they altered the law they would not revive the right of suit."

In *Mohesh Narain Munshi* v. *Taruck Nath Moitra*[4], their Lordships refer to the case in *Appaswami Odayar* v. *Subramania Odayar*[3] and dismiss the contention that the question of limitation should be determined with reference to the provisions of the later statute of 1877, though the right was barred by the earlier statute of 1871, thus :

> " It is clear that, on 1st April, 1873, the plaintiff's suit was barred by limitation under the Act of 1871, and the Act of 1877 could not revive the plaintiff's right so barred, a point which was indeed decided in regard to the Limitation Act of 1859 and 1871, in the case of *Appaswami Odayar* v. *Subramania Odayar*[3]."

In *Khunnilal* v. *Gobind Krishna Narain*[5], dealing with a similar point, thier Lordships said :

> " No suit could be brought, even if the enactments referred to above had permitted it, to enforce the right after the lapse of 12 years ' from the time the cause of action arose.' (Section 1, clause 12

1. (1950) 1 M.L.J. 107.
2. C. R. P. No. 148 of 1947, dated 11th November, 1949.
3. (1888) L.R. 15 I.A. 167 : I.L.R. 12 Mad. 26 (P.C.).
4. (1892) L.R. 20 I.A. 30 : I.L.R. 20 Cal. 487 (P.C.).
5. (1911) 21 M.L.J. 645 : L.R. 38 I.A. 87 : I.L.R. 33 All. 356 (P.C.).

of Act XIV of 1859). Nothing in Article 142 of Act IX of 1871 or in Article 141 of Act XV of 1877 could lead to the revival of a right that had already become barred."

In *Sachindra Nath Roy* v. *Maharaj Bahadur Singh*[1], one of the questions to be considered was which of the two Limitation Acts, that of 1877 or that of 1908, applied to the case to ascertain whether certain decrees were enforceable. It appeared to their Lordships that this question must be determined "by the condition in which the decrees stood when the latter Act came into force on January 1, 1909". The date of the original decrees was August 26, 1905. They became unenforceable by proceedings commenced after August 26, 1908, according to the law as it stood before Act IX of 1908. A certain amount was paid on February 2, 1910, one year and three months after the statutory period had elapsed and over 13 months after 1st January, 1909, when the latter Act had come into operation. Their Lordships in dealing with the effect of the latter Act observed :

"There is no provision in this latter Act so retrospective in its effect as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time."

The latest case of the Privy Council in which this point is dealt with is *Ramayya* v. *Lakshmayya*[2]. It is sufficient to extract the following passage at page 16 :

"The next point to consider on this part of the case is whether the plaintiff's suit is barred under section 1, clause 12 of the Indian Limitation Act XIV of 1859. Ordinarily, the suit would be governed by the Limitation Act IX of 1908, which is the law in force when the suit was instituted ; but if the defendants are able to show that the right of action had become barred under the Act of 1859 then the title that they had acquired could not be defeated by the subsequent Limitation Acts."

Mr. Sivaramakrishna Aiyar, the learned counsel for the appellant attempted to get over these decisions of the Judicial Committee by relying upon a distinction between cases in which rights to immoveable property were concerned in respect of which after the lapse of the satutory period there will be an extinguishment of title in one and the acquisition of title by the other and cases in which there is no such extinguishment and acquisition of rights in property. In the latter cases he contended that though the remedy at law may be unavailable, nevertheless the right is not lost. There is certainly authority for the position that though a debt cannot be recovered by action if the debtor pleads the statute it remains an existing debt and can be made available for certain purposes, as for example, when the creditor may settle it up without resorting to an action. Instances of the application of this doctrine are to be found in its application to several branches of the law. A barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. Even if the claim against the principal debtor is barred, the surety is not discharged on that account only. An executor or administrator may deduct time-barred debts against the legatees. They can even pay time-barred debts except when they have been adjudicated upon in Courts. A father can validly alienate joint family property to pay his barred debts. The fundamental principle underlying all these instances is that though remedies are barred, rights are not extinguished. But it does not follow that because rights are not extinguished, such rights can be deemed to be enforceable in a Court of law. In respect of claims to rights to or interests in immoveable property, besides the law of limitation, there is also the law of extinctive prescription which comes into operation. In such cases there is a negative as well as a positive aspect. By the lapse of time, one person loses his right to enforce his claim to such property. This is the negative aspect. At the end of the period the other person acquires a title. This is the positive aspect. The right which one has lost, the other has acquired. There is in effect a statutory transfer of title. But in the case of debts, obviously this doctrine is totally inapplicable. The fact that the creditor cannot enforce his right to recover his debt does not help the debtor to acquire any right to the debt. The debt remains a debt ; only it cannot be recovered by the creditor in a Court of law. What is significant to notice is that their Lordships of the Judicial Committee in none of the cases above referred deal with the question as one of

1. (1921) L.R. 48 I.A. 335 : I.L.R. 49 Cal. 203 (P.C.).
2. (1942) 2 M.L.J. 249 : I.L.R. (1943) Mad. 1 (P.C.).

acquisitive prescription. They deal with the point as one of limitation and remedial procedure.

Mr. Sivaramakrishna Aiyar cited, in support of his contention that the amending Act of 1942 would apply even though on the date of its commencement the right to enforce the claim was barred by time according to the original Act, certain decisions of the Courts in India. Before dealing with them we should refer to the Privy Council ruling in *Soniram* v. *Kanhayalal*[1] which was also relied on. An examination of the facts of the case clearly show that the décision therein cannot be of any possible assistance to the appellant in this case. A suit was brought on 4th March, 1907, for redemption of a mortgage dated 2nd January, 1842. At the time of the institution of the suit, under Article 148 of Schedule II to the Limitation Act of 1877, the period of limitation was 60 years from the time when the right to redeem accrued. To get over the bar of limitation two acknowledgments of 1866 and 1867 made by two limited owners of the property were relied on. These acknowledgments could not be effective against the defendants (mortgagors), because they were not signed by the party against whom such right was claimed or by persons through whom they claimed title. But the acknowledgments would have been valid under the provisions of Act XIV of 1859. Their Lordships held that Act XIV of 1859 did not apply to the suit and that the Act which applied is Act XV of 1877 and as the acknowledgments made by the two limited owners were not proper acknowledgments within the meaning of section 19 of Act XV of 1877, they could not give any new period of limitation. From this statement of facts, it will be seen that no question there arose of reviving a barred claim. The claim to enforce the mortgage was quite alive when the new Act came into force and, therefore it was the new Act which was applied.

There are two decisions of the Patna High Court which undoubtedly support the appellant's contention, but when the reasoning is analysed, it will be apparent that they cannot be considered as useful precedents. *Baleswar* v. *Latafat*[2], is the earlier of the two. The learned Judges did not really meet the point raised on behalf of the respondent before them that the right of the plaintiff to institute a suit on the hand note was extinguished before the amending Act had come into force. Manohar Lall, J., who delivered the judgment of the Bench said :

> "Now here the right of the plaintiff to recover the debt had not become barred when Act XVI of 1924 was passed."

It is difficult to follow this statement. But if this were so then of course the new Act would apply. Apparently what the learned Judge meant was that though the debt had become barred, it had not ceased to exist. We have already held that this doctrine does not have any bearing on the question of limitation. In the later decision in *Jagadish* v. *Saligram*[3], Manohar Lall, J., was not very happy about his prior judgment. When his attention was drawn to cases in which it had been decided that a new amending Act could not have the effect of reviving a claim barred according to the previous law of limitation he observed :

> "But unfortunately . . . . the matter has been decided expressly by a Division Bench of this Court, of which I was a member in *Baleswar* v. *Latafat*[2], in which we held that the provisions of the Limitation Act applicable to such a suit are the provisions which existed on the date when the suit was instituted, and the provisions of section 20 of the Limitation Act as amended by Act XVI of 1942, must operate to decide the question of limitation . . . I desire to observe that when we gave our decision in *Baleswar* v. *Latafat*[2], our attention was not drawn to the authorities cited . . . by Mr. N. K. Prasad No. 1 which at the first sight may appear to present some difficulty, but I am not prepared to differ from the decision which we gave on that date."

Das, J., the other learned Judge of the Division Bench, expressed his own opinion thus :

> "Had the matter not been settled by a decision of this Court, I would probably have come to the conclusion that the amending Act (XVI of 1942) cannot operate so as to revive and make effective a barred debt."

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1. (1913) 25 M.L.J. 131 : L.R. 40 I.A. 74 : I.L.R. 35 All. 227 (P.C.).
2. (1943) I.L.R. 24 Pat. 249.
3. (1945) I.L.R. 24 Pat. 391.
4. A.I.R. 1949 Orissa 64.

Though he was personally inclined to hold otherwise, he refused to go back upon the prior decisions of the Court. In our opinion the subsequent decision in *Jagadish* v. *Saligram*[1], has considerably shaken the authority of the earlier decision in *Baleswar* v. *Latafat*[2] and neither case can furnish proper assistance in the determination of the question before us.

Our attention was also drawn to a recent decision of the Orissa High Court in *Pitambar* v. *Lakshmidhar*[3] in which it was held that in the case of a debt to which section 28 of the Limitation Act does not apply, even a barred debt is for all purposes an existing debt and no question of revival of an extinguished right arises in applying the Amending Act of 1942 and therefore it would apply even though the remedy to recover the debt might have been barred by time when the amending Act came into force. With great respect to the learned Judges, we desire to point out that the Law of Limitation as such only deals with remedies to enforce rights in a Court of law. If therefore the remedy was gone when the amending Act came into force, there is no principle on which it could be held that the remedy again became available.

An earlier decision of the Calcutta High Court in *Mohesh Lal* v. *Busunt Kunwaree*[4], does certainly support the appellant's contention based upon the distinction between remedy and right. But this case has been adversely criticised by Mitra in his Commentaries on Limitation (1911 Edition, Volume I, at pages 291 and 292) and does not appear to have been followed on this point.

Mr. Sivaramakrishna Aiyar also relied on two early cases of our Court. The first of these is *Valia Tamburatti* v. *Vira Rayan*[5]. Of the two Judges who decided that case, Morgan, C.J., did not think that any question of limitation arose as the lender of the money was constituted a trustee. But he observed :

> "If it had been necessary in my judgment to consider the operation of the new Limitation Act, I should have hesitated to hold that it allowed a suit to be brought in any case where the right of suit had already ceased to exist under the old law.
>
> When the appointed period of limitation is by the law for the time being in force complete, the remedy by suit is for ever gone unless the legislature thinks fit to make the old right again actionable."

In the other case in the same volume in *Teagaraya Mudali* v. *Mariappa Pillai*[6] it was held that the exception of payment of interest contained in section 21 of the Act IX of 1871 was not confined to payments made after that Act came into force, but applied also to payments made before that date. But an examination of the facts discloses that on the date of the commencement of the new Act of 1871 the claim on the registered promissory note of 1867 was still alive. Undoubtedly in such a case the new Act would apply.

In *Pearylal* v. *Solu Gir*[7] Malik, J. (as he then was) took the same view as Viswanatha Sastri, J., in *Mangapathi Naidu* v. *Krishnaswami Naidu*[8]. He summarised the law on the point thus :

> "It is clear, therefore, that, in the absence of anything to the contrary, if a claim is within the limitation according to the old Act, on the date when the new Act comes into force and a proceeding is commenced, after the coming into force of the new Act, it is the new Act, which would govern all decisions on the point of limitation. If, however, the right to sue or the right to apply had already been barred by the provisions of the Limitation Act then in force, then unless there was something in the latter Act which could be deemed to apply retrospectively to revive claims which had already become barred the new Act could not be availed of for the purpose of saving limitation."

We respectfully agree with this statement of the law. We are compelled to dissent from the decisions which express a contrary view, namely *Baleswar* v. *Latafat*[2], *Jagadish* v. *Saligram*[1], *Pitambar* v. *Lakshmidar*[3] and *Moheshlal* v. *Basant Kunwaree*[4].

Mr. Sivaramakrishna Aiyar raised two other contentions, but we consider that there is no substance in either of them. He argued that the proviso to section

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1. (1945) I.L.R. 24 Pat. 391.
2. (1943) I.L.R. 24 Pat. 249.
3. A.I.R. 1949 Orissa 64.
4. (1880) I.L.R. 6 Cal. 340.
5. (1877) I.L.R. 1 Mad. 228.
6. (1877) I.L.R. 1 Mad. 264.
7. I.L.R. (1945) All. 896.
8. (1950) 1 M.L.J. 107.

20, sub-section (1) was allowed to remain as it was before even after the amending Act of 1942, and, therefore, it must be presumed that Legislature contemplated the application of the new amendment to transactions prior to the date of the commencement of the amending Act. This may be so, but we fail to see how this has any bearing on the question to be decided by us. The other contention of his was that as by the amending Act section 20 (1), a new section was substituted for the old sub-section, the new provision must be deemed to be retrospective in operation. No authority was cited for this extraordinary position. If it was the intention of the Legislature to say that not only that the law should be in future as embodied in the amendment but that the law should be deemed to have always been as laid down by the amendment, then appropriate language would have been used as in other statutes in which such an intention is apparent, *e.g.*, the recent amendment to section 28 of the Provincial Insolvency Act.

The Courts below were right in holding that the suit was barred by limitation. The second appeal fails and is dismissed with costs.

V. P. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Manda Venkayya .. *Appellant* *

v.

Margeni Pitchayya and another .. *Respondent.*

Execution application—Addition of further reliefs after limitation when petition was returned for rectification on another point—Effect on original prayers in the petition.

An addition of reliefs after limitation to an execution application containing a prayer for attachment and sale of immovable property will not vitiate the entire execution petition like a promissory note with a material alteration on it.

Where the decree-holder filed an execution application within time for attachment and sale of immovable properties of the judgment-debtor but after limitation had operated added a slip pasted to the original petition when it was returned for rectification in another respect adding further reliefs,

Held, the additional reliefs only are barred and not the reliefs in the original petition and it would be wrong to direct the execution petition to be dismissed *in toto*.

Appeal against the order of the District Court at Krishna in A. S. No. 402 of 1945, preferred against the order in E.P. No. 65 of 1944, in S.C.S. No. 535 of 1931, on the file of the Court of the Subordinate Judge, Masulipatam.

M. S. Ramachandra Rao for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—I have perused the entire records and heard the learned counsel for the appellant (decree-holder). The respondents (judgment-debtors) are absent and are unrepresented by any counsel. The point is simple. The appellant had filed E.P. No. 65 of 1944, in S.C. No. 535 of 1931, Sub-Court, Masulipatam, on 17th December, 1943, within 12 years of the decree, dated 5th February, 1932, and within three years of the amended decree, dated 18th December, 1940, for attachment and sale of the immovable properties of the judgment-debtors. So that E.P. was in time. But he had, on 22nd March, 1944, after limitation had operated, added on a slip, pasted to the E.P., when it was returned for rectification in another respect, adding further reliefs, like arrest of the judgment-debtors, attachment and sale of their movables, etc. This addition was clearly time-barred and was rightly objected to by the judgment-debtors, and rejected by the lower appellate Court. But, in doing this, the lower appellate Court also held the original prayer for attachment and sale of immovables also to be barred because of this

* A.A.A.O. No. 168 of 1947. 9th March, 1950.

material alteration, and directed the E.P. to be dismissed *in toto* with costs throughout. This, of course, was wrong. An addition of reliefs, after limitation to an E.P. containing a prayer for attachment and sale of immovables will not vitiate and invalidate the entire E.P. like a promissory note with a material alteration on it. Only the added reliefs will be deleted. It is not as if the appellant tried to *alter* the original reliefs by making it indecipherable and engrossing the new reliefs on it as if they were the original reliefs prayed for, in which case he might have been asked to answer for his attempted fraud on the Court, and possibly also denied all reliefs in his tampered-with E.P. So, I modify the lower appellate Court's order and restore the E.P. to file so far as the original reliefs for attachment and sale of the immovable property is concerned, and direct the Sub-Court, Masulipatam, to proceed with it to that extent. In the circumstances, I direct the parties to bear their own costs in the appeal and C.M.S.A.

Leave refused.

V. S. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Janaparareddi Tirupati Rao .. *Appellant* *

v.

Kancherla Veeraswami .. *Respondent.*

Provincial Insolvency Act (V of 1920), section 70—Direction for prosecution—Preliminary enquiry as to whether acts contemplated by section 69 of the Act were in fact committed—If necessary.

It is unnecessary under section 70, of the Provincial Insolvency Act, to establish, before launching a prosecution, the various offences referred to in section 69. All that section 70 requires is that the Court should be satisfied that there is ground for enquiring into any offences referred to in section 69. It is not necessary, and the Court is not bound, so far as the language goes, to make a preliminary enquiry even.

Appeal against the order of the District Court, East Godavari, at Rajahmundry, dated 15th December, 1948, in I.A. No. 6 of 1948, in I.P. No. 4 of 1942.

M. S. Ramachandra Rao for Appellant.

N. Bapiraju and the Public Prosecutor (*V. L. Ethiraj*) for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the learned District Judge of West-Godavari directing, under section 70 of the Provincial Insolvency Act, that a complaint may be filed against the insolvent as in his opinion, there was ground for enquiring into offences referred to in section 69 of the Act. The main argument in this appeal is that there is no proof that any of the acts contemplated by section 69 of the Provincial Insolvency Act were in fact committed and that therefore the order of the learned District Judge is unsustainable. In my opinion it is unnecessary under section 70, to establish, before launching a prosecution, the various offences referred to in section 69. All that section 70 requires is that the Court should be satisfied that there is ground for enquiring into any offences referred to in section 69. It is not necessary, and the Court is not bound, so far as the language goes, to make a preliminary enquiry even. In the present case the learned District Judge was satisfied that there was sufficient ground for filing a complaint against the insolvent. The order of the learned District Judge, in my opinion, is perfectly correct and the appeal therefore fails and is dismissed with costs.

V. S. *Appeal dismissed.*

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* A. A. O. No. 621 of 1948. 20th April, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kruthuventi Ramakrishna Rao .. *Appellant* *

v.

The Province of Madras, represented by the District Collector, Krishna, Chilakalapudi .. *Respondent.*

Madras Land Encroachment Act (III of 1905), *section* 7—*Cart-track running through patta land held from a zamindar—Government, if entitled to.*

When cart-tracks run through patta lands held from a zamindar which have not been separately demarcated as poramboke it must be regarded as part of the patta lands and not the property of the Government. Cart-tracks in zamindaries presumably belong to the zamindar concerned and *prima facie* the reversionary right relating to them vest in him. Accordingly, proceedings under Madras Land Encroachment Act would not be maintainable in respect of encroachments on such cart-tracks.

Appeal against the decree of the District Court, Krishna, Masulipatam, in A.S. No. 412 of 1946, preferred against the decree of the Court of the District Munsif, Masulipatam, in O.S. No. 99 of 1945.

V. Subrahmanyam for Appellant.

Kalu Eradi for the Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court delivered the following

JUDGMENT.—The question arising for determination in this second appeal is whether certain proceedings taken by the respondent before me, the Province of Madras represented by the District Collector of Krishna, Chilakalapudi, under section 7 of Madras Act III of 1905 are valid. The appellant sued in the Court of the District Munsif of Masulipatam for a declaration of his right to the plaint schedule land and for an injunction restraining the defendant from interfering with his enjoyment thereof by means of such proceedings or in any other manner. The land in question is part of Survey No. 160/1 of Krithivennu village and the appellant holds the entirety of the survey number under a patta from the zamindar, who is the owner of the village. The learned District Munsif decreed the suit subject to the rights of the villagers of the adjoining villages of Collagudem, Seetanapalli and Sangumudi to take their carts through the suit land from 15th January to 1st July of each year, that being the period during which the land is not under cultivation and holds no crop. On appeal taken to the District Court of Krishna at Masulipatam by the defendant in which a memorandum of cross-objections was filed by the plaintiff—since both the plaintiff and the defendant felt aggrieved by the decision of the learned District Munsif—the learned District Judge allowed the appeal and dismissed the memorandum of cross-objections. The plaintiff has accordingly preferred this second appeal.

There was a survey of the village of Krithivennu in 1925 as a result of which there was a plan prepared, Exhibit D-4, in which the suit land was shown as a cart-track. From 1925 to 1943 the land was used as a cart-track as found by the Courts below. There is no mention of the cart-track in relation to S. No. 160/1 in the A register of the village, Exhibit P-8. In fasli 1353 the plaintiff ploughed the land and thereupon the villagers made a representation to the Tahsildar that there was an encroachment by the plaintiff which deprived them of the use of the cart-track. The Tahsildar treated the act of the plaintiff as an encroachment and issued a B memorandum to him. It was followed by a notice of encroachment under section 7 of the Act, as a sequel to which the suit out of which this second appeal arises came to be filed.

The sole and simple question on these facts is whether the defendant has any right over the suit land such as can justify the proceedings taken by it under the Act. The way in which Mr. Eradi appearing for the Government Pleader has put

*Second Appeal No. 1608 of 1947. 13th July, 1950.

his point before me is that there is a presumption in favour of the Government's ownership under section 2 of the Act which has been left unrebutted by the plaintiff and which has been rightly given effect to by the learned District Judge. The section so far as material provides that,

"All public roads, streets, lanes and paths to the beds of the sea . . . . and of rivers, streams, ..., and all canals and water courses . . . . . save in so far as the same are the property—

(a) of any zamindar, poligar, mittadar . . . . . or any person claiming through or holding under any of them, or

(b) of any person paying shist, ... to any of the aforesaid persons, or

(c) of any person holding under ryotwari tenure . . . .

are and are hereby declared to be Crown property except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights . . . . and to all customary rights legally subsisting."

The land in question being the survey number in a zamindari village held by the plaintiff under a patta from the zamindar, I am perfectly clear that the saving of the section necessarily operates. Cart-tracks in zamindaries presumably belong to the zamindar concerned and *prima facie* the reversionary right relating to them vests in him.

In regard to a channel poromboke included in the survey field held by a ryotwari pattadar from the Government the question arose before me in second appeal No. 180 of 1947 whether the presumption of Government ownership under section 2 of the Act could arise. Relying upon *Kalianna Mudali* v. *The Secretary of State for India*[1] I held that,

"when rills run through patta land and the beds have not been separately demarcated as poromboke, the beds must be regarded as part of the patta and not the property of the Government, and the rills cannot be said to belong to the Government."

The same view must of course hold good in relation to cart-tracks running through patta land held from the Government. *A fortiori* to such a case is the present one where the land is a cart-track situate in a patta number held from a zamindar.

The right, if any, on the part of the villagers of Gollagudem, Seethanapalli and Sengamudi to use the suit property as cart-track does not directly arise for consideration in this case. They are not parties to this litigation, and this decision shall not affect their rights.

The second appeal is accordingly allowed with costs here and in the Courts below.

No leave.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Pagammal (died) and others .. *Petitioners* *

v.

Kasi Goundan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 23, rule 3—Application for recording award decision—One of the parties not party to reference to arbitration—Assent of such party to the subsequent award—Effect.

An application by a plaintiff for recording an award decision under Order 23, rule 3, Code of Civil Procedure, notwithstanding that the fourth defendant was not a party to the original reference to arbitration, might well be considered as one in which after the award was made by the arbitrator which may not *per se* be binding on the fourth defendant, the Court can spell out from the conduct of the parties an agreement on the part of the fourth defendant that she should abide by what the arbitrator had actually declared as the rights and obligations of the parties in respect of the suit properties. In such a case the award can be regarded as representing a certain compromise to which on account of the assent given by the fourth defendant later, effect may be given under Order 23, rule 3, Code of Civil Procedure.

1. (1915) 31 I.C. 982.

* C. R. P. No. 638 of 1947. 25th April, 1950.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order, dated 11th April, 1946, in C.M.A. No. 101 of 1944, on the file of the District Court, Coimbatore (I.A. No. 511 of 1944, in O.S. No. 37 of 1943, Sub-Court, Coimbatore).

S. Ramachandra Iyer for Petitioner.

N. Sivaramakrishna Aiyar and *A. Balasubramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition has been preferred by the 4th defendant in O.S. No. 37 of 1943, on the file of the Court of the Subordinate Judge of Coimbatore. The order against which the revision petition has been preferred is that of the learned District Judge of Coimbatore affirming the order of the Subordinate Judge in I.A. No. 511 of 1944 in the original suit. I.A. No. 511 was filed by the plaintiff in the suit for recording a certain award decision under Order 23, rule 3, Civil Procedure Code.

The application having been ordered by the Courts below learned counsel for the fourth defendant-petitioner urges before me that the provisions of section 47 of the Indian Arbitration Act have not been sufficiently borne in mind and correctly given effect to by the Courts below. The fourth defendant was not a party to the reference to arbitration which resulted in the award on the basis of which the Court was invited to make a decree in terms thereof. There was therefore no arbitration award with reference to the fourth defendant as the expression "award" which means an arbitration award, has to be understood in relation to the definition of the term "arbitration agreement" in section 2 (*a*) of the Act. And so says Mr. Ramachandra Iyer in his able and forceful argument, it cannot be held that there was any arbitration against the fourth defendant in conformity with the provisions of the statute. If there was none such, says learned counsel next, it follows that the award decision cannot be accepted or taken into consideration so far as the fourth defendant is concerned as a compromise or adjustment of a suit by the Court before which the suit was pending. In the course of the argument before me the case in *Arumuga Mudaliar* v. *Balasubramania*[1], has been brought to my notice, which the learned advocate for the petitioner has distinguished as a case in which there was a valid arbitration reference from the very inception which there is not in the present case so far as the fourth defendant is concerned. I must say I am impressed with the argument of learned counsel so far. But then I have felt the difficulty and I have put it to the learned counsel that possibly the present case might well be considered as one in which after the award was made by the arbitrator which may not *per se* be binding on the fourth defendant, the Courts below have spelt out from the conduct of the parties an agreement on the part of the fourth defendant that she should abide by what the arbitrator had actually declared as the rights and obligations of the parties in respect of the suit property. The answer which Mr. Ramachandra Iyer has attempted is that the only case of the plaintiff in the Courts below was that the fourth defendant was in fact and in truth a party to the reference to arbitration and knew everything about it and was consequently bound by the proceedings before the arbitrators and their award. It however seems to me that that is not the exact fact of the situation. It does appear that before the trial Court the point was made that the award decision of the arbitrators might well be regarded as representing a certain compromise to which, on account of the assent given by the fourth defendant, later, effect might be given under Order 23, rule 2, Civil Procedure Code. That is in my opinion fairly clear from a reading of the last paragraph of the judgment in two portions of which the learned Subordinate Judge has dealt with the position that because all the parties have signed the award decision including the fourth defendant the decision must be regarded as in effect a compromise entered into between the parties on the award. If this view of the situation which was suggested by me in the course of the arguments is accepted as properly borne out by the way in which

1. (1945) 1 M.L.J. 463.

the case was presented to the Courts befow for decision, it is amply clear on the whole that there is no need for me to disturb the decision of the Courts below with reference to the application under Order 23, rule 3, Civil Procedure Code, that was made by the plaintiff notwithstanding that the fourth defendant was not a party to the original reference to arbitration. The fourth defendant must be treated as bound for the reasons given in the foregoing by the award rendered by the arbitrator and the decree that might well be passed on the basis of such a compromise under Order 23, rule 3, must be regarded as binding on the fourth defendant as well as the other parties to the suit. This Civil Revision Petition accordingly fails and is dismissed but in the circumstances without costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

Pattipati Ramalingaiah and another .. *Appellants* *

v.

Nagulagunta Subbarami Reddi .. *Respondent.*

Contracts—Agreement amongst villagers not to bid against each other and that actual bidder was to bid at auction sale and obtain right to catch the fish in a tank on behalf of all the villagers—If invalid as opposed to public policy.

The right to catch fish for a year in a tank was leased out by revenue auction and *X* was the sole bidder for Rs. 11-4-0. *X* in his turn granted a lease of the right to *Y* for Rs. 600 (the fishery crop being worth considerably more). A representative suit was filed against *X* on behalf of the other villagers claiming their share of profit alleging that *X's* auction purchase was on behalf of all the villagers who had agreed not to bid against each other. On a question whether such "knock-out" agreement was illegal as opposed to public policy,

Held, in England there had been an enactment of a statute to remedy the evil of a "knock-out" combination like this. But there is no similar statute in India. The agreement was not invalid and as the agreement alleged was found to be true the plaintiffs should succeed.

Appeal against the decree of the District Court, Nellore, in A.S. No. 846 of 1945, preferred against the decree of the Court of the District Munsif, Nellore, in O.S. No. 679 of 1944, etc.

K. Umamaheswaram for Appellants.

M. Seshachalapathi for Respondent.

The Court delivered the following

JUDGMENT.—These two appeals arise out of two actions instituted by the villagers of Somasila and Kammavaripalli in Nellore district for recovery of Rs. 120 and Rs. 240 respectively, from the first defendant in both the actions. There is a tank by name Mallacheruvu which is situate at the junction of three villages, Samasila, Kambhempaud and Kammavaripalli. The right of catching fish in the tank for the year 1944 was leased out by revenue auction. At that auction the first defendant was the sole bidder for Rs. 11-4-0. His bid was accepted and he became the purchaser of the right. He appears to have granted a lease of this right to the third defendant for Rs. 600. There is evidence to show that in that year the fishery crop, if I may use the expression, was a good one, and was probably worth considerably more that Rs. 600 possibly Rs. 800 or Rs. 900. The case of the plaintiffs was that there was an arrangement amongst the villagers as a result of which there was an agreement not to bid against each other and to put up the first defendant as the sole bidder. His bid was really to be for and on behalf of all the villagers, the villagers to share the right in the proportion of 1/5th for Somasila, 2/5th each for the other two villages. The suit was defended by the first defendant who denied that he bid for the villagers under an agreement as stated in the plaint. He claimed that he was a purchaser in his own and individual right. The trial Court held that the agreement was made out, although it found that the custom pleaded by an

* S. A. Nos. 1997 and 1998 of 1946. 6th April, 1950.

agreement on those lands for all preceding years was not established. It decreed the suit in favour of the plaintiffs. I may refer to a counter suit filed by the first defendant for recovery of Rs. 500 alleging that the villagers trespassed upon his rights illegally and forcibly and carried away the fish and thereby caused damage to him to the extent of Rs. 500. The learned Munsif found that the damage was not established, and he dismissed that suit. There were three appeals to the District Court. The learned Judge on appeal took a new point, namely, whether the agreements pleaded were not opposed to public policy and illegal. He was of opinion that a "knock-out" agreement like this amounted to stifling fair competition in the bid of property belonging to the State and was illegal as being opposed to public policy. In that view he dismissed all the appeals. The plaintiffs in the two suits filed by the villagers have filed these two second appeals. The first defendant whose appeal was dismissed has not filed any second appeal of his own.

In the appeals it is contended by Mr. Umamaheswaram that an agreement not to bid against each other is not illegal under the common law; nor is the auction sale invalidated because of such an agreement. He relies on the passage in Halsbury's Laws of England, Volume I, page 708 and the two decisions of the English Courts in *Rawlings* v. *General Trading Company*[1] and *Cohen* v. *Roche*[2]. He points out that the Judicial Committee have recognised a similar doctrine in *Mahomed Meera Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar*[3] and all the Courts in India have practically taken the same view. He refers me to the decision in *Mohamed Isack* v. *Sreeramulu*[4], where the learned Judge following *Hari Balakrishna Jogikar* v. *Maro Moreshwar Joglekar*[5] held that such an agreement was not invalid.

Mr. Seshachalapathi the learned advocate for the respondent draws my attention to the dissenting judgment of Scrutton, L.J., in *Rawlings* v. *General Trading Company*[1] and pointedly refers to the observations of the House of Lords which are found in the well-known case in *Moghul Steamship Company* v. *McGregor Gow and Company*[6]. He argued that this is a case where there was an implied misrepresentation by the villagers who practised deception upon the revenue official and caused detriment to the public exchequer by an unfair and illegal agreement amongst the villagers and created, as it were, a monopoly right and prevented the possibility of a fair auction. He says that an agreement which has such consequences must be treated in law as illegal on grounds of public policy. In the face of the authorities relied on by the appellants it is not permissible for me to take the view contended for by the respondent. In England it would appear that there had been an enactment of a statute to remedy the evil of "a knock-out" combination like this. There is no similar statute in India. However, I cannot give effect to the contention of the respondent that such an agreement should be invalidated on the ground of public policy. The precedents are far too numerous to be got over, even if one should be disposed to disagree with the underlying reasoning therein.

It would follow that the two second appeals should be sent back to the lower appellate Court. The learned advocate for the appellants argues that there is no necessity to send them back, because there is a finding according to him that the agreement set up in the plaint was true. The District Munsif no doubt recorded a finding to that effect. The District Judge also has in discussing the general question referred to this aspect of the matter and has held that the circumstances point out that there must have been an agreement in the terms pleaded. The advocate for the respondent suggests however that the evidence has not been discussed, and that he is entitled to have a revised finding on that point in the light of the evidence. Having regard to the admitted fact that the fishery was worth very much more than Rs. 11-4-0 it seems to be *prima facie* difficult to hold that the villagers would have kept quiet unless there was an agreement that the bid should be really for and on behalf of the villagers. The defendants' denial does not carry

1. (1921) 1 K.B. 635.
2. (1927) 1 K.B. 169.
3. (1899) 10 M.L.J. 1 : L.R. 27 I.A. 17 : I.L.R. 23 Mad. 227 (P.C.).
4. (1946) 1 M.L.J. 187.
5. (1893) I.L.R. 18 Bom. 342.
6. (1892) A.C. 25.

conviction. The appellate Court has stressed the circumstances against the defendants' plea. It seems to me that having regard to the above facts the learned Judge's finding though there is no discussion of the oral evidence, should be accepted as a definite finding against the first defendant. In this view it would follow that there is no necessity to send back the case for re-hearing by the appellate judge again.

The second appeals are therefore allowed, the decrees of the lower appellate Court are set aside, and the decrees of the trial Court are restored with costs both here and in the Court below.

No leave.

K. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

The Chikkottil Rama Variar, Sammadayi of Nhuralath Devaswom .. *Petitioner**

v.

Ananthanarayana Pattar and others .. *Respondents.*

Promissory note—Suit on promissory note executed by Uralars of a devaswom—Debt borrowed for necessary purpose of the devaswom—Decree against assets of devaswom—If can be passed.

In a suit on a promissory note where beyond the description of the executants as Uralars and the statement that the debt had been borrowed for the purposes of the devaswom, there is neither an indication in the promissory note that the Uralars wanted to exclude their personal liability nor is there any promise to pay the debt out of the funds of the devaswom, no decree could be passed against the devaswom properties even though the debt might have been found to have been borrowed for a proper and necessary purpose of the devaswom.

Palaniappa Chettiar v. *Shanmugham Chettiar*, (1918) 35 M.L.J. 903 : I.L.R. 41 Mad. 815 and *Swaminatha Iyer* v. *Srinivasa Iyer*, (1916) 32 M.L.J. 259, followed.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Ottapalam, in S. C. S. No. 85 of 1946.

D. A. Krishna Variar and *Ravi Varma* for Petitioner.

N. Sundara Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The fifth defendant, the Samudayi of a Malabar devaswom, seeks a revision of a decree of a Small Cause Court passed against the assets of the devaswom. On 18th October, 1943, the four Uralars of the devaswom executed a promissory note, Exhibit A-1, in favour of the plaintiff in these terms :

"On demand, we, the Uralars of Nharalath Devaswom, namely, (1) Vasudevan Nambudiri, son of Vasudevan Nambudiri, (2) Vasudevan Nambudiri, son of Parameswaran Nambudiri, (3) Thuppan Nambudiri, son of Damodaran Nambudiri, and (4) Padmanabhan Nambudiri, son of Parameswaran Nambudiri, hereby promise to pay to Ananthanarayana Pattar (plaintiff) or order the sum of Rs. 750 with interest thereon at 6¼ per cent. per annum. The entire consideration amount has been received to the satisfaction of the aforesaid devaswom in the following manner . . . . . Thus, the entire consideration amount has been received to the satisfaction of the aforesaid devaswom.

(Signed) Vasudevan Nambudiri.
(„) Vasudevan Nambudiri.
(„) Thuppan Nambudiri.
(„) Padmanabhan Nambudiri."

It is conceded by Mr. D. A. Krishna Variar, the learned advocate for the petitioner that this promissory note was the last of a series of prior promissory notes which had been renewed in succession and that the amount borrowed under the earliest of the promissory notes was applied for the discharge of a possessory mortgage of the lands of the devaswom. That the debt was borrowed for a proper and necessary purpose of the devaswom is not disputed ; but it is contended that a decree

*C.R.P. No. 470 of 1948. 16th March, 1950.

should not have been passed against the assets of the devaswom in this suit instituted for recovery of the amount due under the promissory note, Exhibit A-1.

In *Swaminatha Aiyar* v. *Srinivasa Aiyar*[1], Abdur Rahim and Spencer, JJ., held following the decisions in *Strickland* v. *Symons*[2] and *Shearman* v. *Robinson*[3] that the fact that the money borrowed by the trustee of a temple was utilised for the purposes of the temple would not entitle the creditor to a decree against the assets of the temple. This decision was followed and applied by King, J., in *Ekambara and Dandayuthapaniswami Temples* v. *Veerappa Gounder*[4], where the suit was on a promissory note on the same terms as in the present case. The learned Judge distinguished his own earlier decision in *Ekambara and Dandayuthapaniswami Temples* v. *Arunachala Gounder*[5] on the ground that in that case there was a promise by the trustee to pay the debt out of the temple funds. These were the cases relied on by the petitioner.

There are other decisions to which reference may be made. In *Madhavarao* v. *Vaikunta Kamath*[6], Happell, J., following the decisions cited above, held that a decree could not be passed against the assets of a temple in a suit on a promissory note executed by the trustee describing himself as a trustee in the body of the note, in spite of the fact that the debt was borrowed for the purposes of the temple. In *Balavenkatarama Chettiar* v. *Maruthamuthu Chettiar*[7], Patanjali Sastri, J., held that on a promissory note similar to the one in the present case the trustees alone were personally liable. He stated his reasons in these words:

"In the case of a trustee or manager of a charity borrowing money on a promissory note, the undertaking to pay which such execution necessarily imports, can be imputed only to the executant, as there is no principal who can be bound by such undertaking and it is difficult to see how such a person can borrow on a promissory note without incurring thereby personal liability. To attribute to the parties in such cases an intention to exclude the personal liability of the executant would, in effect, be to nullify the unconditional undertaking contained in the instrument. Hence it is, I apprehend, that Courts have always inclined to the view that trustees or managers borrowing money on promissory notes incur personal liability."

The learned Judge followed the decision in *Palaniappa Chettiar* v. *Shanmugham Chettiar*[8], where all the earlier cases of this Court were reviewed by Wallis, C.J. and Spencer, J. There, the learned Judges held that a trustee who executed a hundi on behalf of a charity and signed his name as trustee was, nevertheless, personally liable for the debt and that no decree could be passed against the charity properties. They were of the opinion that a person drawing a bill or making a note as trustee of a temple or charity was not acting on behalf of a principal and could not therefore claim the benefit of section 28 of the Negotiable Instruments Act.

The respondent's learned advocate relied on a decision of the Full Bench in *Sivagurunatha Pillai* v. *Padmavathi Ammal*[9]. But it was a case of an agent seeking to exclude his personal liability under section 28 of the Negotiable Instruments Act. Section 28 has no application to the case of a trustee executing a promissory note on behalf of the trust estate. In *Subramaniam Pattar* v. *Velu Nair*[10], Phillips, J., held that a creditor suing on a promissory note executed by the trustee of a temple promising to repay the debt from the devaswom properties was entitled to a decree against the assets of the temple if the debt was to be found to be one binding on the institution. In *Niladri Sahu* v. *Mahant Chathurbhuj Das*[11] and *Vibhudapriya* v. *Lakshmidra*[12], the Judicial Committee held that a decree could be passed against the assets of a religious charity like a mutt, for debts contracted by the head of the mutt for purposes of institution. These two decisions of the Judicial Committee were relied on in *Venkatabalagurumurthi Chettiar* v. *Balakrishna Odayar*[13], where this Court held that where a trustee of a temple buys goods on credit for the conduct of the services of the temple, the creditor is entitled to recover the value of the goods sold from

1. (1916) 32 M.L.J. 259.
2. (1884) 26 Ch. D. 245.
3. (1880) 15 Ch. D. 548.
4. (1941) 2 M.L.J. 568.
5. (1941) 2 M.L.J. 587.
6. (1942) 1 M.L.J. 535.
7. (1942) 2 M.L.J. 742.
8. (1918) 35 M.L.J. 90 : I.L.R. 41 Mad. 815.
9. (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.).
10. (1925) 49 M.L.J. 717.
11. (1926) 51 M.L.J. 822 : L.R. 53 I.A. 253 : I.L.R. 6 Pat. 139 (P.C.).
12. (1927) 53 M.L.J. 196 : L.R. 54 I.A. 228 : I.L.R. 50 Mad. 497 (P.C.).
13. (1930) 60 M.L.J. 90.

the properties of the temple. In *Lakshmindra Thirthaswamiar* v. *Raghavendrarao*[1], Sadasiva Aiyar and Spencer, JJ., held that in a suit to recover a simple money debt incurred by the Sanyasi head of a mutt for the necessary purposes of the mutt, the properties of the mutt could be made liable for the satisfaction of the debt and distinguished the cases of debts incurred by lay trustees of religious or charitable institutions and executors or administrators as standing on a different footing. In *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi*[2], Ayling and Krishnan, JJ., granted, in addition to a personal decree against the trustee who executed a bond, a decree charging the temple funds on the finding that the trustee had agreed to repay the loan out of the funds of the temple and that the loan itself had been borrowed for temple purposes.

The case-law is not altogether consistent. It is well established that it is competent to the trustee of a religious endowment to incur debts and borrow money for the proper and legitimate expenses of the institution, such as keeping up the religious worship, conducting or defending litigation, averting loss of trust properties, etc. It has also been held that the authority of the manager or trustee of an endowment is of the same nature as that of a guardian of an infant heir so far as the capacity to bind the estate by his borrowings is concerned (see *Pramathanath Malik* v. *Pradyumna Kumar Malik*[3] and *Srimath Deivasikamani* v. *Nur Mahomed*[4]). It has also been held that on a promissory note executed by a guardian, the minor is not personally liable, but if the creditor files his suit for recovery of the debt evidenced by the note, he is entitled to a decree against the estate of the minor if the debt is proved to have been incurred for the necessities of the minor or his estate (see *Annamalai Chetti* v. *Muthuswami*[5] and *Pundarikakshayya* v. *Sreeramulu*[6] affirmed on appeal by the Federal Court in *Sreeramulu* v. *Pundarikakshayya*[7]). It is difficult, however, to say whether their Lordships of the Federal Court were unanimous in their approval of the observations of this Court, though they upheld its conclusion.

In India, a promissory note is a part of the mechanism of money-lending and it was for this reason that the Judicial Committee held that Provincial legislation regulating money lending so as to affect and scale down debts evidenced by promissory notes was *intra vires*, though promissory notes and banking were included among the Federal subjects under the Constitution Act of 1935 (see *Prafulla Kumar Mukherjee* v. *The Bank of Commerce*[8]). As between the actual lender and borrower, a promissory note is only a collateral security and a lender can sue on the original debt or consideration disregarding the security. A promise to repay is implied in the loan itself. The original debt or loan does not get merged in the promissory note, so as to make the promissory note the only cause of action available to the lender. Nor is the liability for repayment of the debt extinguished by renewals of the original promissory note. This was the basis of the many decisions given by this Court under Madras Act IV of 1938, of which *Suryanarayana* v. *Alavandar*[9] may be cited as an instance. If so much is established both on principle and authority, it may logically be contended that a creditor should be entitled to a decree against the assets of a temple in a suit on the debt borrowed by the trustee, even though there is a promissory note accompanying or succeeding the loan, provided the debt is found to have been borrowed for the necessities of the temple.

Law, however, does not march on logical lines and there is considerable authority for the view that where a trustee or a person in the position of a trustee, incurs a debt without charging the trust property, the creditor should be taken as having lent the money on the personal credit of the borrower and can look to that credit alone and also to the principle of subrogation for the recovery of his loan in cases

1. (1920) 39 M.L.J. 174 : I.L.R. 43 Mad. 795.
2. (1922) 43 M.L.J. 147 : I.L.R. 45 Mad. 703.
3. (1925) 49 M.L.J. 30 : L.R. 52 I.A. 245 : I.L.R. 52 Cal. 809, 815 (P.C.).
4. (1907) 17 M.L.J. 553 : I.L.R. 31 Mad. 47.
5. (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891.
6. (1945) 2 M.L.J. 375 : I.L.R. (1946) Mad. 242 (F.B.).
7. (1949) F.L.J. 288 : (1950) 1 M.L.J. 586.
8. (1947) 2 M.L.J. 6 : (1947) F.L.J. 34 : L.R. 74 I.A. 23 (P.C.).
9. (1945) 2 M.L.J. 565.

where the trustee has a right to reimbursements. The difficulties in the way of working out the right of subrogation and making it available to the creditor in a suit for recovery of the loan will be apparent from the dissenting judgments in *Ammalu Ammal* v. *Namagiri Ammal*[1], where the earlier cases are collected by Kumaraswami Sastri, J. In *Sriramulu* v. *Pundarikakshayya*[2], Fazl Ali, J., observed as follows :

"It has been held in a series of cases that an executor or a trustee cannot by borrowing money from a person make him a creditor of the estate in his hands, even though the money was applied for the purposes of the estate. In *Farhall* v. *Farhall*[3], Mellish, L.J., took it to be settled law that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator. The principle enunciated in this case has been applied to the case of an executor or trustee in a number of cases in this country also (see *Shailendranath Palit* v. *Hadi Kaza Mans*[4]). The general rule however is subject to certain exceptions and, in a proper case, the executor or trustee may be entitled to be indemnified out of the estate in his charge."

Mukherjee, J., also referred to *Farhall* v. *Farhall*[3] and held that an executor who borrowed money for the purpose of administration made himself only personally liable and the creditor could not proceed directly against the estate.

In the present case, beyond the description of the executants as Uralars and the statement that the debt had been borrowed for purposes of the devaswom, there is no indication in the promissory note that the Uralars wanted to exclude their personal liability ; nor is there any promise to pay the debt out of the funds of the temple. Sitting singly, I am bound by the decisions in *Palaniappa Chettiar* v. *Shanmugham Chettiar*[5] and *Swaminatha Aiyar* v. *Srinivasa Aiyar*[6] which stand unreversed, to hold that no decree could be passed against the devaswom properties. I therefore reverse the decree of the Court below and pass a decree personally against defendants 1 and 2, the executants of the promissory note, and against the assets of the other two deceased executants in the hands of defendants 1 to 4. I direct that the costs of the plaintiff both in the Courts below and in this Court be paid by defendants 1 and 2. The petitioner in this Court will get his costs out of the assets of the temple.

V. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

J. Belli Gowder .. *Appellant**

v.

Joghi Gowder and another .. *Respondents.*

Arbitration Act (X of 1940)—Act if exhaustive—Award passed on oral submission—If can be enforced.

The Arbitration Act is exhaustive of the law relating to arbitration in India. An award, therefore, passed on an oral submission can neither be filed and made a rule of Court under the Act, nor enforced apart from the Act.

Appeal against the decree of the District Court, Coimbatore, in A.S. No. 465 of 1945 preferred against the decree of the Court of the Subordinate Judge, Nilgiris at Ootacamund, in O.S. No. 3 of 1945.

R. Venkataraman and *S. Viswanathan* for Appellant.

T. Srinivasaraghavan and *T. S. Narayanachari* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal has been argued clearly and concisely by Mr. S. Viswanathan for the appellant. The suit was for specific performance of an agreement to convey land to the plaintiff alleged to have been entered into with the defendants. The dispute between the parties has a long history starting from 1927 when the properties now in suit along with others were conveyed by the plaintiff to the predecessors-in-title of the defendants. Suffice it to say that

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1. (1917) 33 M.L.J. 631.
2. (1949) F.L.J. 288 : (1950) 1 M.L.J. 586.
3. (1871) 7 Ch. A. 123.
4. (1931) I.L.R. 59 Cal. 586.
5. (1918) 35 M.L.J. 90: I.L.R. 41 Mad. 815.
6. (1916) 32 M.L.J. 259.

* S.A. No. 765 of 1947. 17th March, 1950.

under Exhibit P-2, dated 5th August, 1937 and Exhibit P-3, dated 21st December, 1938, there were agreements to reconvey the plaint A and B schedule lands to the plaintiff for Rs. 100 and Rs. 507-4-0 respectively within two years from the dates of the agreements. The agreements for reconveyance were entered into by the father of defendants 1 and 2 in respect of the " A " schedule land and by the first defendant in respect of the " B " schedule land. The father of defendants 1 and 2 died thereafter and the defendants represent his interest. The plaintiff made certain payments to the defendants amounting to Rs. 300 during the years 1939 to 1942 and alleged that the time for performance of the contracts, Exhibits P-2 and P-3 had been extended by the defendants. Disputes arose between the parties, each side charging the other with default in performance. There was a panchayat at which it was decided on 3rd January, 1944, that plaintiff should pay Rs. 550 to the defendants and take a conveyance of the lands. A sum of Rs. 450 was paid by the plaintiff to the defendants on 3rd January, 1944, the balance having been agreed to be payable at the time of the registration of the sale deed. The plaintiff's case is that he also went into possession of the lands agreed to be conveyed to him. Disputes again arose between the parties and the plaintiff filed a complaint of criminal trespass against the defendants which was registered as C.C. No. 201 of 1944. Again there was a panchayat whose decision, Exhibit P-7, dated 4th March, 1944, was to the effect that defendants should convey the " A " and " B " schedule properties to the plaintiff on receipt of a further sum of Rs. 200 and that the criminal case filed by the plaintiff should be withdrawn. On 6th March, 1944, both the parties signed a memorandum Exhibit P-1 compounding the criminal case and agreeing to the acquittal of the accused, the present defendants 1 and 2. The plaintiff called upon the defendants to execute the conveyance by his notice, Exhibit P-9, dated 23rd February, 1944, but the defendants denied that there was a panchayat as alleged by the plaintiff or that there was any award of the panchayatdars or any subsequent arrangement obliging them to convey the lands in his favour. Thereupon the plaintiff filed the present suit for specific performance which has been decreed by the Courts below.

The first point argued by the appellant's learned advocate is that the suit is one to enforce an award given on oral reference or submission to arbitration and is not maintainable by reason of the provisions of the Arbitration Act, 1940. It is common ground that there was no written submission to the panchayatdars. Prior to the enactment of the Arbitration Act of 1940 it had been held by this and other High Courts that there was nothing in the Arbitration Act of 1899 or in section 89 and schedule 2 of the Civil Procedure Code of 1908, rendering an oral agreement to refer to arbitration invalid. A parole submission was held to be a legal submission to arbitration and an award passed on an oral reference was held to be valid and enforceable by a suit though not by the special procedure prescribed by Schedule 2, Civil Procedure Code or the Arbitration Act of 1899. (See *Ponnamma* v. *Kotamma*[1], *Mathuradas* v. *Maganlal Parbhudas*[2] and *Ramautar Sah* v. *Langat Singh*[3]). The question is whether the Arbitration Act of 1940 has superseded the law as laid down in these cases. The answer is not free from difficulty in view of the uncertain nature of the statutory provisions. The preamble shows that the object of the Act was to consolidate and amend the law relating to arbitration and it is a legitimate assumption to make that the Act is exhaustive of the law of arbitration in India. Oral submissions to arbitration and awards passed thereon are not so much as referred to, much less saved by the Act, even though the decisions referred to above must presumably have been within the knowledge of the draftsman and the Legislature. At the same time there is no provision in the Act that an award on an oral submission would be invalid and unenforceable. Section 2 (*a*) of the Act defines " Arbitration agreement " as a written agreement to submit present or future differences to arbitration, but section 2 (*b*) defines an " award " not as an award on an arbitration agreement, but as an arbitration award, an expression

1. (1932) 63 M.L.J. 610 : I.L.R. 56 Mad. 85.
2. (1933) I.L.R. 58 Bom. 369.
3. A.I.R. 1931 Pat. 92.

which *prima facie* would include an award on an oral submission. Section 47 of the Act enacts that the provisions of the Act apply " to all arbitrations and to all proceedings thereunder ". Section 32 of the Act lays down that no suit shall lie on any ground whatever for a decision upon the existence, effect or validity of an arbitration agreement or award. Section 14 (2) of the Act prescribes the procedure for filing an award in Court and it is made a condition of the exercise of the Court's power under the section that an " Arbitration agreement " as defined in section 2 (*a*) must exist. The question whether it was intended merely to make awards on oral submissions unenforceable under the procedure of the Arbitration Act or to make them invalid and unenforceable altogether, would depend to a large extent on whether the Act is exhaustive of the law of arbitration. I am inclined to think that it is. I therefore hold that an award passed on oral submission can neither be filed and made a rule of Court under the Act, nor enforced apart from the Act. The same opinion has been expressed in *Gauri Singh* v. *Ramlochan Singh*[1].

In paragraph 7 of the plaint it was alleged that the parties to the suit had agreed to act according to the award of the arbitrators, in other words, the parties had adopted the award as their own consensual agreement and acted upon it. They filed a memorandum, Exhibit P-1 dated 6th March, 1944, stating that in pursuance of the decision of the villagers they were compounding the criminal case 201 of 1944 and that the accused (defendants 1 and 2) might be acquitted. The criminal case could not have been compounded except by the agreement of parties and the award by itself could not have resulted in a composition of the offence. The offence was compounded two days after the award. There is some evidence, though meagre, to show that the parties accepted the award and agreed to abide by its terms and acted in pursuance of such agreement. There was an agreement for sufficient consideration to withdraw the criminal complaint and also to convey the property. Though the case has proceeded on the basis that there was a reference to arbitration and an award, a scrutiny of the evidence discloses that there was only a self-constituted panchayat of the villagers who claimed to exercise some sort of disciplinary jurisdiction over the inhabitants of the village and a decision was given by the body of villagers to the effect that the disputes between the parties should be settled on the lines laid down by them. Indeed the assertion of caste or village autonomy was carried to such an extent as to impose a fine on the plaintiff for venturing to go to Court abandoning the caste forum. It is difficult to say that there was a reference to arbitration in any legal sense and all that appears is there was an informal decision given by the villagers who claimed exclusive jurisdiction in themselves to decide disputes arising between the members of the community. The parties to the suit accepted the decision as their own and to some extent carried it out. In these circumstances the defendants having adopted the decision of the village panchayat and agreed to carry out its terms, must convey the properties to the plaintiff.

The result is that the decree of the Courts below is correct and this second appeal should be dismissed with costs.

(No leave).

V.P.S. *Appeal dismissed.*

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1. A.I.R. 1948 Pat. 430.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Vengu Ayyar and another .. *Petitioners* *

v.

Yegyam Ayyar and others .. .. *Respondents.*

Arbitration Act (X of 1940), section 16 (1)—Remittal of award on grounds other than those in statute—If justified—Plea, if can be taken in appeal.

In a suit for partition referred to arbitration the Court remitted the award on the ground that it was not clear whether every individual sale in respect of the items in suit were considered by the arbitrator. As the plaintiff did not turn up the arbitrator returned the award to Court, which after examining the arbitrator and the plaintiff upheld the award. On appeal it was held that the award became void under section 16 (3) of the Act. In revision,

Held, (i) the Court could not remit an award on any ground not contemplated by section 16 (1) of the Act. (ii) It was open to the parties to plead in appeal the irregularity of the trial Court in so remitting the award.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tirunelveli, dated 5th August, 1948, in C.M.A. No. 35 of 1948 (O.S. No. 282 of 1944, District Munsif Court, Ambasamudram).

K. Sankara Sastri for Petitioners.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The facts connected with this Civil Revision Petition are these: There was a suit for partition before the District Munsif's Court, Ambasamudram, by one brother against others which was referred to arbitration. The first defendant, the eldest brother, claimed that except items 1 to 5 of the plaint schedule the rest of them, items 6 to 25 were his self-acquisitions standing either in his own name or in the name of his wife, the second defendant. The advocate-arbitrator agreed with the first defendant's contentions and made an award which the Court however remitted on the ground that it was not clear whether every individual sale in respect of the items in suit was considered by the arbitrator. On remittal the arbitrator gave notices to both the parties. The plaintiff did not turn up with the result that the arbitrator, finding that he could do nothing, sent back the record to the District Munsif. He thereupon took up the objections to the award which had been previously filed, and after examining the arbitrator and the plaintiff found that there was no misconduct about the proceedings of the arbitrator and upheld the award. The plaintiff thereupon preferred an appeal to the Court of the Subordinate Judge of Tinnevelly objecting to the award as one which became void under sub-section (3) of section 16 of the Indian Arbitration Act X of 1940 on the failure of the arbitrator to reconsider the award on remittal and submit his decision within the time fixed. The objection was upheld by the learned Subordinate Judge, so that the suit stands to be tried by the learned District Munsif as a result of the decision of the learned Subordinate Judge.

Defendants 1 and 2 have preferred this revision petition against the order of the learned Subordinate Judge. Their contention is that the order of the original remittal by the learned District Munsif was itself irregular, and that although they did not file an appeal against the order because of its unappealability it would be open to them to plead the irregularity as they did in the appeal preferred by the plaintiff against the order of the learned District Munsif eventually upholding the award. This contention is, in my opinion, well-founded. The ground on which the original remittal was made by the learned District Munsif is not one contemplated by any of the clauses of sub-section (1) of section 16. The procedure adopted by the learned District Munsif seems more akin, in my judgment, to the procedure by way of remand in the exercise of inherent powers on the part of an appellate Court under the Civil Procedure Code. No Court is entitled to add

* C.R.P. No. 1436 of 1948. 4th April, 1950.

to the grounds of remittal set forth in the statute, and the order of remittal made by the learned District Munsif must accordingly be held to be invalid. There was and could be no appeal against that order, because none is provided for by the statute, and when against the order of the learned District Munsif upholding the award an appeal was taken by the plaintiff to the Court of the Subordinate Judge it was undoubtedly competent to the first defendant to plead the irregularity of the order of remittal and to sustain the order of the learned District Munsif on the ground of such irregularity.

In *Abdul Rahman* v. *Yar Muhammad*[1], to which my attention has been drawn by the learned counsel for the petitioners an award was remitted under section 520 of Act X of 1877. The arbitrators refused to reconsider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under section 520. It was held that the question whether the award had been properly remitted under section 520 or not could be entertained in such appeal. Says Oldfield, J., at page 641 of the report:

"I consider we are competent to entertain this appeal, as it is only where a decree has been made in the terms of the award that no appeal lies; and in determining the appeal it is open to us to consider whether the award did become legally void by the refusal of the arbitrators to reconsider their award when directed to do so by the Judge; and this will depend on whether the Judge's order remitting it was one which he could legally make. Section 520 empowers the Court to remit an award for reconsideration upon certain grounds specified in the section, but upon no others; and by section 521 an award remitted under section 520 becomes void on refusal of the arbitrators to reconsider it. Section 520 gives no unreserved discretion to a Court in the matter of remitting awards for reconsideration; and the refusal of the arbitrators to reconsider the award will render it void only when the order remitting it was one which could be properly made under section 520. It is therefore the duty of this Court on appeal to see if the order of the Judge was one which he could legally make under section 520 so as to render the award void by refusal to comply with it."

Referring to section 16 of the Indian Arbitration Act, Lord Justice Du Parcq in delivering the judgment of the Judicial Committee in *Shree Minakshi Mills, Ltd.* v. *Patel Bros.*[2] observed at page 19:

"The section specifies three sorts of defects which may necessitate reconsideration of an award and empowers the Court to remit the defective award in the cases specified (and *in no others*) to the arbitrator or umpire, and to fix the time within which the arbitrator or umpire is to submit his decision to the Court."

I am satisfied that the learned District Munsif's order remitting the award is invalid, and that it was open to him to uphold the award as he did on return of the record by the arbitrator after going into the objections to the award in the light of the evidence adduced before him.

Mr. Venkatarama Aiyar for the respondents has drawn my attention to a case reported in Re *An arbitration between Baxters and Midland Rail Co.*[3]. As the headnote to the ruling puts it, what happened in that case is this: In an arbitration under the Light Railways Act, 1896, in which under the statute the costs were in the discretion of the arbitrator, the arbitrator made and published an award in which he said nothing as to costs. Upon an affidavit by the arbitrator that the reason why he had made no award as to costs was that he had been under the misapprehension that the arbitration was subject to the provisions of the Lands Clauses Act, 1845, under which costs follow the event, and that if he had known that he had power to award costs, he would have awarded them to the claimants, it was held that as the mistake made by the arbitrator was merely one of omission, and he did not seek in any way to impeach the award that he had made, the matter ought to be remitted to him for his consideration. The statute with which that case was concerned is different from the one with which we are concerned here. The provision as to remittal in that statute is in section 10 (1) and is as follows:

"In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them, to the reconsideration of the arbitrators or umpire."

1. (1881) I.L.R. 3 All. 636.
2. (1944) 2 M.L.J. 17: L.R. 71 I.A. 106: I.L.R. (1944) Bom. 469 (P.C.).
3. 95 L.T. 20.

and schedule I of that statute further provided as follows :

"The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs, or any part thereof, shall be paid."

The decision reached by the Court of appeal in England on the language of that statute and on the facts of that case affords no assistance to the determination of the point before me.

I must accordingly uphold the contention of the petitioners ; but this only means that the matter should go back to the learned Subordinate Judge of Tinnevelly who has at the end of his order now under revision referred to the question of misconduct on the part of the arbitrator which was apparently argued before him but refrained from arriving at any decision thereupon in the view that he took that the award became void under sub-section (3) of section 16 of the Indian Arbitration Act on the failure of the arbitrator to reconsider it and submit his decision within the time fixed. I accordingly set aside the order of the learned Subordinate Judge and direct him to take up the appeal on his file for fresh hearing and disposal in the light of the foregoing and in accordance with law. The petitioners shall have their costs of this revision petition. The costs in the Courts below will abide the result of the re-hearing.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

N. Chinnakannu Pillai .. *Petitioner**

v.

N. S. Sundaram .. *Respondent.*

Succession Act (*XXXIX of* 1925), *sections* 371 *and* 372—*Application for succession certificate—Jurisdiction of Subordinate Judge of Tuticorin to entertain—Notifications under Succession Certificate Act* (*VII of* 1889) *empowering Subordinate Judges to exercise powers under that Act—If continues to be in force under the Succession Act,* 1925—*Scope and effect of the successive notifications—Succession Act, section* 265—*Notification of High Court investing powers on District Munsifs and Subordinate Judges—If includes powers under Part X, Succession Act,* 1925.

The Subordinate Judge of Tuticorin would have jurisdiction to entertain applications for the grant of succession certificates. It cannot be successfully contended that with the repeal of the Succession Certificate Act, 1889, and its re-enactment by the Indian Succession Act, 1925, the life of the notifications issued under the earlier Act came to an end by reason of the omission in the later Act of a provision continuing the notifications issued under the earlier Act. Under section 26 (1) of the Succession Certificate Act, 1889, G. O. No. 391 dated 22nd October, 1921, notified that the Subordinate Judge of Tuticorin would have jurisdiction to issue succession certificates and this notification continued to be in force notwithstanding G. O. No. 1731 dated 5th June, 1924 (which confers jurisdiction only on Subordinate Judges and District Munsifs not functioning at headquarters of districts) because there was nothing in the later G. O. depriving those Courts of jurisdiction vested in them by the earlier notification. The doctrine of repeal by implication must not be resorted to unless the implication is quite clear. Nor has the superseding of G. O. No. 1731 dated 5th June, 1924, by a subsequent G. O. No. 24 dated 7th January, 1925, any effect on the jurisdiction conferred by G. O. No. 391, dated 22nd October, 1921.

Quære.—Whether the notification issued by the High Court under section 265 of the Succession Act, 1925, and section 29 (1) of the Madras Civil Courts Act, 1873, as amended by Act XIV of 1926, authorising "all Subordinate Judges to take cognizance of any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by district delegates" are wide enough to include proceedings under Part X of the Succession Act?

Karthirama Goundar v. *Rangammal,* (1932) 62 M.L.J. 622 : I.L.R. 55 Mad. 701 and *Rangaraja Rao* v. *Tulasibai Ammal,* (1949) 1 M.L.J. 650, considered.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tuticorin, dated 15th March, 1950, in O. P. No. 33 of 1949.

S. Ramachandra Aiyar for Petitioner.

V. Ramaswami Aiyar for Respondent.

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* C. R. P. No. 455 of 1950. 14th April, 1950.

The Court delivered the following

JUDGMENT.—This civil revision petition is directed against an interlocutory order of the Subordinate Judge of Tuticorin in O. P. No. 33 of 1949, a petition for the issue of a succession certificate under the Indian Succession Act (XXXIX of 1925); holding that he had jurisdiction to entertain the application. The contention of the petitioner in this Court is that the Subordinate Judge had no jurisdiction. There is no notification of the Provincial Government under section 388 (1) of the Succession Act, 1925, empowering Subordinate Judges to issue succession certificates. Under section 26, sub-section (3) of the Succession Certificate Act (VII of 1889), there were three notifications by the Local Government conferring jurisdiction on Courts inferior to a District Court to issue succession certificates. The effect of these successive notifications issued under that Act is one of the matters that fall to be decided in this case. The provisions of Act XIV of 1926 passed by the Indian Legislature, whereby section 29 of the Madras Civil Courts Act, 1873, was inserted in that Act, empowered the High Court, by notification, to invest judicial officers with jurisdiction in matters arising under the Indian Succession Act. Sections 265 and 388 of the Indian Succession Act empower the High Court and the Provincial Government respectively, by notification, to invest any Court inferior in grade to that of a District Judge with power to exercise the functions of a District Judge under the Act in respect of the matters specified in those sections. The High Court has issued notifications in the exercise of the power conferred upon it under section 265 of the Indian Succession Act and section 29 (1) of the Madras Civil Courts Act of 1873, as amended by Act XIV of 1926 of the Indian Legislature authorising all Subordinate Judges to take cognizance of any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by "District Delegates" and appointing all Subordinate Judges *ex officio* as "District Delegates" under the Succession Act, 1925, within the local limits of their respective jurisdiction. It is the effect of these several notifications that has to be considered in arriving at a decision on the question of jurisdiction raised in the present case.

Under section 26 (1) of the Succession Certificate Act, 1889, the Local Government by G. O. No. 391 dated 22nd October, 1921, notified that the Subordinate Judge of Tuticorin would have jurisdiction to issue succession certificates. In a later G. O. No. 1731 dated 5th June, 1924, the Local Government invested all Subordinate Judges and District Munsiffs except those at the headquarters of districts (subject to a few exceptions) with the powers of a District Court under the Succession Certificate Act, 1889, within the local limits of their respective jurisdiction. By another notification, G. O. No. 24 dated 7th January, 1925, superseding G. O. No. 1731 (wrongly printed as G. O. No. 371 at page 274 of Volume I of the Civil Rules of Practice) the Local Government invested all Courts of District Munsiffs in the Presidency except those situated at headquarters of districts, with jurisdiction to issue succession certificates. All these notifications were issued under section 26 of the Succession Certificate Act, 1889, which has now been repealed and re-enacted as Part X of the Indian Succession Act, 1925. It cannot be successfully contended that with the repeal of the Succession Certificate Act, 1889, and its re-enactment by the Indian Succession Act, 1925, the life of the notifications issued under the earlier Act came to an end by reason of the omission in the later Act of a provision continuing the notifications issued under the earlier Act. Section 24 of the General Clauses Act provides for the continuation in force of such notifications unless otherwise expressly provided in the later Act, and there is no such provision in the Indian Succession Act, 1925. The argument of the petitioner is that the second G. O. No. 1731 dated 5th June, 1924, operated as a repeal of the first G. O. No. 391 dated 22nd October, 1921, and the second G. O. was, in its turn, repealed by the third G. O. No. 24 dated 7th January, 1925, and that the result of the several notifications is that District Judges and District Munsiffs, except those at headquarters of districts, alone have jurisdiction to issue succession certificates.

I am unable to accept this argument. While the third notification in terms supersedes the second, the second does not purport to supersede the first. It cannot

be said that the first notification became otiose or wholly devoid of any effect after the issue of the second notification. The special notification empowering certain selected Subordinate Judges' Courts, of which the Tuticorin Subordinate Judge's Court was one, to take cognizance of applications for grant of succession certificates, continued to be in force notwithstanding G. O. No. 1731 dated 5th June, 1924, because there was nothing in the later G. O. depriving those Courts of the jurisdiction vested in them by the earlier notification. To some extent, G. O. No. 1731 dated 5th June, 1924, may overlap G. O. No. 391 in cases where Courts of Subordinate Judges specially empowered by G. O. No. 391 fall within the category of Subordinate Judges functioning at places other than headquarters of districts. With reference to Subordinate Judges functioning at the headquarters of districts and empowered by G. O. No. 391 to take cognizance of applications for grant of succession certificates, their jurisdiction would remain unaffected by G. O. No. 1731 dated 5th June, 1924, which confers jurisdiction only on Subordinate Judges and District Munsiffs not functioning at headquarters of districts. It is therefore not possible to say that the scope and ambit of G. O. No. 1731 dated 5th June, 1924, are comprehensive enough to provide for all matters for which G. O. No. 391 made provision. In other words, the two G. Os. can exist and have operation side by side. The doctrine of repeal by implication must not be resorted to unless the implication is quite clear. An enactment or a rule having the force of law cannot be held to be repealed by implication by a later enactment or statutory rule unless the provisions of the earlier enactment or rule are plainly repugnant to those of the subsequent enactment or rule and the entire subject-matter of the first is taken away by the second. If the two provisions standing together would lead to wholly absurd consequences or if the entire subject-matter of the earlier statutory provision is provided for by a later statutory provision, then there may be room for the application of the rule of repeal by implication. Repeal by implication is not to be lightly inferred and the mere inclusion in a later statutory provision of a portion of the subject-matter contained in an earlier statutory provision cannot by itself have the result of a repeal of the earlier provision. Repeal by implication is the consequence of contradictory or inconsistent legislation and should not be imputed to a legislative or rule-making authority unless one is driven to do so. *See* Halsbury's Laws of England, Vol. 31, page 561. Even in a case where there is repeal or amendment of an earlier Act by necessary implication, the repeal need not extend to the whole of the provisions of an earlier enactment and certain provisions of the earlier enactment may survive the repeal or amendment. The present is such a case. In my opinion, G. O. No. 1731 dated 5th June, 1924, neither expressly nor by necessary implication repeals the earlier G. O. No. 391. In this view, the Subordinate Judge of Tuticorin would have jurisdiction to entertain the petition for the grant of succession certificate.

It is unnecessary to consider the effect of the notifications issued by the High Court in 1939 acting under the provisions of section 265 of the Indian Succession Act, 1925 and the provisions of section 29 (1) of the Madras Civil Courts Act, 1873, as amended by Act XIV of 1926. These notifications do not, in so many terms, confer jurisdiction on Subordinate Judges to take cognizance of applications for grant of succession certificates. At the same time, the notification authorises

> "all Subordinate Judges to take cognizance of any proceedings under the Indian Succession Act, 1925, which cannot be disposed of by district delegates."

District delegates had no place in the old Succession Certificate Act and under the Succession Act of 1925 could not entertain applications for the issue of succession certificates. The words of the notification are, however, wide and quite general and literally interpreted, would include proceedings under Part X of the Indian Succession Act. There is a decision of this Court in *Karthiruma Goundan* v. *Rangammal*[1], favouring such a wide and literal interpretation of the Notification which adopts the language of section 29 (1) of the Madras Civil Courts Act as amended by Act XIV of 1926. Panchapagesa Sastri, J., in the decision

1. (1932) 62 M.L.J. 622 : I.L.R. 55 Mad. 701.

reported in *Rangaraja Rao* v. *Tulasibai Ammal*[1], was inclined to place a more restricted interpretation on the scope of the notification and to hold that it did not authorise Subordinate Judges to entertain applications for the issue of succession certificates. It is unnecessary for me to express an opinion as to which of these divergent views represents the true intention of the Legislature. The difficulty has arisen from the Indian Succession Act, 1925, assembling together different enactments which dealt with different topics without reference to each other, namely, the Succession Certificate Act, 1889, the Probate and Administration Act, 1881, the Indian Succession Act, 1865, The Succession (Property Protection) Act, 1841, and the Hindu Wills Act, 1870. There was no place for a District delegate in the Succession Certificate Act, 1889, while the Probate and Administration Act, 1881, gave jurisdiction to a District delegate in non-contentious applications for probate or letters of administration. The consolidating Act of 1925 has, to some extent, to be interpreted in the light of the history of the previous legislation embodied in the several enactments above referred to, and, if so interpreted, the reasoning of Panchapagesa Sastri, J., if I may say so, with respect, appears to me to be convincing. I need not pursue the matter further as this civil revision petition fails on my interpretation of G. O. No. 391 of 1921 and the subsequent notifications issued by the Government.

The civil revision petition is therefore dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Ponnuru Satyanarayana .. *Appellant**

v.

Bolisetti Nagabushanam .. *Respondent.*

Execution—Irregular order entering up full satisfaction—Right of decree-holder to proceed afresh with the execution petition erroneously closed—Right of decree-holder to proceed in execution against the legal representative of the surety leaving out the principal debtor and his representatives.

Where full satisfaction has been entered erroneously, it is a case in which the Court in order to prevent obvious injustice, ought to proceed afresh with the execution petition after setting aside the irregular and illegal order entering full satisfaction. A subsequent execution petition filed by the injured decree-holder is only to be treated as a reminder to the Court to revise that old execution petition irregularly and erroneously closed by it. Though such an earlier petition is filed on the last day of 12 years' limitation under section 48 of the Civil Procedure Code, there is nothing unjust or inequitable in reviving it.

Under the law, a decree-holder can proceed against any one of the joint judgment-debtors he likes and a surety against whom the decree has been passed or his legal representative can be proceeded against without first proceeding against the principal debtor, though the decree-holder may be doing what a layman may consider to be unfair. But the use of law can never be an *abuse* of law, and, when the law allows it, the Court cannot disallow it.

It cannot be said that the decree-holder is not entitled to leave out a portion of the old relief prayed for when asking for a revival of the old execution petition.

Appeal against the order of the Court of the Subordinate Judge, Tenali, dated 26th October, 1948 in A.S. No. 84 of 1948, preferred against the order of the Court of the District Munsif, Repalle, in E.P. No. 228 of 1946 in O.S. No. 173 of 1931.

V. G. Krishnamurthy for Appellant.

G. Venkatarama Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This is a civil miscellaneous second appeal filed by one Satyanarayana, the fourth respondent in E.P. No. 228 of 1946, which was merged in the revived E.P. No. 283 of 1943 in O.S. No. 173 of 1931 on the file of the District

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1. (1949) 1 M.L.J. 650.

* A. A. A. O. No. 24 of 1949. 11th August, 1950.

Munsif's Court, Repalle, against the orders of both the lower Courts overruling his objections and directing the execution petition to proceed and his properties to be sold for realising the decree amount.

The facts were briefly these. B. Nagabushanam, the decree-holder, obtained a simple money decree on a promissory note for Rs. 600 dated 6th February, 1930, against one B. Ramayya, the executant and his surety P. Sitaramaswami, in O.S. No. 173 of 1931. The decree amount was scaled down, and, after several E.Ps., with which we are not now concerned, E.P. No. 283 of 1943 was filed by the decree-holder on 17th September, 1943, for recovering more than a thousand rupees due under the scaled down decree with subsequent interest and costs. That E.P. was undoubtedly filed within time under section 48, Civil Procedure Code, as well as under Article 181 of the Indian Limitation Act. That E.P. shows Ramayya, the first defendant, as alive, and not as dead, though it is represented to me now by the learned counsel for the appellant, relying on an observation in paragraph 2 of the judgment of the trial Court, and in paragraph 2 of the judgment of the lower appellate Court in A.S. No. 84 of 1948, that the first defendant was dead already by the time of the execution petition and that his legal representatives have not been brought on record till now. There is, however, no formal or legal proof that the first defendant is really dead. Whatever that be, the decree itself is an old one dated 17th September, 1931 and E.P. No. 283 of 1943 was filed on 17th September, 1943, the very last day of limitation under section 48, Civil Procedure Code. Some immoveable properties claimed to be the first defendant's were attached and proclaimed for sale on 6th November, 1944. But, just before the sale, one Parachuri Subba Rao filed a claim petition, E.A. No. 529 of 1944, regarding those properties, claiming them to be his. It was dismissed as filed too late. The claimant then deposited the sale warrant amount under protest into the Court on 6th November, 1944, itself and the Court ordered the stay of the sale of the properties on his application, E.A. No. 525 of 1944. On 13th November, 1944, the Court closed the execution petition, recording full satisfaction on account of the deposit made by Parachuri Subba Rao under protest. This order was rather curious as the deposit was made under protest by Subba Rao and a stay had been got by him regarding its payment out to the decree-holder, and the Court should have therefore awaited the result of the suit filed by the claimant. What is more, it, of course, kept the deposit in Court and did not allow the decree-holder to draw it out, as there was a stay. The claimant filed O.S. No. 296 of 1944 and got the order of the Court dismissing his claim set aside on 22nd December, 1945. On 7th February, 1946, the claimant withdrew from Court the amount deposited under protest by him. He was allowed to withdraw the entire amount as the decree entitled him to do so, having recognised his claim to the attached properties. Thereupon, the decree-holder filed E.P. No. 228 of 1946 to set aside the order of full satisfaction, erroneously passed by the Court on 13th November, 1944, to revive the proceedings in E.P. No. 283 of 1943, to continue the sale proceedings thereunder, and to sell the properties of the present appellant, who was a legal representative of the surety judgment-debtor, the second defendant. The District Munsif allowed that to be done despite all the objections of this appellant. The appellant thereupon filed A.S. No. 84 of 1948 in the Sub-Court, Tenali. The learned Subordinate Judge dismissed the appeal, overruling the contentions of the appellant; and he has preferred this C.M.S.A. against that judgment.

I have perused the entire records, and heard learned counsel on both sides. Mr. Y. G. Krishnamurthy, the learned counsel for the appellant, raised five main contentions. The first was that both the lower Courts went wrong in reopening the matter of this stale decree after full satisfaction had been entered on 13th November, 1944. The argument is unsustainable. That full satisfaction order was passed erroneously, treating a deposit under protest, by a man claiming independently a title to the attached properties of the first defendant judgment-debtor, in order to save his own properties from sale, and that stranger third party established his claim in his suit and took back the money deposited by him under protest.

Not a pie out of that deposit was paid to this decree-holder. It is, therefore, quite unreasonable to call this a stale claim, simply because the decree is old and the decree-holder had received not a pie. It is a case in which any Court of equity, justice and good conscience ought, in order to prevent "obvious injustice", and according to the ruling of the Full Bench of this Court in *V. B. T. Sundaramma* v. *Abdul Khadar*[1], to proceed with the execution petition afresh, after setting aside the irregular and illegal order entering full satisfaction as there is an error patent on the face of the records, and the dismissal was for some reason which turned out later on to be untenable and the District Munsif was not responsible for it. Suppose, for instance, a cow has to be delivered to a decree-holder and some cow belonging to a stranger, found in the Court premises and mistaken by the Judge to be the cow in question, is delivered, and full satisfaction entered, can it be said that the matter cannot be reopened when the stranger establishes his right to that cow and recovers it, and the cow of the decree-holder has still to be caught hold of and delivered? So too, if counterfeit currency notes are given in satisfaction of a decree by a judgment-debtor, and full satisfaction is entered by the Judge taking them to be genuine notes, can it be said that the execution petition cannot be reopened when the fraud is discovered and the money has to be paid to the decree-holder?

The next contention of Mr. Krishnamurthy was that it was highly unjust and inequitable to allow an execution petition like E.P. No. 228 of 1946 to be filed 15 years after the decree, and three years after the period of limitation prescribed in section 48, Civil Procedure Code, and allow it to be tacked on to an execution petition like E.P. No. 283 of 1943 filed on the very last day of limitation under section 48, Civil Procedure Code. I see nothing unjust or inequitable in that. Many rulings of this Court, including the Full Bench ruling quoted above, have held that, where an execution petition has been closed erroneously by a Court either for statistical purposes or under an error, as here, and the decree-holder is free from blame, the injured decree-holder has got a right to have that old execution petition revived and proceeded with from the stage immediately before the error, and that a subsequent execution petition filed by him is only to be treated as a reminder to the Court to revive the old execution petition irregularly and erroneously closed by it. The lower appellate Court has dealt fully with this point and it is unnecessary to cite further rulings or authorities for this elementary position which has become well established now. No question of limitation will therefore be involved. None of the defendants were parties to O.S. No. 286 of 1944, only the transferee decree-holder and the claimant being parties to it.

The third contention of Mr. Krishnamurthy was that it was highly unjust and inequitable for the decree-holder not to bring the legal representatives of the first defendant on record and to proceed only against the properties of this appellant who was the legal representative of the surety. For one thing as already stated it is not clear whether the first defendant was alive or dead when E.P. No. 283 of 1943 was filed. Nobody has spoken to the date of his death. An observation in judgments, leading to an inference that he was dead even before the filing of E.P. No. 283 of 1943, cannot be relied on when the execution petition itself shows the man as alive and without any legal representative, and when there is nothing in the evidence to show when the man died, and when the counter of this appellant in E.P. No. 228 of 1946 seems to show that the first defendant was alive at the time when O.S. No. 286 of 1944 was filed. Under our law, a decree-holder can proceed against any one of the joint judgment-debtors he likes, and the second defendant (surety) had become a judgment-debtor by the decree in O.S. No. 173 of 1931. No doubt by saving one and leaving him out and proceeding against another, towards whom he has not got the same consideration, the decree-holder may be doing what a layman may consider to be unfair. But the *use* of law can never be an *abuse* of law, and, when the law allows it, the Court cannot disallow it. It is open

1. (1932) 64 M.L.J. 664 : I.L.R. 56 Mad. 490 (F.B.).

to this appellant to sue the first defendant's legal representative for contribution after the decree amount has been recovered from him in this E.P.

The next contention of Mr. Krishnamurthy was that Parachuri Subba Rao, the third party who deposited the decree amount under protest in that claim petition, was only a name lender for the first defendant and had deposited only the money of the first defendant, and that this decree-holder, acting in collusion with that first defendant had filed this execution petition against this appellant, in order to recover the money once more and pay it back to the first defendant, and that the lower appellate Court failed to consider this important contention and decide it. The lower appellate Court did not consider this contention because it was not raised before it at all. Nor has it been raised in the appeal memo. here. Nor was there any evidence on record to prove this extremely interesting, but rather incredible, story. So, this contention also must fail.

The last contention was that as E.P. No. 283 of 1943 was revived by filing E. P. No. 228 of 1946, the decree-holder should have asked also for the sale of the old attached properties of the first defendant, as he was not entitled to leave out a portion of the old relief prayed for when asking for a revival of the old execution petition. I cannot agree. Suppose, for instance, in an old E.P. fifty sheep and two cows of the judgment-debtor were sought to be attached and were attached, but the two cows died before the execution petition, wrongly closed, was revived, how can it be said that the decree-holder applying for the revival of the execution petition should also apply for the sale of the two cows which died and whose carcasses themselves had disappeared? So too, how can this decree-holder be expected to ask for the sale of the immoveable properties alleged to be the first defendant's but which were declared by a Court, in a suit, to belong to a third party and not to the first defendant?

All the contentions of the learned counsel for the appellant have failed. On a scrutiny of the entire records, I am satisfied that both the Courts below were perfectly right in overruling all the contentions of the appellant and in directing the execution petition to proceed. This C.M.S.A. therefore deserves to be, and is hereby, dismissed with costs.

Leave refused.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

Adapala Subba Reddy and another .. *Appellants* *

v.

Adapala Andemma and others .. *Respondents.*

Probate proceedings—Appointment of receiver to safeguard estate—Powers of Court.

Where in probate proceedings there is danger to the assets of the estate being secreted and otherwise dealt with by the parties in possession, to safeguard such an estate it would be just and proper that a person should be appointed receiver or administrator *pendente lite*. The Court can confer upon such a person all such powers as may be necessary for the realisation, management, protection and preservation of the property.

Namagiri Ammal v. *Subba Rao*, (1947) 2 M.L.J. 364: I.L.R. (1948) Mad. 494, explained.

Appeal against the order of the District Court, Nellore, dated 6th January, 1950, in I.A. No. 93 of 1949 in O.P. No. 4 of 1949.

K. Kuttikrishna Menon and *P. Babulu Reddi* for Appellants.

K. Umamaheswaram, *A. Subramanyan* and *P. Rami Reddi* for Respondents.

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* A. A. O. No. 33 of 1950. 12th April, 1950.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against the order of the District Judge of Nellore on an application filed in O.P. No. 4 of 1949, a petition for the grant of probate of a will dated 22nd July, 1948, of one Venkatanarasa Reddi who died leaving behind him three widows, three daughters and two divided brothers. The first widow is the applicant for probate of the will which was registered during the lifetime of her deceased husband. To the petition, her co-widows, the daughters of the deceased and his brothers were made parties. An application was made pending the petition purporting to be under sections 247 and 268 of the Indian Succession Act and sections 94 and 151 and Order 40, rule 1, Civil Procedure Code, for the appointment of an interim administrator or receiver to take possession of the entire estate and manage the same during the pendency of the probate proceedings.

The estate comprises admittedly of considerable extent of immoveable property. The deceased was entitled to a third share. The properties had not been divided by metes and bounds and it is common ground that on the date of the petition the properties were in the possession of the two divided brothers who were respondents 6 and 7 in the petition. The application was made on the ground that it was necessary to secure and preserve the properties pending the disposal of the proceedings, having regard to the magnitude of the estate and the hostile attitude taken up by respondents 6 and 7, the brothers. Their attitude was based on a will which they set up alleged to have been executed by the deceased on 15th August, 1948, a day before he died. This will has not been registered. It was alleged in the affidavit filed in support of the application that respondents 6 and 7 had cancealed moveable properties of large value and realised large amounts by way of income and sale of moveables and had manipulated the accounts to suppress the true extent of the estate and to minimise the income accruing therefrom. The petitioner's co-widows did not have any objection to the appointment of a receiver and the opposition was entirely from the brothers, respondents 6 and 7. The learned District Judge found that the applicant had a *prima facie* case in view of the registered will on which she was relying as against the unregistered will relied on by the contesting respondents. The learned Judge thought that as the two brothers were admittedly entitled to two-thirds of the estate, it would be unfair and improper to oust them from possession and management and to vest the entire estate in the hands of a third party. He, however, was convinced that it was necessary to safeguard the interests of the petitioner by appointing a local advocate as receiver but with limited functions, namely, to have general supervision over the management of the estate, to take an inventory of the moveables and outstandings and to receive a third share of the net income from the two brothers (respondents 6 and 7) and deposit the same immediately into Court. Respondents 6 and 7 were directed to give adequate facilities to the receiver for supervising their management and to make the accounts available to him for scrutiny. Respondents 6 and 7 have appealed against this order.

On their behalf Mr. Kuttikrishna Menon first raised a preliminary objection to the maintainability of the application in the lower Court on the ground that in probate proceedings no receiver could be appointed, because it could not be said that any right to property was in dispute in such proceedings. Reliance was placed on the decision in *Namagiri Ammal* v. *Subba Rao*[1]. At the outset we may mention that this objection does not appear to have been raised in the lower Court; nor in the memorandum of appeal to this Court in the first instance. It was clearly an afterthought. There was another suit which had been filed by the other widows for a partition of the properties to which the widow who had applied for probate and the daughters and the brothers were all parties. If the technical objection to the sustainability of the application had been taken in the Court below, a similar application would have been filed in the suit for partition. In these circumstances,

1. (1947) 2 M.L.J. 364 : I.L.R. (1948) Mad. 494.

we do not think it fair or proper to permit the appellants to raise this technical objection.

We may also add that we do not see much substance in this objection. In *Namagiri Ammal* v. *Subba Rao*[1], the probate proceedings in the first Court had come to a close. The Court granted a probate and there was a person clothed with due authority to administer the estate. It was clear therefore that the estate was not in need of any adequate representation. In that case the application was for an injunction restraining the person who had been granted probate from taking possession of the properties of the deceased and administering his estate. Having regard to these facts it was held that there was no scope for the application being granted either under Order 39, rule 1, Civil Procedure Code, or under any inherent jurisdiction of the Court. It was pointed out *inter alia* that under section 247 of the Indian Succession Act of 1925, pending any suit touching the validity of the will of a deceased person, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate. It has also been held that the position of such an administrator would be analogous to that of a receiver appointed under Order 40, rule 1, Civil Procedure Code. In the case before us the probate has not yet been granted to any one and therefore it can be said that there is no adequate representation of the estate of the deceased. To safeguard such an estate it cannot be said that it is not just and proper that a person should be appointed receiver or administrator *pendente lite*.

It was next urged by Mr. Kuttikrishna Menon that no case had been made out for the appointment of either a receiver or an administrator *pendente lite*. We do not agree. We have already mentioned that the estate is of considerable magnitude and the income from the lands most of which, it was represented, was under the pannai cultivation of the appellants, must be considerable. In view of the hostile claim being set up by the appellants, there is every probability of attempts to secrete the income and otherwise to defeat the claims of the petitioner in the probate proceedings. We agree with the learned District Judge that in view of the registered will in her favour, the applicant must be deemed to have a *prima facie* case.

Actually the learned District Judge has not in any manner affected the rights of the appellants. He has not ousted them from possession or management. All that he has provided for is a supervision of the management by the appellants in the interests of the persons who would ultimately be held entitled to the share of the deceased. A member of the Bar has been appointed to do that supervision. Obviously, for such supervision he must be entitled to look into the accounts and to take other steps to prevent the income of the property from being secreted or otherwise misappropriated.

It was contended that a receiver with powers such as have been conferred by the learned District Judge is not contemplated under Order 40, rule 1, Civil Procedure Code. But, in our opinion, the language of Order 40, rule 1 is wide and elastic enough to justify an order of the kind made by the learned District Judge. Under clause (*d*) of rule 1 of Order 40, the Court can confer upon the receiver all such powers as may be necessary for the realisation, management, protection and preservation of the property. This is all that the learned District Judge has done by his order appealed against.

Two decisions of the Calcutta High Court in *Jogendra Lal Chowdhury* v. *Atindra Lal Chowdhury*[2] and *Bhuban Mohini Debi* v. *Kiran Bala Debi*[3], were cited to us as well as the decision of the Privy Council in *Benoy Krishna Mukerjee* v. *Satish Chandra Giri*[4], but after all we must come to a conclusion on the facts of the particular case whether the appointment of a receiver is just and convenient.

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1. (1947) 2 M.L.J. 364 : I.L.R. (1948) Mad. 494.
2. (1909) 13 C.L.J. 34.
3. (1910) 13 C.L.J. 47.
4. (1927) 54 M.L.J. 423 : L.R. 55 I.A. 131 : I.L.R. 55 Cal. 720 (P.C.).

It was finally said that the order giving directions to the receiver was vague. If in any respect the directions given are defective, the parties including the appellants are always at liberty to approach the lower Court for further and better directions.

There is no reason to interfere with the order of the lower Court. The appeal is therefore dismissed with the costs of the first respondent. The memorandum of objections is also dismissed with costs.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Synabhog Marthandu Rao (died) .. *Appellant* *

v.

Rao Bahadur Chenna Basappa Kuruba Gond and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 91 and 120—Private sale prior to attachment before judgment—Transaction found to be fraudulent and to defeat attachment—Suit to declare sale deed void—Limitation—Starting point—Onus of proof.

The plaintiff obtained a money decree against the defendant and obtained an order for attachment before judgment on 2nd December, 1936. But the 3rd defendant had on 4th November, 1936, *i.e.*, earlier to the attachment, sold the property attached to the 1st defendant who in his turn sold it to the 2nd defendant in 1942. The plaintiff filed the present suit in 1942 for a declaration that the sale deeds in favour of the defendants were vitiated by fraud and want of consideration, etc. It was found as a fact that the sales were fraudulent and intended to defeat the threatened attachment. On a contention that the suit was barred by limitation,

Held, that the view of the lower Court that time began to run not from the date of the first sale but from the time of the plaintiff's knowledge of it, which admittedly was within three years of the institution of the suit was not erroneous.

The burden of proof is on the defendant to show that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation and the fact that the plaintiff knew some facts such as would raise a bare suspicion is not enough evidence to discharge the onus.

Appeal against the decree of the District Court, Bellary, in A.S. No. 53 of 1944 preferred against the decree of the Court of the District Munsif, Hospet, in O.S. No. 589 of 1942.

K. Umamaheswaram for Appellant.

Kasturi Seshagiri Rao and *K. Sivaprasada Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in the suit out of which this second appeal arises lost before the trial Court but succeeded on appeal. The relevant facts are these :

The plaintiff obtained a decree against the third defendant for over Rs. 9,000 in the Dharwar Sub-Court in the State of Bombay and obtained an attachment before judgment of lands belonging to the third defendant in Harvi of the Harpanahalli taluk of the district of Bellary. The attachment was ordered on 12th November, 1936 and was actually effected on 2nd December, 1936. The third defendant, on 4th November, 1936, sold these lands to the first defendant by a registered sale deed, Exhibit P-2, for Rs. 600. The first defendant, in his turn, sold them to the second defendant under Exhibit D-1, a registered sale deed, for Rs. 800 on 30th July, 1942. Then the plaintiff filed the present suit for a declaration that the sale deed, Exhibits P-2 and D-1 were void, nominal, fraudulent and not binding on him. The finding of both the Courts below is that the two alienations were brought about fraudulently to defeat, in anticipation, the attachment the plaintiff contemplated and further that in spite of these sale deeds the third defendant continued to remain in possession and collected the rent.

The points taken before me for the second defendant, the appellant, are firstly that the suit was barred by limitation and secondly that the suit, not having been instituted by the plaintiff in a representative capacity as required by section 53

* S. A. No. 254 of 1946. 31st March, 1950.

of the Transfer of Property Act ought to have been dismissed and that the application for amendment filed before the learned District Judge on appeal ought to have been rejected.

On the second of the points, I think that there is absolutely no ground for me to interfere with the discretion exercised by the lower appellate Court in allowing the amendment of the plaint sought. On the first of the points it is argued that the view of the lower appellate Court, that time began to run for the suit not from the date of Exhibit P-2 but from the date of the plaintiff's knowledge of that transaction, which admittedly is within 3 years of the institution of the suit, is erroneous. The point however is covered by direct authority of this Court to be found in Madhavan Nair, J.'s view in the case reported in *Narasimham* v. *Narayanarao*[1]. Venkatasubba Rao, J., in that case even went further than Madhavan Nair, J., and took the view that the starting point of limitation was the date on which the plaintiff decided to exercise his option of avoiding the transfer and not the date of the transfer. Whether the latter view is right or not it is unnecessary for me to decide, although I may say that a Bench of the Bombay High Court in *Abdallakhan Daryakhan* v. *Purshottam*[2], disapproved of a view to this effect which was taken by Lokur, J., in that Court. Even adopting the *terminus a quo* adopted by Madhavan Nair, J., it is beyond doubt that the present suit is in time.

My attention has been drawn by the learned counsel for the respondent to the decision of the Privy Council in *O. RM. O. M. SP. Firm* v. *Nagappa Chettiar*[3], where Sir George Rankin delivering the judgment of the Judicial Committee of the Privy Council observed as follows :—

"The claim against the appellant bank is not that a breach of trust was committed by it but that it took the trust property by a transaction with Subrahmaniam which was a breach of trust on his part and with notice that it was a breach of trust. Their Lordships are of opinion that Article 36 of the Limitation Act does not apply to the case and that it comes under Article 120 which prescribes a period of six years from the time 'when the right to sue accrues'. The question is whether time began to run from 10th February, 1920, or from the date in 1929 when the plaintiff came to know that the money of the charities was set off against Subrahmaniam's debt to the appellant bank upon his overdraft. The suit having been brought in 1933 it is necessary for the plaintiff to be able to calculate the time from the later date. The language of Article 120 makes no reference to the knowledge of the plaintiff and is in this respect in contrast with that of other articles, *e.g.*, 90, 91, 92, 95, 96, 114. On the other hand it was recognised by the Board in *Mt. Bolo* v. *Mt. Koklan*[4], that an infringement of the plaintiff's right or at least a clear and unequivocal threat to infringe it is necessary before time begins to run against the plaintiff under the article. The appellate Bench acted upon a principle which has been accepted as applicable to this article in a number of cases in several of the High Courts : *Venkataswara Aiyar* v. *Somasundaram Chettiar*[5], *P. Viswanadham* v. *P. Narayanadas*[6], *Lalsingh* v. *Jaichand*[7], *Matharasingh* v. *Rama Rudra Prasad Sinha*[8], and *Basavayya* v. *Bapannarao*[9]. In the last mentioned case it was said that in cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Such articles as 90, 91, 92, 95 and 96 were mentioned by way of illustration of this principle, and it was considered that Article 120 being an omnibus one the general expression employed in column 3 is necessitated by the variety of suits coming within its purview, in some only of which would fraud, misconduct or mistake be part of the cause of action. It was accordingly held that it would be in consonance with the scheme of the Act if the right to sue should be deemed to accrue under Article 120 from the time of the plaintiff's knowledge of the fraud, misconduct or mistake where such a ground was the basis of the suit. Their Lordships can see some difficulties in this reasoning as a matter of interpretation of the language of the statute and had the matter been *res integra* they are not certain that this interpretation would have prevailed with them. But the decisions in India have established a rule of limitation under Article 120 by which the plaintiff in the cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay. The decisions which have been referred to were given in cases where the plaintiff sought to set aside a decree passed against him when a minor owing to the negligence of his guardian, or a mortgage of property which belonged not to the mortgagor but to a temple, or a transfer by a debtor to defeat his creditors. The subject-matter of the present suit is somewhat different but their Lordships are prepared to follow the principle of the Indian decisions in the present case and to hold that the suit is within time."

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1. A.I.R. 1926 Mad. 66.
2. (1946) 49 Bom.L.R. 875.
3. (1941) 1 M.L.J. 393 : L.R. 67 I.A. 448 : I.L.R. (1941) Mad. 175 (P.C.).
4. (1930) 59 M.L.J. 621 : L.R. 57 I.A. 325 : I.L.R. 11 Lah. 657 (P.C.)
5. (1918) 44 I.C. 551.
6. A.I.R. 1928 Mad. 837.
7. (1930) I.L.R. 12 Lah. 262.
8. (1935) I.L.R. 14 Pat. 824.
9. (1929) 58 M.L.J. 349.

There is also the decision of the Bombay High Court reported in *Abdallakhan Darya-Khan* v. *Purshottam*[1] and referred to by me above in another connection which distinctly rules that a suit by a creditor under section 53 of the Transfer of Property Act, 1882, for a declaration that a transfer by his debtor is intended to defeat or delay him and other creditors and is, therefore, not binding on them, is governed by Article 120 and not by Article 91 of the Indian Limitation Act and that in such a suit limitation starts against the plaintiff when he is fixed with the knowledge about the fraudulent character of the transaction which he seeks to impeach in his suit. The learned Judges have, in that case, further observed, that the burden of proof is on the defendant to show that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation and that the fact that the plaintiff knew some facts such as would raise a bare suspicion is not enough evidenee to discharge this onus. In my view the conclusion reached by the lower appellate Court is correct and this second appeal fails and is dismissed with costs.

(Leave to appeal is refused.)

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

C. S. Gopal .. *Petitioner**

v.

Industrial Tribunal, Madras and another .. *Respondents.*

Industrial tribunal—Decision as to propriety of closure of concern on account of loss—Jurisdiction to order payment of gratuity to workmen.

It cannot be said that a direction to pay gratuity to the workmen is beyond the jurisdiction of the Industrial Tribunal which is called upon to decide the propriety of a closure of the concern on account of loss sustained.

Payments such or bonus or gratuity though strictly cannot be part of the contract between the parties, nevertheless, have been regarded impliedly as part of the terms of employment in an industrial concern.

Petition praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Industrial Tribunal for Engineering Firms and Type Foundries constituted by G.O. Ms. No. 1115, Development, dated 5th March, 1948 and quash the proceedings.

S. Suryaprakasam and *A. S. Prakasam* for Petitioner.

T. K. Raman Nambisan for the Advocate-General (*K. Kuttikrishna Menon*) instructed by the Government Solicitor on behalf of the 1st Respondent.

R. Dandapani and *R. Gopalan* for 2nd Respondent.

The Order of the Court was pronounced by

The Chief Justice.—The management of the Madras Engineering Workers which is the applicant before us in this application made a reference to the Industrial Tribunal for Engineering Firms and Type Foundries, Madras, on 7th July, 1949, requesting permission to suspend work for two months as the firm was suffering loss and needed time to make arrangements for continuing the business. Subsequently on 27th July, 1949, the management requested permission for permanent closure. There was however an experiment to find out if the concern could be successfully continued and the work was continued till 8th September, 1949; but even during this short experimental period loss was incurred. In the circumstances both parties agreed that the business should be closed. The Tribunal permitted the closure of the work with effect from 9th September, 1949. There is now no dispute in this matter.

1. (1946) 49 Bom. L.R. 875.

* C. M. P. No. 9685 of 1949. 20th July, 1950.

What the applicant complains is the direction made by the Tribunal that the management should pay all the workers half a month's wage for every year of service *pro rata*. This payment was directed to be made because the Industrial Tribunal thought that the workers should get some compensation for the sudden closure of the concern. In the award there is a statement that the manager of the applicant firm did not deny his liability, but said he was unable to make the payment while the workers said that he was in a position to pay. Mr. Suryaprakasam for the applicant contended that there was no dispute before the Tribunal as regards the payment of any compensation and that the Tribunal had no jurisdiction to award such compensation. He also attempted to argue that a reference to the Tribunal itself was unnecessary, but we do not think that he can be permitted to raise this objection having himself invoked the jurisdiction of the Tribunal.

The language employed by the Tribunal is not particularly apposite, but in substance what it has done does not appear to call for any interference from us. As a result of the closure of the concern, the workers were thrown out of employment. They were in a sense being compelled to retire. At the time of retirement, when there is no provision for a Provident Fund, it has become customary that the workmen should get some payment by way of gratuity or pension. The workmen in fact did ask for a month's gratuity for every year of service in their memorandum filed on 27th July, 1949. For the management it was pleaded that it was unable to pay any gratuity because of great loss. It cannot be said that a direction to pay gratuity is beyond the jurisdiction of the Industrial Tribunal which is called upon to decide the propriety of a closure of the concern on acccount of the loss sustained. It is true that neither under the common law, nor under any express provision in the contract between the parties is there any liability on the part of the management to pay gratuity to the workers on retirement or compulsory discharge. But it is too late in the day to contend that the Industrial Tribunal cannot go into the question of payments such as bonus or gratuity which though strictly cannot be part of the contract between the parties, nevertheless, have been regarded impliedly as part of the terms of employment in an industrial concern. As the learned Judges say in *Baktavatsalu Naidu* v. *Chrome Leather Company*[1].

> "Payments of gratuities, pensions, and provident fund may be regarded as deferred wages payable upon retirement, and affording a means, which the individual worker may be unable to do for himself, of putting by a little to provide for the days when he will no longer be able to work."

What the Tribunal has done in this case is to direct a payment of the kind referred to in that decision. It may not be exactly compensation for any wrongful act on the part of the management. It really partakes of the nature of a gratuity payable on retirement.

In these circumstances the application must be dismissed; but we make no order as to costs.

K.S. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAGESA SASTRY.

Chekka Subrahmanyam .. *Petitioner**

v.

The Union of India, represented by the Secretary to the Government of India in charge of Railways, New Delhi .. *Respondent.*

Civil Procedure Code (V of 1908), section 80—Notice to Government—Terms of—Validity.

The terms of section 80, Civil Procedure Code are explicit and mandatory and cannot be waived. It requires that the notice should state the name, the residence, etc., of the plaintiff, the cause of action, and the relief prayed for.

1. (1949) 1 M.L.J. 119 at 126.

* C. R. P. No. 753 of 1948. 20th April, 1950.

Where goods were sent through a railway but the delivery was not made and the plaintiff therefore sued the Government claiming damages after sending a notice to the Secretary, Governor-General of India in Council, Department of Railways, New Delhi, on an objection that the notice was not a proper one according to section 80, Civil Procedure Code,

Held, under the circumstances, the notice under section 80, Civil Procedure Code, was a proper one.

Governor-General in Council v. *Krishnaswami*, (1946) 1 M.L.J. 267 and *Governor-General in Council* v. *Raghunathan*, (1946) 2 M.L.J. 65, distinguished.

Bholaram Shidbhan Firm v. *Governor-General in Council*, A.I.R. 1949 Pat. 416, followed.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Kakinada, in S. C. S. No. 212 of 1946.

K. Venkataramana for Petitioner.

King and Partridge for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of S. C. S. No. 212 of 1946 on the file of the Sub-Court, Kakinada. The plaintiff claimed Rs. 400 and odd for loss of goods sent through the M. & S. M. Railway. He gave notices, Ex. A-1 dated 22nd August, 1946, to the Chief Commercial Manager, M. & S. M. Railway, Ex. A-3 of the same date, to the Manager, M.&S.M.Railway and Ex. A.-6 a notice under section 80, Civil Procedure Code, to the Secretary, Governor-General of India in Council, Department of Railways, New Delhi. Amongst several defences raised by the defendant the objection to the validity of the notice, Ex. A-6 is pressed. The trial Court held that proper notice under section 80, Civil Procedure Code, was not given and dismissed the suit.

In revision it is argued that Ex. A-6 satisfies the requirements of section 80 and that the lower Court is wrong in holding otherwise. That notice was issued to " the Secretary, Governor-General of India in Council, Department of Railways, New Delhi," and it states that it is under section 80, Civil Procedure Code. In the body of the notice it is set out that the goods were despatched through the M. & S. M. Railway and that the goods were not delivered. The claim is for compensation for the value of the goods. The last paragraph of the notice reads as follows :

> " Please therefore take notice that if the said amount of Rs. 419-2-0 with interest at 6 per cent. be not paid to my client within 2 months of the receipt of this notice a suit will be filed in due course for the recovery thereof."

The objection to this notice on behalf of the defendant is that it is not stated in Ex. A-6 that the suit will be filed against the Governor-General in Council. Reliance was placed by the learned Judge on two decisions of this Court reported in *Governor-General in Council* v. *Krishnaswami*[1] and *Governor-General in Council* v. *Raghunathan*[2]. In the first of those cases the notice that was given was addressed to the Secretary of State for India. The suit itself was filed against the Secretary of State for India. It was later on amended by describing the defendant as the Governor-General in Council. No fresh notice to the Governor-General in Council was given. It was decided that the notice was bad, as the notice actually stated that the suit would be instituted against the Secretary of State for India. In the present case it will be noted that there is no such mistake committed by the person who issued the notice. The notice merely says that a suit will be instituted but it does not state against whom. The argument on behalf of the respondent is that unless the notice expressly states in itself that the suit will be against the Governor-General in Council section 80 is not complied with. I think this reading of section 80 is not warranted. I realise that the terms of section 80 are explicit and mandatory and cannot be waived. It requires that the notice should state the name, the residence, etc., of the plaintiff, the cause of action and the relief. There is no objection in this case that the notice was not delivered to the proper person.

1. (1946) 1 M.L.J. 267. 2. (1946) 2 M.L.J. 65.

The only objection is that the notice does not say in the last paragraph where a reference to the proposed suit is made that the suit will be against the Governor-General in Council. Any person who reads this notice can have no doubt that it is a suit proposed to be filed against the Crown or the Government. There is no reason to think that the suit was to be against the Secretary as a public officer concerned. Obviously he has had nothing to do with any of these transactions in question, and the only reasonable way of understanding the notice is that it is given as indicated in section 80 to the Secretary of the Railway Department, because it is a suit which is intended to be filed against the Government. The decision in *Governor-General in Council* v. *Krishnaswami*[1] is clearly distinguishable because there the notice itself stated distinctly that the suit will be against the Secretary of State, who is altogether a different person from the Governor-General in Council. Learned counsel drew my attention to a recent decision of the Patna High Court in *Bholaram Shidbhan Firm* v. *Governor-General in Council*[2], where the terms of section 80 are discussed. I am in agreement with the views contained therein.

In these circumstances I have no doubt that the notice is a proper notice under section 80, Civil Procedure Code. I set aside the decree of the trial Court, and remand the case for fresh disposal on the other points raised in the pleadings. The petitioner is entitled to get his costs of this revision petition from the respondent.

K. C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Lachuma Goundan, son of Pachiappa Goundan and others .. *Appellants**

v.

Pandiyappan *alias* Annamalai Goundan and others .. *Respondents.*

Irrigation rights—Right of ryotwari proprietor to water—Liability of Government.

The obligation of the Government is to supply water necessary and sufficient for the accustomed requirements of the ryotwari proprietor so long as such supply is not adversely affected by natural causes such as deficiency of rainfall or scarcity of water in the rivers from which the supply channels take off. The ryotwari proprietor has a claim against the Government only when the Government diverts, to his prejudice, water which is available in the channel so as to materially diminish the supply of water that he had been accustomed to receive from the channel for the cultivation of his wet lands. In other cases the interference by the Government with the existing rights of irrigation from artificial channels constructed by Government is not an actionable wrong and the ryotwari proprietor is not entitled to insist that the entire volume of water which had been flowing through the artificial channel should, for all time, be allowed to run along the channel without diminution or diversion by the Government. Damage to the ryotwari proprietor actual or inevitable, is the gist of the action as well as the basis of the liability of the Government.

Appeal against the decree of the Court of the Subordinate Judge, Salem, in A. S. No. 1 of 1946 preferred against the decree of the Court of the District Munsif, Krishnagiri, in O. S. No. 505 of 1940.

T. L. Venkatarama Aiyar for Appellants.

M. S. Venkatarama Aiyar, K. R. Krishnaswami Aiyar, S. P. Subramania Aiyar and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—Plaintiffs 1, 2, 5, 6 and 8 are the appellants in this second appeal. The suit was filed by the plaintiffs in a representative capacity on behalf of the villagers of Nadamuthur and Chinnamuthur against the villagers of Periamuthur and the Province of Madras, for a declaration that they were entitled to the usual mamool supply and distribution of the water of the Desabandam channel taking off from the south Pennar river, for 24 hours as against 12 hours of the defendants, or, in the alternative, for effecting any other fair and equitable distribution of the water flowing in the channel in proportion to the respective wet ayacut extents

1. (1946) 1 M.L.J. 267.
2. A.I.R. 1949 Pat. 416.

* S. A. No. 829 of 1947. 23rd March, 1950.

of the three villages. There was also a claim for Rs. 100 by way of damages against the defendants. The suit has been dismissed by the Courts below.

From the channel styled the Dasabandam channel taking off from the south Pennar river, the wet lands in the three villages have been irrigated from a long time. The channel is an artificial channel which vests in the Government. The extent of wet cultivation in the two villages of the plaintiffs is 100 acres while the extent of wet cultivation in the defendants' village is 75 acres, but the lands of the defendants' village are on a higher level and water has to be baled out from the channel. The second defendant who is the Dasabandam inamdar has the duty of keeping the channel in good repair. It may be stated that all the three villages are ryotwari villages and there have been, since 1939, quarrels between these villagers regarding the distribution of the water flowing in this channel, which culminated in an order of the Sub-Collector of Hosur, dated 13th March, 1940, by which he directed that the village of Periamuthur should have 12 hours of exclusive supply during day time and the villages of the plaintiffs should have their turn of 12 hours during night time. The order of the Sub-Collector was confirmed on 1st May, 1940, by the Collector of Salem. The plaintiffs, feeling aggrieved by this order, have brought the present suit.

Several witnesses have been examined in the case and some documents have been filed to prove the usual method of distribution by turns of the channel water before the disputes arose between the parties. On this point both the Courts below found that there was no documentary evidence, or acceptable oral evidence, to prove the usage set up by the plaintiffs regarding the turn of water. It was also held by the Courts below that the mode of distribution now ordered by the Collector was not an unfair or inequitable distribution of the channel water having regard to the lie of the lands and the needs of the villagers. It was also held by the Courts below that the plaintiffs have not been damnified to any extent by the order of the Government regulating the supply of water and therefore their claim for damages was unsustainable.

Mr. T. L. Venkatarama Aiyar for the appellants has challenged the findings of the Courts below on all these points. In my opinion it is unnecessary to consider many of the matters adverted to in the course of the arguments by the learned counsel in view of the allegations in the pleadings and the finding that no injury or damage has been caused to the plaintiffs.

Beginning with *Kristna Aiyar* v. *Vencatachala Mudali*[1], it has been held in a series of decisions of this Court that the Government has a right to distribute the water of Government channels among ryotwari proprietors holding wet lands in the ayacut of the channel the only limitation on their power being that they should not disturb existing arrangements for the supply of water without providing an equally convenient source of supply of water necessary and sufficient for the cultivation of their wet lands. The rights and obligations as between the Government and ryotwari proprietors in the matter of the supply of water for irrigation purposes rest largely on custom and usage and they have been expounded in the decisions of this Court from time to time. In *Sankaravadivelu Pillai* v. *Secretary of State for India*[2], and *Secretary of State for India* v. *Muthuveerama Reddi*[3], it is taken to be settled law that the Government has the right to distribute the water of Government channels for the benefit of the ryotwari proprietors depending upon the ayacut subject to the right of a ryotwari proprietor to whom water had been supplied by the Government to continue to receive such supply of water as would be necessary and sufficient for his accustomed requirements. To the same effect is the decision in *Fisher* v. *Secretary of State for India*[4]. The Government in exercising its prerogative right of distribution of water flowing in Government channels should not inflict sensible injury on ryotwari proprietors who have been accustomed to receive a supply of water sufficient for the purposes of irrigating their wet lands. Subject

1. (1872) 7 M.H.C.R. 60.
2. (1904) 15 M.L.J. 32 : I.L.R. 28 Mad. 72.
3. (1910) I.L.R. 34 Mad. 82.
4. (1908) 19 M.L.J. 131 : I.L.R. 32 Mad. 141.

to the aforesaid conditions, it has been recognised by decisions that the Government has the right to change the source of irrigation or the method of distribution by which ryotwari proprietors have been supplied with water and also to regulate the use of the waters flowing in artificial channels constructed by or belonging to the Government so as to ensure a fair and equitable distribution of water among all the ryotwari proprietors depending on the ayacut of the channel. A ryotwari proprietor could not plead, as against the Government that he has an absolute right to all the volume of water flowing through a particular channel acquired either by grant or by prescription ; nor can he object to the Government allowing other ryotwari proprietors to utilise the water of a Government channel unless the usual supply of water necessary and sufficient for the cultivation of the wet lands of the former, is prejudicially interfered with. It may here be observed that though the ryotwari proprietor is ordinarily spoken of as being entitled to the usual and accustomed supply of water, there is no corresponding obligation on the part of the Government to find the required supply of water at any cost on pain of being held liable in damages for default. The obligation of the Government is to supply water necessary and sufficient for the acustomed requirements of the ryotwari proprietor so long as such supply is not adversely affected by natural causes such as a deficiency of rainfall or scarcity of water in the rivers from which the supply channels take off. From this it follows that the ryotwari proprietor has a claim against the Government only when the Government diverts, to his prejudice, water which is available in the channel so as to materialy diminish the supply of water that he had been accustomed to receive from the channel for the cultivation of his wet lands. In other cases the interference by the Government with the existing rights of irrigation from artificial channels constructed by Government is not an actionable wrong and the ryotwari proprietor is not entitled to insist that the entire volume of water which had been flowing through the artificial channel should, for all time, be allowed to run along the channel without diminution or diversion by the Government. In other words, damage to the ryotwari proprietor, actual or inevitable, is the gist of the action as well as the basis of Government's liability.

Judged in the light of these principles I am of opinion that the plaintiff's suit must fail. There is no allegation in the plaint, or in the notice which preceded the plaint, that the order of the Government in fixing the turns for the distribution of the water flowing in the channel in question has in any way led to a diminution in the supply of water necessary and sufficient for the cultivation of the wet lands in the plaintiffs' villages. All that the plaintiffs say is that they had a mamool right of irrigation by which the water flowing in the channel ought to be divided in the proportion of the area of the respective villages. They do not say that the water flowing in the channel, as a result of the order of the Collector regulating the turns of the villages, has injuriously affected the cultivation of their lands, or deprived them of water which was necessary for the cultivation of their wet lands under the ayacut of the channel. The plaintiffs proceeded on the basis that they had an absolute right to all the water flowing in the channel according to the extent of their lands as compared with the area of the defendants' village. This is not a legally sustainable claim. The written statements of the defendants raise pointedly the contention that the action of the Government was not an illegal or improper act and that the plaintiffs had no cause of action in the absence of any allegation of any damage that had accrued, or that must necessarily accrue, as the result of the action of the Government. The findings of both the Courts below is that no such damage has occurred, or is likely to occur. On this ground alone, without considering the other matters discussed in the judgments of the Courts below, I hold that the second appeal fails. I therefore dismiss this second appeal with costs—one set.

Leave to appeal is refused.

V. P. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Thummalapalli Lakshmi Narayanamurthi and another .. *Appellants* *

v.

Sait Purnachand Chatrabhan a firm of Bankers represented by Muktyar Agent Channaji and others .. *Respondents.*

Civil Procedure Code (V of 1908), Section 48—Application twelve years after decree to amend execution application by adding receiver as party—Receiver already functioning when execution petition was filed—Amendment, if can be allowed.

Where twelve years had passed after the passing of a decree a receiver was sought to be brought upon record in the execution application to represent the judgment-debtors already on record, even though the receiver was functioning for the judgment-debtors at the very time when the execution petition was filed, on the question whether the amendment sought could be permitted,

Held : A receiver is only the representative of the judgment-debtor. He does not become the owner, but in order effectively to get at the properties without any danger of the right to do so being challenged, the receiver is also made a party. The fact that he was operating even when the execution petition was filed, and that the decree-holder could have found this out with diligence on his part will only be a circumstance for saddling him with costs when allowing the amendment and will not be a circumstance converting the amendment asked for into a fundamental one, or justifying the refusal of such an amendment.

Case-law reviewed.

Appeal against the order of the District Court, West Godavari at Eluru, dated 9th February, 1948, in A.S. No. 518 of 1946 (E.P. No. 76 of 1944, Sub-Court, Eluru, O.S. No. 33 of 1932 on the file of the District Court, East Godavari at Rajahmundry).

V. Parthasarathi for Appellants.

D. Narasaraju for Respondents.

The Court delivered the following

JUDGMENT.—Only two points arise for determination in these two Civil Miscellaneous Second Appeals. The first is whether both the lower Courts went wrong in overruling the appellants' plea of limitation and allowing the receiver of Court to be brought on record, after 12 years had elapsed since the passing of the decree, to represent the judgment-debtors already on record even though the receiver was functioning for the judgment-debtors at the very time when the execution petition was filed. The second point which is only raised before me and in the lower appellate Court and was not taken before the trial Court, is that there has been a partition in the family after the decree in execution now was got against the manager of the joint family, and that the decree-holder, therefore could not proceed against the shares of the junior members without establishing their liability and the exact quantum of their liability in a fresh suit. This second point cannot be gone into as it is a point not taken in the trial Court and was raised for the first time only in the lower appellate Court and involves a question of mixed law and fact, and it is admitted that the decree against the manager now in execution was a decree binding on all the members of the joint family before partition and this decree-holder had not been privy to the partition or agreed to restrict the liability of each member regarding this decree to a certain figure. So, only the first pount really arises for consideration before me in these Civil Miscellaneous Second Appeals.

Mr. V. Parthasarathi for the appellants urged vehemently that under section 48, Civil Procedure Code, it will be unthinkable to allow any execution petition to be amended by adding a receiver, instead of the judgment-debtors, in order to get at the properties without avail, and said that such an amendment will be like adding a new party, or seeking a new mode of relief, or attaching new properties, and should be disallowed seeing that the amendment was prayed for after the expiry of 12 years from the date of the decree. There is absolutely no doubt that no

*A.A.A.O. Nos. 151 and 153 of 1948. 18th August, 1950.

person can be allowed to amend an execution petition after the expiry of 12 years, under section 48, in the Courts to which section 48 applies, by seeking to proceed against persons other than those against whom it was originally sought to execute the decree, or to seek to execute the decree in a manner different from the way in which it was sought to be executed, as by applying for attachment and sale of immoveable properties whereas the original prayer was for attachment of moveables or arrest of the judgment-debtor. This is well settled. If authority is necessary for this obvious position, the rulings in *Ram Ranbijaya Prasad* v. *Kesho Prasad*[1] and *Bhanpal Singh* v. *Siya Ram*[2] will show this; nor does Mr. Narasaraju, appearing for the other side, dispute this. The question here, however, is whether the addition of a receiver, who is in charge of the properties of the judgment-debtors (already on record) sought to be proceeded against will amount to the addition of a *new party*. It is admitted that only the same old properties are sought to be proceeded against, and that the execution petition was filed before limitation operated though the receiver was sought to be brought on record, in lieu of the judgment-debtors, after 12 years had elapsed since the decree. A receiver appointed by Court does not become the *owner* of the properties, and will only be holding the properties for the benefit of the true owners, like the guardian of a minor, the manager of a lunatic, the trustee of a temple, etc. This has been well recognised in *Mangtulal* v. *Daya Shankar*[3]. In *Ghasiram Marwari* v. *Raja Shiba Prasad Singh*[4], a Bench of the Patna High Court has held that an execution petition is not necessarily barred merely because one of the judgment-debtors is not described as a minor in the execution petition and a guardian *ad litem* is not appointed till after the period of limitation under section 48; it has held that the subsequent appointment of a guardian *ad litem* does not amount to the addition of *a new party* to the suit or proceeding which must be deemed to have been instituted against the minor on the date on which it was filed. The principles in the last two cases must apply here also. I am unable to agree with Mr. Parthasarathi that the ruling in *Ghasiram Marwari* v. *Raja Shiba Prasad Singh*[4], turned upon the fact that there were other judgment-debtors in that case who could be said to have effectively represented the minor judgment-debtor. Mr. Parthasarathi urged that the case might be different if a receiver was appointed in the course of the execution petition to take charge of the properties of the judgment-debtors sought to be proceeded against, but that, here, the receiver was in charge of the properties even when the execution petition was filed, and the decree-holder ought not to have been allowed to amend the execution petition by bringing the receiver on record in lieu of the judgment-debtors when he could and should have done it before 12 years had elapsed. He said that the addition of the receiver in this case would therefore be *a fundamental alteration* of the scope of the execution petition, and not merely an *incidental rectification of a formal defect*. He urged that whenever a decree-holder, for whatever reason, be it from ignorance or carelessness, files an execution petition which contains allegations against the facts obtaining then, he cannot be allowed to amend the execution petition after 12 years have elapsed since the decree. I cannot agree with this extreme argument. Suppose, for instance, a decree-holder did not know the judgment-debtor to have become a lunatic at the time he filed the execution petition, and discovers it a few days later and wants to add the manager of the lunatic's estate after the 12 years' period was elapsed, he having filed the execution petition on the last day of limitation. Is he to be precluded from the remedy he seeks? I am of opinion that he should not be. So too suppose a decree-holder has asked for attachment of some cattle which he has seen housed in a village *A* by the judgment-debtor, but by the time he files the execution petition on the last day of limitation, the cattle have been, unknown to him, removed to village *B*, 3 or 4 miles away, can it be said that the very same cattle cannot be attached and sold after giving him the indulgence of amending the name of the village so that the officers of Court may go to the place where the cattle really are and attach them? Again,

1. A.I.R. 1941 Pat. 635.
2. A.I.R. 1942 All. 442.
3. A.I.R. 1936 Pat. 574.
4. (1937) I.L.R. 16 Pat. 316.

suppose a decree-holder, believing that a sum of Rs.50,000 belonging to the judgment-debtor is in the Reserve Bank, Madras, files an execution petition for attaching that money to satisfy his decree for a lakh of rupees, but, unknown to him, the money has been transferred to another branch of the bank, or another bank, before he files the execution petition on the last day of limitation, can it be said that he should not be given the indulgence of amending the execution petition by stating the exact place where the money is to be found for attachment or for serving a garnishee notice? I do not think so. These are all things which merely affect the *description* of the properties or parties, and rectify the incidental *defects*. They do not effect *fundamental alterations*. A receiver is only the representative of the judgment-debtor. He does not become the *owner*, but, in order effectively to get at the properties without any danger of the right to do so being challenged, the receiver also is made a party. The fact that the receiver was operating even when the execution petition was filed, and that the decree-holder could have found this out with diligence will only be a circumstance for saddling him with costs when allowing the amendment, and will not be a circumstance converting the amendment asked for into *a fundamental one*, or justifying the refusal of such amendment. Of course, if any new property with the receiver, though belonging to the judgment-debtor, is sought to be included, by the amendment prayed for after 12 years, that amendment will be refused, to that extent. Here we are concerned with no such position. In the result, therefore, I hold that the orders of both the lower Courts directing the receiver to be brought on record and the execution petitions to proceed were correct and proper. These Civil Miscellaneous Second Appeals deserve to be and are hereby dismissed with costs.

Leave refused.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

The Province of Madras represented by the District Collector, Tanjore .. *Appellant* *

v.

The District Board of Tanjore, by the Collector and Special Officer, Tanjore District Board .. *Respondent.*

Water cess—Construction by Government of Cauveri-Mettur project—Flow of more water in a channel—Levy of water cess by reason of such construction on inam lands which were not liable to such cess.

Merely because the Government have constructed the Cauveri-Mettur project, as a consequence of which more water flowed into a channel, it cannot be said that the Government is justified in the levy of water cess in case of lands in Inam villages which were not liable to pay water cess from time immemorial.

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in A.S. No. 153 of 1946, preferred against the decree of the Court of the District Munsif, Pattukottai, in O.S. No. 48 of 1945.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

V. Ramaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The Province of Madras, represented by the District Collector, Tanjore, is the appellant in this second appeal, and the respondent is the District Board of Tanjore, by its president. The suit raises a dispute regarding water rate demanded by the Government. The management of certain inam villages belonging to a *chatram* is vested in the District Board. The *chatram* in question is Mohanambalpuram Chatram situated at Rajamatam. The villages were granted in inam to the *chatram* by a late Rajah of Tanjore. The grant of these inams was recognised at the time of the inam settlement, and the grant was confirmed. The channel known as Puttuvanachi Vari, is the source of supply of water for the irrigation

* S.A. No. 1362 of 1947. 20th April, 1950.

of the inam villages, and the channel is admittedly situated within the limits of the inam villages. From time immemorial, the water from the channel was drawn for the purpose of irrigation of lands in the villages, without any liability to pay water cess to the Government. This was the state of affairs both before and after the inam settlement. It would appear that in one of the villages there is also a tank to which the water is taken from Puttuvanachi Vari. After the construction of the Cauveri-Mettur project the flow of water in these channels became more certain and perhaps larger in volume. On this ground the Government levied irrigation cess from the plaintiff, the District Board of Tanjore, and therefore the plaintiff was obliged to institute the present suit for declaration that the lands were entitled to free irrigation rights and also for a refund of the water cess collected from the plaintiff. The suit was successful in both the courts. Hence this second appeal.

The only question for consideration is, whether the fact that more water is made to flow into the Puttuvanachi Vari channel by the Governmet in consequence of the construction of the Cauveri-Mettur project, is the Government justified in the levy of water cess.

It is now well established law that the extent of the free irrigation right of a zamindar or that of an inamdar in respect of lands in his estate is governed by the decision of the Uralam Case *Prasadha Rao* v. *Secretary of State for India*[1]. The principle of this decision is that the permanent settlement with a zamindar constitutes an engagement within the meaning of the proviso to section 1 of the Madras Irrigation Cess Act.

On the same analogy, it is established now that the inam settlement is also an engagement within the said proviso. The extent of the rights of free irrigation has to be measured not with reference to the area of the land irrigated at the time of the settlement, but by a reference to the physical conditions of the channel and its size. If, at the time of the engagement, the inamdar or the zamindar was drawing water to his lands from a channel of particular dimensions, the dimensions of that channel provide the measure of the right of free irrigation. This has been decided by the Privy Council in the Swamigal's case, *Secretary of State for India* v. *Vidhya Varada Thirtha Swamigal*[2]. In some cases it may be that the zamindar or the inamdar not only took the water through the channel, but also stored it in an irrigation tank to facilitate continuous supply of water to his lands. The increase in the dimensions of the tank by raising, for example, the F. T. L. would not make him liable to pay water cess on the ground that he had exceeded his right by increasing the storage capacity of the tank, so long as he does not alter the dimensions of the channel which is situate in his inam village; see *Yahya Ally Saheb* v. *Secretary of State*[3]. My attention was drawn by the learned Government Pleader to an observation of Mr. Justice Somayya in *Sri Ekambaraswami Temple of Sirukarumbur* v. *The Provincial Government of Madras*[4], where the learned Judge at page 318 observed :

> "the only ground which would justify the Government in levying water cess is that the channel Ammanam Kolakkal was interfered with at its entry into the village or above, and that a larger quantity of water is taken from the channel than what was hitherto flowing into the village."

If one considers the facts of the case, the importance of that observation of the learned Judge would be evident. In the inam village there was a tank which irrigates the lands of the village. The water to this tank was supplied by a Government channel known as Ammanam Kolakkal, which entered the village from the North, and after supplying water to the tank, passed on to the village lower down. The Government attempted to justify the levy of water cess on the ground that the inamdars raised the level of the surplus water of the tank and therefore stored more water in the tank than they were entitled to. The learned Judge pointed out, after referring to the decision in *Yahya Ally Saheb* v. *Secretary of State*[3], and the *Swamigal's case*[2], that the tank and the channel situate within the limits of the village passed to the inamdars under the grant, and that the inamdars were

1. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 (P.C.).
2. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. 1942 Mad 893 (P.C.).
3. (1927) 53 M.L.J. 769.
4. (1945) 1 M.L.J. 317.

entitled to irrigate more lands by the water of that tank, and were entitled even to raise a second crop on what was a single crop land. In the context, the observations of the learned Judge means, in my opinion, that so long as the dimensions of the channel were not increased and were not interfered with either above or in the village, it would not be exceeding the right recognised under law, and under the engagement the Government would not be justified in levying water cess. It is not certainly authority for the position that if more water was brought into a channel whose dimensions remained unaltered, the Government are entitled to levy water cess on the ground that the free irrigation right recognised by an engagement at the time of the inam settlement was exceeded. The expression "more water" used in some of the decisions no doubt on first impression, appear to be ambiguous; but in the context of the decisions it only means more water in the sense that the measure of the rights recognised under the law was exceeded, and that therefore the water taken over and above the right was more water. From such expression in some of the judgments, and divorcing them from the context, it cannot be inferred that merely because the Government have constructed the Cauveri-Mettur project, as a consequence of which more water flowed into the channel, the Government was justified in the levy of water cess in the present case. In my opinion, therefore, the conclusion arrived at by the Courts below is correct, and the second appeal fails and is dismissed with costs. (No leave.)

V. P. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAGHAVA RAO.

Koneru Satyanarayana .. *Appellant**

v.

Vempati Kodandarama Sastri and another .. *Respondents.*

Madras Estates Land Act (I of 1908), section 28 (as amended by Madras Act XVIII of 1936)—Fair and equitable rent in the case of land becoming an estate within the meaning of section 3 (2) (d)—Existence of agreement between parties as to rent—Effect.

In the case of land which has become an estate for the first time under the Madras Estates Land (Third Amendment) Act, in the matter of fixing the fair and equitable rent a distinction must be made between cases in which on the 1st day of November, 1933, there is no rent obtaining under a lawful bargain between the parties and cases in which there is rent so obtaining. "Lawfully payable" in the proviso to section 28 of the Estates Land Act can mean nothing more than payable under a lawful bargain between the parties on the date in question.

Where it is found as fact that a rate had been stipulated by a document executed between the parties which was current on the 1st day of November, 1933, and no ground is suggested for the invalidation of the bargain between the parties as evidenced by the document except that it must *prima facie* be unfair to regard the rent obtaining between the parties prior to the coming into force of the Amendment Act of 1936 as the lawful rent after the conferment of occupancy right on the tenant, that cannot be a consideration which can enter into the construction of section 28 which is clear that in such a case the rent so agreed shall be presumed to be the fair and equitable rent until the contrary is proved. Of course, where there is no such rent found fixed, the Court may have to fix the rent and in so doing it may have to adopt the rate under the waram system.

Appeal against the decree of the District Court, Krishna, at Masulipatam, in A. S. Nos. 135 and 287 of 1945, preferred against the decree of the Special Deputy Collector's Court, Bandar division, in S. S. No. 151 of 1941, etc.

B. V. Ramanarasu for Appellant.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—These two second appeals arise out of two summary suits for rent on the file of the Special Deputy Collector, Bezwada, and Bandar division. The lands in respect of which rents were claimed are situate in the inam village of Kuchipudi in the district of Krishna, which, according to the line of argument adopted

* S.A. Nos. 1061 and 1062 of 1947. 8th August, 1950.

in this Court, must be taken to have become an estate for the first time under the Madras Estates Land (Third Amendment) Act (XVIII of 1936). At the time that the Act came into force there was Exhibit C, a khat of 12th April, 1932, in force between the Agraharamdars, the plaintiffs and the tenant, the defendant. The Deputy Collector held that the rent fixed by that document had to be altered suitably to the fact of permanent occupancy right which the Act for the first time conferred upon the defendant, and that a fair and equitable rent payable should be ascertained by him by substituting for the bags of paddy stipulated under that document what might represent a half of the net income of the land as proved by the evidence. This he did following the decision of Chandrasekhara Aiyar, J., in S. A. No. 1366 of 1942 (not reported). Referring to that decision he says :

"In S.A. No. 1366 of 1942, on the file of the High Court, the question of fixing a fair and equitable rent in respect of lands in another inam village of this district arose for consideration. There also, kattubadi was being paid at so many bags per acre as in the present case. His Lordship observed that in fixing the rent the conferment of occupancy rights should be taken into account and adopted the rate under the waram system where the landlord and the tenant would take half and half in the net income."

Against his judgments there were appeals to the Court of the District Judge of Krishna at Masulipatam who held reversing him that :

" the rent payable by the defendant shall be as stipulated under Exhibit C, the terms of which shall be presumed to enure for the suit faslis under the presumption enacted by section 27 of the Act."

The point arising for decision on the argument here is whether the rate of the Special Deputy Collector or of the District Judge should be accepted by me.

In the initial stages of the argument I was inclined to think that the Special Deputy Collector did right and the learned District Judge did wrong, although at the close of the argument my mind was not made up one way or the other. I have, since reservation of judgment, carefully considered the matter and have come to the conclusion that these appeals should fail.

The argument of Mr. Ramanarasu that what the Special Deputy Collector did was right has been attempted to be supported by reference to a decision of this Court in *Raja of Pithapuram* v. *Jonnalagodda Venkatasubba Rao*[1], as well as to the unreported decision of Chandrasekhara Aiyar, J., above mentioned. In *Raja of Pithapuram* v. *Jonnalagodda Venkatasubba Rao*[1], Seshagiri Aiyar and Napier, JJ., held that an agreement to pay an increased rate of rent entered into before the Madras Estates Land Act came into force by a person who was a yearly tenant did not bind him after the Act came into force, as his status became changed by the Act. Dealing with section 52 of the Madras Estates Land Act relied upon in support of the argument that the agreement would bind the tenant notwithstanding the change of status created by the Act, the learned Judges held that the section applied only to pattas and muchilikas exchanged since the Act came into force, and that no retrospective effect could be given to that section so as to bring within its operation pattas and muchilikas executed under the Rent Recovery Act (VIII of 1865) and tenable for a year only. It must be noted however that this view did not commend itself to a Bench of this Court (Oldfield and Phillips, JJ.) in a later case reported in *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[2]. There the Court observed :

"The more important objection is that Exhibit C-1 was obtained for fasli 1311 under Act VIII of 1865 in a Court, which would not be competent to try the suit, in which it is now proposed to plead it, and, therefore, it cannot be *res judicata* under section 11 of the Civil Procedure Code. The answer is that the general doctrine of *res judicata* is not in question, but the application of the special rule stated in section 52 (3), Estates Land Act, under which muchilikas decreed for any revenue year remain in force until the beginning of the year for which fresh ones are exchanged or decreed, and that there is no reason for restricting the scope of the general reference to muchilikas decreed to those decreed by any particular description of Court. Such a restriction was, no doubt, imposed on the interpretation of the section in *Vaddadi Jagannadha Bhupathi Deo Garu* v. *Paddala Appalaswami*[3] on the ground that pattas and muchilikas under Act VIII of 1865 were current for one year only and that the Legislature cannot be supposed to have intended to enlarge their currency

1. (1915) 31 I.C. 93.
2. (1916) 40 I.C. 587.
3. (1914) 28 M.L.J. 75.

But the words of the section are clear, as they stand, and there is, in my opinion, no necessity or justification for reference to extrinsic considerations in order to their construction. In *Raja of Pithapuram v. Jonnalagedda Venkatasubba Rao*[1], the restricted interpretation was supported also on the ground that any other would have given retrospective operation to the section, in the sense presumably that the effect of the exchange of patta and muchilika would be extended beyond the period originally contemplated by the parties to it. But, if that case cannot be distinguished on the ground that, unlike the present, it deals with non-occupancy tenants, there is still no reason for treating this objection as decisive. For the presumption against a retrospective construction is not applicable, simply because a part of the requisite for the action of the Statute is drawn from the time antecedent to its passing (Maxwell's Interpretation of Statutes, 3rd Edition, page 307) or where the Statute affects only the procedure of the Courts (page 313); and in the present case, the unrestricted effect of the section is only to recognise a relation, which existed before the Act, and to direct its continuance until it is terminated by the method for which the Act provides."

It is significant too that the decision in *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[2], was affirmed by the Privy Council in *Radhakrishna Aiyar* v. *Sundaraswamier*[3]. Lord Shaw in the Privy Council expresses the full agreement of the Board with this view at page 484 of the report. I may add however that the position before me is not strictly one covered by the rulings of the High Court in *Raja of Pithapuram* v. *Jonnalagodda Venkatasubba Rao*[1] and *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[2] or the decision of the Privy Council in *Radhakrishna Aiyar* v. *Sundaraswamier*[3].

The question here really is how the proviso to section 28 of the Madras Estates Land Act of 1908 introduced by the Madras Estates Land (Third Amendment) Act of 1936 is to be understood. The language of the proviso is, in my opinion, sufficiently clear that in the case of an estate within the meaning of sub-clause (*d*) of clause (2) of section 3 the rent or the rate of rent lawfully payable by a ryot or tenant on the 1st day of November, 1933, shall be presumed to be fair and equitable at the commencement of the Madras Estates Land (Third Amendment) Act (XVIII of 1936), until the contrary is proved. The sole and simple question for determination is whether the rate stipulated by Exhibit C which was current on the 1st day of November, 1933, is or is not to be regarded as the rent lawfully payable within the proviso. No ground has been suggested for the invalidation of the bargain between the parties as evidenced by Exhibit C except that it must *prima facie* be unfair to regard the rent obtaining between the parties prior to the coming into force of the Act of 1936 as the lawful rent after conferment of occupancy right on the tenant by that Act. That, in my opinion, is not a consideration which can enter into the construction of the statute which is perfectly clear. Of course where no rent is found to have been fixed by a bargain between the parties continuing in operation on the 1st day of November, 1933, the Court may have to fix the rent and in so doing it may have to adopt a basis like the one adopted by Chandrasekhara Aiyar, J., in the unreported decision referred to in the foregoing. As observed by Somayya, J., in *Ramakrishna Somayajulu* v. *Krishnayya*[4] :

"Where it is not a case in which there was no rent payable on the land on the date when the amending Act came into force and the villages in question became converted into estates, whether the terms expired before the Act came into force or whether they were still running, section 27 of the Estates Land Act would apply, namely, that the rent payable for previous years would be presumed to be the fair rent under the Act."

There, no doubt, the question of the proviso to section 28 and the proper construction of the words "lawfully payable" occurring in the proviso did not arise for determination; but the principle which to my mind seems to be obvious is that a distinction must of course be made between cases in which on the 1st day of November, 1933, there is no rent obtaining under a lawful bargain between the parties and cases in which there is rent so obtaining. "Lawfully payable" in the proviso can mean nothing more than payable under a lawful bargain between the parties on the date in question.

For these reasons these second appeals must be dismissed with costs. (No leave.)

V. S. ——— *Appeals dismissed.*

1. (1915) 31 I.C. 93.
2. (1916) 40 I.C. 587.
3. (1922) 43 M.L.J. 323 : L.R. 49 I.A. 211 : I.L.R. 45 Mad. 475 (P.C.).
4. (1943) 2 M.L.J. 494.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Ponnuswamy and others .. *Petitioners**

v.

O. Mahipathy .. *Respondent.*

Penal Code (XLV of 1860), section 441—Accused convicted for unlawfully entering property in the possession of another—If can be convicted for continuing to remain there after entry.

Where a person has been convicted for unlawfully entering into or upon property in the possession of another he cannot be convicted for continuing to remain after that unlawfully. The offence is complete as soon as there was unlawful entry and it falls within section 441, Penal Code. The accused cannot be proceeded again for remaining there. The plea of *autrefois convict* will be open to the accused in such a case. His continuing to remain unlawfully will be an offence only if it falls under the second part of section 411 of the Indian Penal Code and for the second part it will be an offence only if he having lawful entry unlawfully remains on the property.

Saibaj v. *Gaffoor*,, A.I.R. 1932 Nag. 112 ; *Anantram* v. *Emperor*, A.I.R. 1940 Nag. 117 ; *Emperor* v. *Bandhu Singh*, (1927) I.L.R. 6 Pat. 794 ; *Emperor* v. *Baldeva*, (1933) I.L.R. 56 All. 33 at 37 and *Emperor* v. *Jamuna Das*, I.L.R. (1944) All. 754, considered.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying that the High Court will be pleased to revise the order of the Third Presidency Magistrate, Egmore, Madras, dated the 27th day of December, 1948, and made in C. C. No. 1785 of 1948.

M. Srinivasagopalan and *C. Ramanna* for Petitioners.

State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

The Court made the following

ORDER.—This revision raises an interesting question of law, *viz.*, whether a person who unlawfully enters into or upon the property in the possession of another so as to be guilty of criminal trespass can be held to be guilty of the offence if he unlawfully continues to remain there with one of the intentions mentioned herein.

The facts of the case are these. House No. 8, Barber's Bridge 2nd lane, belonged to the accused who had mortgaged it to the complainant. The bank brought the property to sale and itself purchased it in auction. Execution was taken for delivery of possession of the property. On 23rd August, 1947, bailiff came and delivered vacant possession of the property to the complainant. Subsequently on the same day the accused broke open the lock and occupied the house. A criminal complaint was laid and the accused was convicted on 14th June, 1948, for trespass and sentenced to a fine of Rs. 75. The accused paid off the fine and continued to remain in possession. On 26th June, 1948, and 27th June, 1948, an attempt was made by the complainant to get possession but it failed as the accused prevented the complainant party from taking possession. On these facts the lower Court convicted the petitioner for house trespass, on the ground there was a fresh cause of action on 26th and 27th June, 1948, when the attempt by the owner was resisted by the accused and what was criminal at its inception does not cease to be so by successful continuance.

Mr. Srinivasagopalan contends that after the delivery of possession on 23rd August, 1948, when the accused entered upon the property it was criminal trespass for which he has been convicted on 14th June, 1948, and the subsequent continuance or remaining on the property is not an offence within the meaning of section 441, Indian Penal Code. Section 441, Indian Penal Code, is as follows :

"Whoever enters into or upon property in the possession of another with intent to commit an offence to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence is said to commit 'criminal trespass'."

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*Cr. R.C. No. 90 of 1949. 19th September, 1950.
(Cr. R.P. No. 87 of 1949).

It consists of two parts the first part relates to entry into or upon the property in the possession of another. The later part relates to unlawful remaining, having lawfully entered into or upon the property.

In this case the accused has been convicted on 14th June, 1948, under the first part for having unlawfully entered into or upon the property on 23rd August, 1947.

His continuing to remain unlawfully will be an offence only if it falls under the 2nd part of section 441, Indian Penal Code, and for the 2nd part it will be an offence only if he having lawful entry unlawfully remains on the property. Now in this case having unlawfully entered on 23rd August, 1947, and having been convicted for it can he be convicted for continuing to remain after that unlawfully.

In *Saibaj* v. *Gaffoor*[1], it has been held that remaining in possession of property after unlawful entry is not a fresh offence of criminal trespass. This decision lays down that

> "to constitute criminal trespass as defined in section 441, Indian Penal Code, there must either be entry upon the property in the possession of another or unlawful continuance therein after a lawful entry."

Macnair, J., who decided the case refused to follow the decision in *Emperor* v. *Bandhu Singh*[2], where it was held

> "that each time the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by section 441, a new offence under that section is committed and a new liability arises."

The decision in *Saibaj* v. *Gaffoor*[1], was followed in *Anantram* v. *Emperor*[3], where Niyogi, J., held

> "that the view in *Emperor* v. *Bandhu Singh*[2], cannot prevail in the face of the plain terms of section 441, Indian Penal Code . . . . . It is clear that the offence of criminal trespass is complete as soon as there is unlawful entry. It is a continuing offence only when the entry is lawful and the subsequent possession becomes unlawful."

In *Emperor* v. *Baldewa*[4], Bajpai, J., observes:

> "The contention of the accused is that the second provision comes into play only when the entry of the accused in the first instance is lawful and the continuance in possession unlawful with the intent mentioned in the provision. *Ex hypothesi* in the present case the entry itself was unlawful and therefore it is submitted on behalf of the accused, the second provision of the section cannot be invoked in aid by the prosecution. A literal reading of the section might lend some support to this argument but a literal interpretation of the same would land us in an anomaly, because it would then mean that a lawful entry followed by unlawful continuance would be punishable whereas unlawful entry followed by unlawful continuance in possession would not be punishable."

In this he cites with approval the observations in *Emperor* v. *Bandhu Singh*[2],

> "In my opinion section 441 of the Indian Penal Code substantially reproduces the English Law. It provides that if the trespasser having entered lawfully remains unlawfully on the property with intent to annoy he will be said to commit criminal trespass. In my opinion no less punishable is an unlawful entry followed by an unlawful continuance of occupation."

But in *Emperor* v. *Jamuna Das*[5], Mathur, J., does not agree with the view of Bajpai, J., and says

> "that it would certainly not be punishable under this section. It might be punishable under any other section but not under section 441 read with section 448, Indian Penal Code.".

There is no decision of this Court on this point. The section creates only one offence and it defines what it is. It is committed in one of the ways mentioned and not in both ways. As pointed out in *Saibaj* v. *Gaffoor*[1], the offence is complete as soon as there was unlawful entry and it falls within section 441, Indian Penal Code. He cannot be prosecuted again for remaining there as he has already been convicted under section 441, Indian Penal Code. The plea of *autrefois convict* will be open to the accused in such cases and the present conviction is therefore unsustainable.

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1. A.I.R. 1932 Nag. 112.
2. (1927) I.L.R. 6 Pat. 794.
3. A.I.R. 1940 Nag. 117.
4. (1933) I.L.R. 56 All. 33 at 37.
5. I.L.R. (1944) All. 754.

The conviction and sentence are set aside and the petitioner is acquitted. The fine, if paid, will be refunded.

K. S. ——— *Petitioner acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Vurakarnam Lakshmi Narasimham .. *Appellant**

v.

Golanki Venkayya and others .. *Respondents.*

Attachment before judgment—Continuance subsequent to decree—Application for execution within three years of decree—Necessity.

For continuance of an attachment before judgment beyond three years from the date of the decree an application for execution must be filed within that period, otherwise the attachment lapses.

Sahul Hameed v. *Arunachalam*, (1944) 2 M.L.J. 192 : I.L.R. (1945) Mad. 80 (94) (F.B.), followed.

An attachment before judgment was effected on 24th January, 1934, in a suit in which a decree was subsequently passed on 19th September, 1934. An execution petition filed on 17th February, 1944, was held to be in time by reason of certain proceedings in insolvency and for scaling down of the debt. When the execution petition was held to be in time by the lower appellate Court, it directed the lower Court to allow the decree-holder an amendment of the execution petition by the insertion of a prayer for sale in pursuance of the attachment before judgment. On a contention that as the attachment before judgment had lapsed, the order allowing the amendment was without jurisdiction.

Held, that as the Full Bench ruling in *Sahul Hameed* v. *Arunachalam*, (1944) 2 M.L.J. 192 : I.L.R. (1945) Mad. 80 (F.B.), had not come into being when the execution petition was filed, it was assumed that no prayer for fresh attachment was necessary and that in the circumstances, the matter need not be interfered with in revision.

Appeal and revision petition respectively preferred to the High Court against the order of the District Court, West Godavari, Eluru, dated 9th August, 1947, in A.S. No. 253 of 1946 (E. P. No. 62 of 1944, in O. S. No. 28 of 1934, District Munsiff Court, Eluru).

G. Balaparameswari Rao for Appellant.

N. Bapi Raju for Respondents.

The Court delivered the following

JUDGMENT.—There are two connected cases before me, a Civil Revision Petition and a Civil Miscellaneous Second Appeal with a memo. of objections in the latter. They arise out of E. P. No. 62 of 1944, in O. S. No. 28 of 1934 on the file of the District Munsiff of Eluru. The E. P. was held to be out of time by the learned District Munsiff but has been held on appeal to be in time. No question arises in regard to that on the facts and the dates which are not in controversy between the parties, and I need only say that I uphold the view of the lower appellate Court in this respect.

Having held the E. P. in time the lower appellate Court said in regard to a certain attachment before judgment in the case that although the decree-holder did not make a prayer for a sale in pursuance of that attachment in his original petition, the learned District Munsiff should allow him to amend the petition by praying for it. The decree was passed on 19th September, 1934. The attachment before judgment referred to above had already been effected on 24th January, 1934. The E. P. with which we are concerned was filed on 17th February, 1944, and has been held to be in time on account of certain proceedings in insolvency which eventually resulted in an annulment of the adjudication of the debtor and of certain proceedings for amendment of the decree by way of a scaling down of the debt, which had all intervened between the date of the decree and the date of the E. P. The question of limitation decided by the lower appellate Court in favour of the decree-holder is, as I have already said, no longer a matter for consideration here. The propriety and legality of the direction of the learned District

*A.A.A.O. No. 103 of 1948 and C.R.P. No. 354 of 1948. 8th August, 1950.

Judge in appeal to the learned District Munsiff to allow the decree-holder an amendment of his execution petition by the insertion of a prayer for a sale in pursuance of the attachment is the only matter which has been the subject of a fairly long and able argument of both sides in this case before me and which calls for determination by me.

It is contended for the judgment-debtors that there was no execution petition filed in this case within three years of the decree and that consequently the attachment before judgment lapsed and could not be availed of by the decree-holder, though the execution petition itself filed by him in 1944 might be regarded as in time. Mr. Bapiraju says that this is the true legal position emerging from the decision of a Full Bench of this Court reported in *Sahul Hameed* v. *Arunachalam*[1]. If so, the learned District Judge had no jurisdiction, and that is the next contention—to direct the learned District Munsiff to allow an amendment of the execution petition in the manner mentioned above. Learned counsel says that a prayer for execution by way of fresh attachment ought to have been made in the E. P. and that an amendment of the E. P. in the manner directed by the learned District Judge more than 12 years after the passing of the decree would be illegal. He relies in support of his contention upon a ruling reported in *Pattath Veeran Kutty* v. *Kuni Kandi Shaikhath Veethil Appu*.[2] There in execution of a decree for money the decree-holder applied to proclaim and sell certain properties without having attached them. The District Munsiff dismissed the application while the Sub-Judge on appeal allowed the petitioner to amend the petition by inserting a prayer for attachment also. When the Subordinate Judge's order was passed, the decree had become barred by limitation. It was held by the learned Judges (Abdur Rahim and Ayling, JJ.), relying upon the well-known principle of procedure laid down by Lord Esher, M. R., in *Weldon* v. *Neal*[3], viz., that as a general rule amendments ought not to be allowed when they would prejudice the rights of the other parties as existing at the date of such amendment—that the Subordinate Judge had acted wrongly in ordering the amendment in question.

To take up the first contention of Mr. Bapiraju that with the lapse of three years from the date of the decree without any execution petition being filed within that period the attachment before judgment became altogether dead, I have after careful consideration come to the conclusion that it is well founded. Learned counsel relies upon what is ruled by the judgment of the Full Bench delivered by Leach, C.J., in *Sahul Hameed* v. *Arunachalam*[1], at page 94 of the Report. There after referring to *Ramanadhan* v. *Veerappa*[4], decided by Pandrang Row, J., on the basis of an earlier Full Bench decision of this Court reported in *Meyyappa Chettiar* v. *Chidambaram Chettiar*[5], the learned Chief Justice observes with reference to certain observations of that learned Judge as follows:

"It is said that here Pandrang Row, J., was laying down the proposition that an intention to execute is all that is necessary to keep an attachment before judgment alive. It matters not whether the decree-holder applies for execution provided that an intention to do so is to be gathered from what has happened in other proceedings. In this connection the learned advocate for the appellant points to the fact that the first respondent had opposed the second respondent's application to have the decree in O.S. No. 95 of 1932 set off by way of part satisfaction of the decree in O.S. No. 11 of 1931.

If the opinion expressed by Pandrang Row, J., is correct in law, the first respondent's action would probably have been sufficient for the appellant, but we are unable to accept what the learned Judge said in *Ramanadhan* v. *Veerappa*[4], as correctly expressing the law. Whether an attachment before judgment continues indefinitely after judgment cannot depend on what has happened in other proceedings. For continuance beyond three years from the date of the decree an application for execution must be filed within that period, otherwise the decree-holder loses his remedy."

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1. (1944) 2 M.L.J. 192 : I.L.R. (1945) Mad. 80 (F.B.).
2. (1911) 1 M.W.N. 181.
3. (1887) 19 Q.B.D. 394.
4. A.I.R. 1937 Mad. 84.
5. (1923) 46 M.L.J. 415 : I.L.R. 47 Mad. 483 (F.B.).

I consider the ruling of the Full Bench to be categorically clear and perfectly decisive of the point in favour of the contention of Mr. Bapiraju. Mr. Balaparameswari Rao, on the other side urges that the Full Bench case is distinguishable from the present case on the ground that here, unlike there, there was an amendment of the decree in the scaling down proceedings which gave his client a fresh start of limitation for the execution from its date. The distinction, in my opinion, does not affect the legal position now under discussion. It has a bearing only on the question whether the E. P. itself should or should not be regarded as in time.

The further contention of Mr. Bapiraju founded upon *Pattath Veeran Kutty* v. *Kuni Kandi Shazhath Veethil Appu*[1], already referred to has given me greater trouble. On the one hand I was feeling obsessed by the observation of Lord Esher, M. R., in *Weldon* v. *Neal*[2] that

> "Under very peculiar circumstances the Court might perhaps have power to allow such an amendment but certainly as a general rule it will not do so."

On the other hand I was wondering whether the discretion exercised by the lower appellate Court by way of allowing the amendment in the present case should be interfered with by me sitting in revision. It seems to me on close reflection that possibly the pleader who filed the E. P. did not have, in framing it as he did, a sufficiently clear and accurate appreciation of the legal position with reference to the subsistence or cessation of the attachment before judgment after the lapse of three years from the date of the decree without any execution petition being filed by the decree-holder within that period. In fact at the time that he filed the E. P. the Full Bench ruling in *Sahul Hameed* v. *Arunachalam*[3], had not come into being. The Full Bench ruling was of 4th April, 1944, while the E. P. was of 17th February, 1944. On the latter date the authority of *Ramanadhan* v. *Veerappa*[4], was intact, and the pleader who filed the E. P. was entitled to assume and presumably did assume that no prayer for a fresh attachment was necessary, because the attachment before judgment had not, according to that authority, lapsed by that time.

I am on the whole not prepared in these circumstances to interfere either in C.R. P. No. 354 of 1948, and the memo. of objections in C. M. S. A. No. 103 of 1948, questioning the propriety of the amendment allowed by the lower appellate Court or in C. M. S. A. No. 103 of 1948 itself, maintaining that the attachment before judgment never lapsed; with the result that all of them shall stand dismissed with no order as to costs in any of them.

No leave.

V.S. ——— *Appeal and Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Bhimavarapu Venkatasubbayya .. *Appellant* *

v.

Addanki Bapadu (died) and others .. *Respondents.*

Arbitration Act (X of 1940), section 32—Scope and effect—Defendant in a suit relying on an award as bar to the suit—Defendant not taking steps to file the award and make it a decree—Effect.

Where the defendant who is relying upon an award as a bar to the plaintiff's suit did not take steps to have it filed and dealt with under the appropriate provisions of the Arbitration Act, it is not competent to him to rely upon it in answer to the action. That, he might be entitled to do if the award happened to be acted upon by the parties and if the part of it which had to be performed by the defendant was actually performed. *Rasheed Jamshed Sons and Co.* v. *Moolchand Jothajee*, (1945) 2 M.L.J. 98 and *Suryanarayana Reddi* v. *Venkata Reddi*, (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad. 111, referred to.

1. (1911) 1 M.W.N. 181.
2. (1877) 19 Q.B.D. 394.
3. (1944) 2 M.L.J. 192 : I.L.R. (1945) Mad. 80 (F.B.).
4. A.I.R. 1937 Mad. 84.

* S.A. No. 640 of 1947. 24th August, 1950.

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, in A.S. No. 92 of 1945, preferred against the decree of the Court of the District Munsif, Ongole, in O.S. No. 88 of 1944.

K. Krishnamurthi and *G. Suryanarayana* for Appellant.

B. V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT.—An interesting point has been raised by Mr. Krishnamurthi for the appellant in this case. The suit was laid by the respondent before me for a declaration of his title and for an injunction to restrain the defendant from interfering with his possession. The plaintiff rested his title upon a certain sale deed, dated 11th October, 1930 and also upon a prescriptive title by enjoyment had by him all along from the date of that sale deed. The defence, so far as material to the disposal of the present second appeal, is that there was an award on a reference to arbitration which is binding upon the plaintiff and precludes him from filing this action. The learned District Munsif of Ongole dismissed the suit giving effect to the defence above referred to.

The award was pronounced on 12th January, 1944 and registered on 24th March, 1944. On 9th March, 1944, it was that the suit, out of which this second appeal arises, was instituted.

The learned District Munsif at the end of his judgment says,

"As the award was pronounced before the suit, it is not possible to accept the plaintiff's contention that in spite of it the Court can adjudicate on the rights of the parties."

On appeal the learned Subordinate Judge of Bapatla reversed the judgment and decree of the learned District Munsif dismissing the suit, observing thus in paragraph 9 of his judgment under appeal:

"In dismissing the suit the lower Court seems to have been considerably influenced by the award, Exhibit D-3, alleged to have been given by D.W. 3, Kotayya. The case for the defendant is that the disputes between him and the plaintiff, including the dispute with reference to the suit property, were referred to the arbitration of D.W. 3 under the arbitration agreement, Exhibit D-1, that the arbitrator gave the award, Exhibit D-3, holding that he and the plaintiff were entitled to the suit property in equal shares, that this award is binding both on himself and the plaintiff and that, consequently, the plaintiff cannot be entitled to the reliefs prayed for by him in the suit. The case for the plaintiff is that the arbitration agreement, Exhibit D-1, does not refer to the suit property at all, that even otherwise it is not binding on him and that the award, Exhibit D-3, is invalid in law and not binding on him. And, I do not think it is open to the defendant to rely on the arbitration agreement, Exhibit D-1, or on the award Exhibit D-3, in support of his case in the present litigation. The arbitration agreement was admittedly executed only in the year 1943, *i.e.*, after the Arbitration Act of 1940 came into force; and, it is clear from the recent ruling of our High Court in *Rashid Jamshed Sons and Co.* v. *Moolchand Jothajee*[1], that if a party to an arbitration wants to rely on the arbitration agreement or upon the award passed by the arbitrator, in support of his case, he must have taken steps to have a decree passed on the award as provided for in the Arbitration Act, and, in the absence of any such decree, it is not open to him to ask the Court, in another litigation, to rely on the arbitration agreement or on the award, in support of his case."

The learned advocate for the appellant has, as against this reasoning of the learned Subordinate Judge, founded upon the case in *Rashid Jamshed Sons & Co.* v. *Moolchand Jothajee*[1], drawn my attention to a Divisional Bench ruling of this Court in *Suryanarayana Reddi* v. *Venkatareddi*[2]. The question which arose in that case, as formulated by Mr. Justice Govindarajachari who delivered the judgment of the Court consisting of Mr. Justice Happell and himself is, whether, by reason of the provisions of the Indian Arbitration Act, 1940, a defendant is precluded from putting forward an award which has been fully performed by him but which was not filed under section 14 and according to which a judgment was not pronounced or a decree given under section 17 of the Act in answer to the plaintiff's claim which was the subject-matter of the reference and the award. The answer was that the defendant was not so precluded. So, says Mr. Krishnamurthi, the defendant is not precluded in the present case either. But the question which one has to consider here is, whether when the award has not been subjected to the treat-

1. (1945) 2 M.L.J. 98. 2. (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad. 111.

ment prescribed for it by the Arbitration Act it can be relied upon in the absence of anything to show that the award became completely preformed by the defendant. And if it is to be said that there was nothing to be performed by the defendant in the present case under the agreement, it has still to be shown how the present suit is really not maintainable under the provisions of the Arbitration Act.

Mr. Krishnamurthi says that under and by virtue of the award his client went into possession of 1/3rd of the property. But the finding of the lower appellate Court in regard to this is that the defendant has never been in possession of the property whether, before the award or after, and that the possession has all along been, down to the date of the suit, with the plaintiff himself. In regard to Mr. Krishnamurthi's contention that the suit falls within the mischief of the Arbitration Act, the sections which one has to consider are sections 31 to 33. Section 31 is devoted essentially to the question, which Court has jurisdiction in the matter of an arbitration. There is nothing in it that really bears upon the maintainability or otherwise of the present suit. Section 32 provides that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in in any way affected otherwise than as provided in this Act. This section, it has to be seen, is not relevant to the present case because the suit here is not for a decision upon the existence, effect or validity of an arbitration agreement or award. Section 33 of the Act provides that any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits; provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit. This section too, in my opinion, is not relevant to the matter on hand. The plaintiff is not challenging the existence or validity of the arbitration agreement the award, nor is he anxious to have the effect of an arbitration agreement or award determined. If he were anxious to have that done, no doubt the would have to apply to the Court. The question here plainly and simply, is whether the defendants can rely upon an unfiled award in answer to the present action? That, he might be entitled to do if the award happened to be acted upon by the parties and if the part of it which had to be performed by the defendant was actually performed as in the case in *Suryanarayana Reddi* v. *Venkatareddi*[1].

It seems to me that no valid bar to the maintainability of the present action has been made out, and since the defendant, who is himself relying upon the award, did not take steps to have it filed and dealt with under the appropriate provisions of the Arbitration Act, it is not competent to him to rely upon it in answer to the action. That being so, this second appeal fails and it must be dismissed with costs.

No leave.

K.S. *Appeal dismissed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO, MR. JUSTICE PANCHAPAKESA AYYAR, AND MR. JUSTICE BALAKRISHNA AYYAR.

A. L. S. P. PL. Subramania Chettiar (deceased) and another .. *Appellants* *

v.

Moniam P. Narayanaswami Gounder .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938)—Principal and surety—Scaling down of debt as against agriculturist principal debtor—Effect on liability of the surety who is not an agriculturist.

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1. (1948) 1 M.L.J. 317 : I.L.R. (1949) Mad. 111.

*Appeal No. 503 of 1946. 16th August, 1950.

A non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the provisions of the Madras Agriculturists Relief Act, but he will be liable only to the extent of the scaled down debt due by the principal debtor.

Subramanian Chettiar v. *Batcha Rowther*, (1941) 2 M.L.J. 751, overruled.

Authorities discussed.

Subba Rao and Panchapakesa Ayyar, JJ. After receipt of the opinion of the Full Bench : 29th August, 1950.

Practice—Costs—Appeal based on a decision which is overruled—Liability of appellant for costs.

Where an appeal filed on the strength of a ruling which is overruled by the Full Bench, is argued fully before and during the reference to the Full Bench the appellant cannot claim that it is a fit case for dismissing the appeal without costs. (The appeal however was dismissed with half the costs of the respondent).

Ramaswami Naicken v. *Venkataswami Naicken*, (1919) 37 M.L.J. 271 : I.L.R. 43 Mad. 61, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in O.S. No. 171 of 1945.

K. V. Ramachandra Aiyar for the Appellants.

V. S. Rangaswami Aiyangar and *M. S. Venkatarama Aiyar* for Respondent.

This appeal coming on for hearing before Subba Rao and Panchapakesa Ayyar, JJ., on 25th January, 1950, the Court made the following Order of Reference to a Full Bench :—

The judgment of the Court was delivered by

Subba Rao, J.—This appeal arises out of the suit filed by the appellant for recovery of a sum of Rs. 5,746 with interest. Defendants 1 and 2 executed a promissory note, dated 22nd September, 1933, in favour of the plaintiff for a sum of Rs. 1,500 payable with interest at 36 per cent. per annum. Defendants 1 and 2 are brothers. Defendants 4 and 5 are the sons of the first defendant. Defendant 3 executed a letter of guarantee dated 22nd September, 1933, in favour of the plaintiff for the due payment of the amount due under the promissory note. Defendants 1 and 2 paid several amounts on 20th September, 1936; 10th September, 1939 and 7th September, 1942 and the payments were duly endorsed on the promissory note. On the same dates, the third defendant made endorsements on the letter of guarantee binding himself to pay the principal and interest due in respect of the promissory note. The learned Subordinate Judge scaled down the debt in regard to all the defendants and gave a decree for a sum of Rs. 1,500 with interest thereon at 6¼ per cent. from 1st October, 1937, till the date of payment less Rs. 55 paid. The plaintiff preferred the above appeal.

The learned counsel for the appellant contended that the lower Court should not have scaled down the decree against the third defendant, the surety. The learned Subordinate Judge held that as the third defendant renewed his liability on 10th September, 1939 and 7th September, 1942, confining it only to the amount due under the promissory note he could not be made liable for an amount higher than the amount now found due under the promissory note as scaled down. The learned counsel says that the lower Court's construction of the renewals is contrary to the plain wording of the renewals as the third defendant undertook thereunder to pay the entire amount due under the promissory note. Whereas the learned counsel for the respondent argued that the third defendant being a surety his liability is only co-extensive with that of the principal debtor and as the principal debt has been scaled down he cannot be made liable for higher amount.

To appreciate the contentions of the parties it will be relevant to consider the scope of the relief given to an agriculturist under the Madras Agriculturists Relief Act, 1938. Under section 7 of the Act all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of the Act and that the sum in excess of the amount so scaled down shall be recoverable from him or from any land or interest in land belonging to him. Section 8 provides the manner of scaling down the debts incurred before 1st October, 1932.

Under that section all the interest outstanding on 1st October, 1937, shall be deemed to be discharged. Clause 2 of section 8 provides the alternative mode of scaling down the debt. Section 9 provides for the scaling down of the debts incurred after 1st October, 1932. Section 19 prescribes the machinery for amending the decrees so scaled down and also for recording satisfaction in case the entire decree debt is discharged. A combined reading of the provisions shows that the liability of an agriculturist is reduced under the provisions of the Act and thereafter he would be liable only for the amount scaled down. This is not the case of a debt being intact but by a statutory provision the recovery of the debt or the execution of the decree as the case may be is restricted by legislation. This distinction may be important in considering the liability of a surety. The liability of the surety *vis a vis* the principal debtor is regulated by the provisions of the Contract Act. Section 128 reads:

"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

It is a settled principle of law that the surety's liability is only accessory and secondary. Under the express provisions of the aforesaid section his liability is made only co-extensive with that of the principal debtor. It can only mean that his liability is no less or no more than that of the principal debtor. If the amount payable by the principal debtor is discharged in part is the surety's liability also *pro tanto* reduced. If a debt of the principal debtor is reduced by statute, on the same principle, the surety's liability also must be confined only to the amount payable by the principal debtor. Section 128 of the Indian Contract Act does not either expressly or by necessary implication confine its operation only to debts reduced by the Act of the parties. In whatever manner the liability of the principal debtor is reduced the benefit must go also to the surety. Section 133 deals with the discharge of a surety by variance in the terms of a contract. Section 134 provides for the discharge of a surety by a release or discharge of the principal debtor. Section 135 prescribes for the discharge of surety when the creditor compounds with, gives time to or agrees not to sue the principal debtor. These and similar sections protect the interests of the surety when the creditor acts to his detriment without his consent. In the circumstances mentioned therein the surety is discharged of his liability as the contract on the basis of which he stood surety is varied by the creditor without his consent. The principle underlying these sections is different from that governing section 128. Section 128 deals with the extent of his liability, whereas section 133, etc., provide for his discharge in the circumstances mentioned therein. The scope of section 128 was considered in *Sami Aiyar* v. *Ramaswami Chettiar*[1]. The following passage from the judgment of Venkatasubba Rao, J., at page 177 is instructive:

"The debt due by the judgment-debtor having become extinguished are the plaintiffs entitled to proceed against the surety? They are not. To my mind the question does not admit of any doubt. Cunningham and Shephard in their Indian Contract Act quote the following passage from Pothier when dealing with section 134—'It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety, it being the nature of an accessory obligation that it cannot exist without its principal.' The learned commentators add: 'The rule may also be put upon the less technical ground that, if the release of the surety did not follow from that of the debtor, the latter's release would be purely illusory, because, the consequence would be that the surety on being compelled to pay, would immediately turn round on the debtor.'"

The facts in that case are the plaintiffs there obtained a decree for mesne profits against a person and the defendant stood surety for him under an order for stay of execution pending a second appeal against the decree. The judgment-debtor died and his estate became vested in the plaintiffs. On an application filed by the plaintiffs to recover the amount from the surety the learned Judges held that under the circumstances the plaintiffs were not entitled to recover. They held so because the liability of the surety for a debt ceased to exist when his principal's debt is extinguished by an act which causes the merger of the estates of the debtor and the creditor.

1. (1922) 44 M.L.J. 171.

Though the liability of the principal debtor was extinguished by operation of law the learned Judges held that the liability of the surety was also extinguished. Niyogi, J., in *Baburao* v. *Babu Manaklal*[1], lays down the same principle in the following manner :

"When the creditor seeks to enforce the debt against the surety, the latter is legitimately entitled to ask " is the principal debtor himself liable to you ? If not he has committed no default and you cannot compel me to discharge an obligation which has no existence. If on the other hand, I pay you, how can I recover it from the principal debtor whose liability, the debt itself having vanished, has ceased ?' When the surety seeks his remedy against the principal debtor, he does it in respect of the same debt as the one owned by the principal debtor to the creditor. It is clear that the debt must exist although the creditor may choose to enforce his remedy against the surety only to the exclusion of the principal debtor."

Unhampered by Judicial decisions, on a fair reading of the provisions of the Indian Contract Act we are inclined to hold that as the liability of the surety is co-extensive with that of the principal debtor if the latter's liability is scaled down or otherwise reduced by statute, the liability of the surety also is *pro tanto* reduced. But a decision of a Bench of this Court in *Subramanian Chettiar* v. *Batcha Rowther*[2] which has taken a different view is pressed on us for our acceptance. In that case the first defendant executed a promissory note in favour of the plaintiff the second defendant guaranteeing payment. The principal debtor was an agriculturist whereas the guarantee was a non-agriculturist. The debt against the first defendant was scaled down under the Madras Agriculturists Relief Act but the learned Judges a gave decree for the full amount against the surety. At page 753 they lay down the principle thus :

"It is sufficient for the purpose of this case to hold that when a new statutory provision has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability, the remedy of the creditor against the guarantor will not be affected."

This principle they have deduced from a consideration of the provisions of the Indian Contract Act and also some English decisions arising under the Bankruptcy Act. In their view section 128 of the Indian Contract Act lays down only the general principle governing the interpretation of the contracts of guarantee and does not purport to govern the relations between the parties as a result of subsequent events after the contract has been entered into and those relations are governed by sections 133, 134, 135, etc., of the Contract Act. They have also accepted the argument that the surety would not be discharged if the principal debt was wiped out by the operation of law. With great respect we cannot agree with either of the two reasons given by the learned Judges. There is no conflict between section 128 of the Indian Contract Act and sections 133, 134 and 135 of the Indian Contract Act. The former section lays down the extent of the surety's liability. In the latter sections he is discharged if the creditor acts to his detriment. We cannot also find any principle for excluding the debts reduced by the operation of law from the class of cases governed by the provisions of section 128. Section 128 does not exclude such cases. Section 133, etc., obviously do not govern such a case. If the debtor pays off the creditor in part and thereby reduced the liability it cannot be contended that the liability of the surety is not reduced, on the ground that it is not one of the cases governed by sections 133, 134, 135, etc. There is no reason why a different principle should apply if the debt is reduced by operation of the statute. The English cases relied upon by the learned Judges arose under the Bankruptcy Act, 1869. Apart from the fact that they are governed by the statutory provisions it cannot be said in insolvency that the debt is scaled down though the creditors are paid dividends and in certain circumstances the debtor is discharged. The distinction is brought out by a passage cited by the learned counsel for the appellants himself from Rowlatt on Principal and Surety at page 277 where the learned author says :

"A guarantee is not put an end to by reason of the debt becoming unenforceable against the principal by reason of matters happening subsequently unless it is due to an act or omission of the

1. I.L.R. (1939) Nag. 175.
2. (1941) 2 M.L.J. 751.

creditor contrary to his duty to the surety. Thus a surety is liable though the claim against the principal be barred by the Statute of limitations, or by reason of the bankruptcy of the principal."

In either case the debt is not wiped out but it becomes unenforceable either by the Statute of limitation or by operation of the Bankruptcy Law. That there is no distinction in principle between the change of position of the surety by the act of parties or by the operation of law is stated at page 157 of Halsbury's Laws of England (Hailsham) 2nd edn., Vol. 16, where the learned author says :

"Whatever expressly or impliedly discharges the principal debtor from liability usually discharges the surety also by implication, as his position is thereby altered withiut his consent, notwithstanding that the alteration is accomplished by operation of law."

We cannot therefore with great respect agree with the aforesaid decision. As the Bench decision is binding on us, we think that this is a fit case for us to refer the following question to a Full Bench for an authoritative decision. The question is :

"Whether a non-agriculturist surety would be liable for the entire debt even though the principal debt was scaled down under the provisions of the Madras Agriculturists Relief Act."

The other question raised in the appeal will be considered by us after the aforesaid question is answered by the Full Bench. The papers may be placed before the Hon'ble the Chief Justice for necessary orders.

(In pursuance of the aforesaid order of reference, this appeal coming on for hearing before the Full Bench, the Court expressed the following Opinion) :—

Panchapakesa Ayyar, J.—The point referred by the Bench to this Full Bench for an authoritative decision is "whether a non-agriculturist surety would be liable for the entire debt even though the principal debt was scaled down under the provisions of the Madras Agriculturists Relief Act."

The facts are briefly these : the first plaintiff (since deceased) had brought O.S. No. 471 of 1945 in the Court of the Subordinate Judge, Coimbatore, against the five defendants for recovering Rs. 5,746 being the principal and interest due on a promissory note, dated 22nd September, 1933, executed by defendants 1 and 2 in favour of the plaintiff for Rs. 1,500 repayable with interest at 36 per cent. per annum, but he claimed only at 24 per cent. per annum. Defendants 4 and 5 were the minor sons of the first defendant. The third defendant was a surety for the debt and had executed a letter of guarantee and renewed his liability thereunder, just as the principal debtors had renewed their liability for the debt under endorsements. So the suit was not barred against either the principal debtors or the surety. But the principal debtors claimed that they were entitled to a scaling down of the debt under the Madras Agriculturists Relief Act, being agriculturists. The surety (the third defendant) contended that the Varthamanam executed by him did not amount to a contract of guarantee and that at any rate limitation had already operated against him. He contended further that he was also entitled to scaling down of the whole debt under the Madras Agriculturists Relief Act, as his guarantee, even if there was one, would amount only to a guarantee of the amount actually payable by the principal debtor on the dates of his renewal of it after 22nd March, 1938. He also stated that 24 per cent. interest claimed in the plaint was penal and unconscionable and that the plaintiff could not claim more than 5 per cent. simple interest per annum. The learned Subordinate Judge held that there was no bar of limitation against the surety or against the principal debtors, that the surety's *varthamanam* deed constituted a contract of guarantee, and that the surety was not an agriculturist as he was paying house-tax of more than Rs. 600 per annum to the Tirupur Municipality. But he held that though he was not entitled to the benefits of the Madras Agriculturists Relief Act on the ground that he himself was an agriculturist, he would be liable to pay only the scaled down amount and nothing more, since the renewal endorsements found on Exhibit P-2 his letter of guarantee clearly stated that he was liable only for the amount due under the promissory note, Exhibit P-1, which in the opinion of the learned Subordinate Judge would amount to the surety saying that he would be liable for the amount due under the note as on the dates of the endorsements, in other words, only for the amounts as scaled down, as two of the endorsements were dated 10th September,

1939 and 7th September, 1942 long after the coming into operation of the Madras Agriculturists Relief Act on 22nd March, 1938. In that view, he scaled down the promissory note debt as against all the defendants and gave a decree against all of them for Rs. 1,500 the principal amount under the promissory note, with subsequent interest thereon at 6¼ per cent. per annum from 1st October, 1937 till payment, less Rs. 55 paid by the defendants towards interest, and also awarded proportionate costs of Rs. 230-15-6.

The first plaintiff died, and the second plaintiff is his legal representative. The second plaintiff has filed this appeal only as against the third defendant (surety) and his only contention is that the lower Court should not have granted the surety the benefit of the scaling down under the Madras Agriculturists Relief Act. The appeal relates to Rs. 3,357-4-0, the difference between the unscaled and the scaled down amounts. During the arguments in the appeal, the question referred to this Full Bench became necessary to be decided, and the Bench which heard the appeal was unable to agree with the Bench decision in *Subramanian Chettiar* v. *Batcha Rowther*[1], and so has referred the matter to this Full Bench, reserving the other questions raised in the appeal for consideration by it after this question is answered by the Full Bench. Mr. K. V. Ramachandra Aiyar for the appellant raised two main contentions. The first was that the scaling down under the Madras Agriculturists Relief Act and the payment of the scaled down amount does not extinguish the debt itself, but only bars the remedy of the creditor as against the agriculturist debtor as regards the balance of the amount, and that the debt itself continues, as in the case of a debt barred by limitation, or is not recoverable in bankruptcy. In other words, he equated this case with cases of debts barred by limitation or not recoverable under the bankruptcy law, and relied on the observations in *Subramania Aiyar* v. *Gopala Aiyar*[2]. In that case, Benson, C.J. and Krishnaswami Aiyar, J., held that a debt the recovery of which is barred by limitation is not extinguished and the debtor is not, by reason of the bar of limitation discharged therefrom and that the omission of the creditor to sue the debtor within the period of limitation is not an act the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under sections 134 and 137 of the Indian Contract Act. They went on to say that there was hardly any room for doubt in the face of the express language of section 28 of the Indian Limitation Act, which merely extinguishes the right to property when the period is determined for suits for recovery of such property and added that whenever personal actions are barred the rights themselves are not extinguished. They said,

> "A barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. It is impossible to regard a debt as discharged by limitation when section 56 of the Indian Contract Act speaks of a barred debt as a lawful debt actually due and payable to the creditor. Unless the law of limitation operates as well as a law of extinctive prescription, omission to sue cannot discharge the debtor. Limitation, which merely bars the remedy is never spoken of in works of Jurisprudence as a mode of discharging an obligation."

They relied on Holland's not enumerating limitation, amongst the modes of termination of rights *in personam*. They also relied on Anson's observations :

> "At common law lapse of time does not affect contractual rights. Such rights are of a permanent and indestructible character unless either from this nature of the contract or from its terms it be limited in point of duration. But though the rights possess this permanent character, the remedies arising from their violation are by various statutory provisions withdrawn after a certain lapse of time. The remedies are barred though the rights are not extinguished.

So too, the learned counsel for the appellant relied on In re *Jacobs*[3], where it was held by James, L.J., that a discharge of a debtor under a liquidation or a composition is really a discharge in bankruptcy by operation of law, and will not discharge the surety from his liability. He also relied on the ruling in *Bombay Co., Ltd.* v. *Sithapathi Aiyar*[4], where a Bench of this Court consisting of Wallis, C.J. and Seshagiri Aiyar, J., held that the acceptance of a composition by the principal creditor during the insolvency of the principal debtor after part payments by the surety will not

1. (1941) 2 M.L.J. 751.
2. (1909) 20 M.L.J. 633 : I.L.R. 33 Mad. 308.
3. (1875) L.R. 10 Ch. A. 211.
4. (1920) 40 M.L.J. 404.

entitle the surety to a refund of such part payments, following the principle in In re *Jacobs*[1] and holding that it was the insolvency law and not the creditor that discharged the insolvent. He also relied on the observations of Rowlatt in his book "Law of Principal and Surety", 1936 Edn., at page 277, as follows :

> "A guarantee is not put an end to by reason of the debt becoming unenforceable against the principal by reason of matters happening subsequently, unless it is due to an act or omission of the creditor contrary to his duty to the surety. Thus a surety is liable though the claim against the principal be barred by the statute of limitation or by reason of the bankruptcy of the principal."

He relied further on the provisions of sections 133, 134, 135, etc., of the Indian Contract Act which according to him are the only sections which will discharge the surety or enable the surety to claim the benefit given to the principal debtor and which do not maintain the benefit under the Madras Agriculturists Relief Act given to the surety by adding to or amending the sections of the Indian Contract Act or even the section of the Madras Agriculturists Relief Act. According to him, this also shows that the Madras Agriculturists Relief Act never intended to extinguish the debt or liability of the debtor, but only to bar the remedy regarding the amount lost by the scaling down. He strongly relied on the wording of section 7 which uses the phrase "No sum in excess of the amount as so scaled down shall be recoverable" thereby showing, according to him, that the intention is only to bar the remedy as against the agriculturist debtor and not to extinguish the whole or any portion of the debt. He also relied on the phrase "shall be deemed to discharged and shall be deemed to be the amount repayable by the agriculturist on that date" in clause 8 (1) and "shall be *deemed to be* wholly discharged" in section 8 (2) for the position that the Legislature never intended to extinguish the liability as in that case, the phrase used would be "shall be discharged". I cannot agree with this. Mr. M. S. Venkatarama Aiyar, for the surety, pertinently pointed out that the phrase "shall be deemed to be discharged" is used only to show that it is not an actual discharge by payment, but a discharge by operation of law. I may add that in section 8 (4) of the Madras Agriculturists Relief Act there is the phrase "shall be deemed to require the creditor to refund any sum which has been paid to him," etc., showing that the real meaning of the phrase is what Mr. Venkatarama Aiyar attributes to it. What is even more clinching is the fact that the Madras Agriculturists Relief Act provides for the amendment of the original decree by scaling down under section 19. No amendment of the decree will be required if the debt is not extinguished in whole or in part but is intact as the original decree will do. It is obvious that a decree barred by limitation is not and cannot be amended but stands intact. Further, in section 19, we find the significant expression "amend the decree accordingly or enter satisfaction as the case may be". The entering of satisfaction can only be done when the debt is satisfied or discharged or extinguished, and not when the remedy is merely barred. No satisfaction can be entered in respect of a decree barred by limitation or in the case of a debt in insolvency where only a dividend of any Re. 0-2-0 in the rupee, has been paid, to the creditor and the remainder cannot be recovered from the insolvent because the remedy as against him is barred. Moreover, it is obvious, as held in *Subramania Aiyar* v. *Gopala Aiyar*[2], that a barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. Whereas it has been held in *Suryanarayana* v. *Alavandararao*[3] by a Bench of this Court, that if an agriculturist debtor executes a promissory note in favour of his creditor including in it a sum which cannot be recovered from him under the Madras Agriculturists Relief Act because of the scaling down the promissory note will be devoid of consideration to the extent to which the promissory note amount exceeded the amount due on a proper scaling down of the debt. That too shows the intention of the Madras Agriculturists Relief Act to discharge or extinguish the debt to the extent of the difference between the unscaled and scaled down amount.

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1. (1875) L.R. 10 Ch. A. 211.
2. (1909) 20 M.L.J. 633 : I.L.R. 33 Mad. 308.
3. (1945) 2 M.L.J. 565.

It was then argued by Mr. Ramachandra Aiyar for the appellant, that the object of the Madras Agriculturists Relief Act is only to benefit an "agriculturist" debtor, and that, therefore, this non-agriculturist surety could never have been intended to be, or really, be benefited under any provision of the Madras Agriculturists Relief Act. The proposition is not sound. A Bench of this Court, consisting of King and Patanjali Sastri, JJ., negatived its soundness when it was raised before it in *Arunachalam* v. *Seetharam*[1] a case of "Lucky purchase" by a Court auction purchaser. At page 933 it is observed:

"It is undoubtedly true that agriculturist debtors alone are entitled to the relief provided in the Act, which does not contemplate any scaling down of debts due by others, but it does not follow that a non-agriculturist debtor can in no circumstances be benefited by the scaling down of a debt under the provisions of the Act. The properties now held by the 12th respondent (who was a non-agriculturist auction purchaser) are liable only as security for the debt due by the mortgagors (who were agriculturists), and, if as a result of the Act there is a statutory discharge or reduction of the debt, the properties cannot, it seems to us, be proceeded against for anything more than the scaled down amount of the debt."

The same view was adopted by that Bench in *Marina Ammayi* v. *Mirza Bakhan Beg*[2]. Another Bench of this Court consisting of Wadsworth and Patanjalai Sastri, JJ., in *Satyanarayanamurthi* v. *Sathiraju*[3], also accepted this view. We cannot accept Mr. Ramachandra Aiyar's contention that the observations in that case must be confined to the case of a mortgage suit where questions of the integrity of the mortgage security for the mortgage, etc., arise. The ruling in *Arunachalam* v. *Seetharam*[1] was quoted by another Bench of this Court, consisting of Wadsworth and Patanjali Sastri, JJ., in *Srinivasa Thatachariar* v. *Sivasubramania Chettiar*[4], without any dissent, though, on the facts of that case, where the mortgagor was not an agriculturist, they held that the unscaled amount could be recovered from the non-agriculturist purchaser.

Section 128 of the Indian Contract Act says that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by contract. It is a settled principle of law that the surety's liability is only accessory and secondary. Under the express provisions of section 128 his liability is made only co-extensive with that of the principal debtor. That can only mean that his liability is no less or no more than that of the principal debtor. If the amount payable by the principal debtor is discharged in part, the surety's liability also is *pro tanto* reduced. Mr. Ramachandra Aiyar urged that section 128 ought not to be read or construed literally. He said that supposing the surety were an agriculturist and the principal debtor was not an agriculturist, it could not be urged that the principal debtor could claim scaling down simply because the surety could claim it and his liability was co-extensive with the surety's. But here he is forgetting that the liability of the surety is accessory and secondary while the liability of the principal debtor is not and so the principal debtor, who is not an agriculturist and whose liability is primary, and not secondary or accessory, can be made to pay the full amount. In *Sami Iyer* v. *Ramaswami Chettiar*[5], a Bench of this Court, consisting of Spencer and Venkatasubba Rao, JJ., held that the liability of a surety for a debt ceased to exist when his principal's debts were extinguished. In that case the debt was extinguished by an act which caused the merger of the estates of the debtor and the creditor. We are of opinion that section 133, etc., of the Indian Contract Act, do not exhaust the modes of discharges of a surety as they do not even mention the case of a voluntary payment of the entire debt or portion of the debt by the principal debtor to the creditor as effecting a discharge of the surety wholly or *pro tanto*. Section 140 of the Indian Contract Act says that the surety, on discharging a debt would only get all the rights which the creditor had against the principal debtor. So, if the creditor could not recover any portion of the debt from the principal debtor, owing to scaling down under the Madras Agriculturists Relief Act, it follows that the surety could not also recover that portion of the debt. That would be very unjust to the surety

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1. (1941) 1 M.L.J. 561: I.L.R. 1941 Mad. 930.
2. (1947) 1 M.L.J. 547.
3. (1942) 1 M.L.J. 506.
4. (1942) 2 M.L.J. 631.
5. (1922) 44 M.L.J. 171.

and would land him in unexpected and unmerited loss by the Madras Agriculturists Relief Act intervening and scaling down the debt. The Madras Agriculturists Relief Act in our opinion, therefore, to prevent such injustice to the surety, intended to extinguish the portion of the debt affected by the scaling down, and not merely to bar the remedy. By doing so it did not confer any benefit on the non-agriculturist surety but only relieved him from an extra burden and loss which would have been thrown on him if the debt was not extinguished and he was made liable to bear the loss of the difference by virtue of section 140 of the Indian Contract Act.

The fact that there was a moratorium before the Act came into operation also shows that the intention of the Act itself is to extinguish the debt. This is shown further by the fact that the portion of the debt lost by the scaling down cannot form a good consideration for a fresh promissory note by the agriculturist debtor and that full satisfaction has to be entered under section 19 whenever the debt as scaled down has been paid.

Mr. Ramachandra Aiyar relied on the ruling of a Bench of this Court consisting of Wadsworth and Patanjalai Sastri, JJ., in *Sundararaja Reddiar* v. *Ramachandra Reddiar*[1], which held that before the Court reduced a debt by the application of the scaling down provisions, it must be satisfied that there was at the date of the commencement of the Act a debt due from an agriculturist and that such debt was one which the agriculturist could be compelled to pay by legal process and that the provisions of Act IV of 1938, were not intended to benefit an agriculturist who voluntarily paid debts which could not be enforced against him and urged that this ruling has impliedly held that the Madras Agriculturists Relief Act does not extinguish the debt, but only bars the remedy against the agriculturist debtor. I am unable to agree. There, the first defendant was an agriculturist but not defendant 8 from whom the whole of the unscaled debt could have been recovered. Defendant 1 paid the whole debt, which he would not have been bound to pay under the Act, and then pleaded for scaling down and recovering the excess, paid by him. But, of course, the Court refused his request, as there was no debt recoverable from him by process of law when he made the application, and under section 8 (4) of the Madras Agriculturists Relief Act a creditor was not required to refund any sum which had been paid to him. It did not say that the Madras Agriculturists Relief Act did not extinguish the debt but only barred the remedy. The argument of Mr. Ramachandra Aiyar that the debt is not extinguished but only barred because an agriculturist need not take advantage of the Madras Agriculturists Relief Act but may pay the unscaled amount is unconvincing. A surety whose obligation is released under sections 133 to 137 of the Indian Contract Act can also pay up if he likes.

Now we come to the second point, namely, assuming that the intention of the Madras Agriculturists Relief Act is to extinguish the whole or portion of the debt affected by the scaling down, would such extinction of the debt as regards the principal debtor enure to the benefit of his surety and extinguish his liability also regarding that portion of the debt so extinguished? I have absolutely no doubt that it will. Section 128 of the Indian Contract Act clearly enacts that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. There is nothing in section 133, etc., to alter this general proposition. In *Sami Iyer* v. *Ramaswami Chettiar*[2], already referred to, it was held that the liability of a surety for a debt ceased to exist when his principal's debt was extinguished, in that case by an Act which caused the merger of the estate of the principal debtor and the creditor. It was observed there by Venkatasubba Rao, J., at page 177 :

"The debt due by the judgment-debtor having become extinguished, are the plaintiffs entitled to proceed against the surety? They are not. To my mind, the question does not admit of any doubt. Cunningham and Shephard in their "Indian Contract" quote the following passage from Pothier when dealing with section 134 : "It results from the definition of a surety's engagement as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety, it being the nature of an accessory obligation that it cannot exist without

1. (1945) 1 M.L.J. 384.
2. (1922) 44 M.L.J. 171.

its principal." The learned Commentators add " The rule may also be put upon the less technical ground that if the release of the surety did not follow from that of the debtor, the latter's release would be purely illusory because the consequence would be that the surety on being compelled to pay would immediately turn round on the debtor." I find it impossible to hold that the creditor can proceed against the surety although the debt has been recovered."

Spencer, J., remarks in the same case :

" Ordinarily the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided for . . . . An illustration of the effect of section 128 of the Contract Act occurs in *Shaik Sulaiman* v. *Shivram Bhikaji*[1], where it was observed that if an amount recoverable by a plaintiff from a defendant debtor is diminished in appeal, the surety's engagement, being one of indemnity would diminish in like proportion. So, if the sum recoverable became zero, owing to the decree being reversed, the surety's liability would also be reduced to nothing."

It is obvious that in a case like this, where the decree is amended under section 19 of the Madras Agriculturists Relief Act and the amount recoverable by a plaintiff from the principal debtor is diminished in appeal, the surety's engagement, being one of indemnity, would diminish in like proportion ; and if the sum recoverable from the principal debtor becomes zero, under the amended decree the surety's liability would also be reduced to nothing.

Niyogi, J., in *Babu Rao* v. *Babu Manaklal*[2], lays down the principle in a different, though equally effective, manner as follows :

" When the creditor seeks to enforce the debt against the surety, the latter is legitimately entitled to ask ' is the principal debtor himself liable ? If not, he has committed no default and you cannot compel me to discharge an obligation which has no existence. If, on the other hand, I pay you, how can I recover it from the principal debtor whose liability, the debt itself having vanished, has ceased ? ' When the surety seeks his remedy against the principal debtor, he does it in respect of the same debt as the one owed by the principal debtor to the creditor. It is clear that the debt must exist."

So, it is clear that the debt must exist (and should not have been extinguished as under the Madras Agriculturists Relief Act), if the creditor is to choose to enforce his remedy against the surety when the principal debtor stands discharged. In *Annadana Jadaya Goundar* v. *Konammal*[3], relied on by the learned counsel for the appellant the debt had not been extinguished, as the liability to proceed against the surety, in case the principal debtor defaulted to pay the amount under a private compromise with the creditor was expressly reserved, and so, the debt had not become extinguished, but only the remedy against the principal debtor effected.

The learned counsel for the appellant relied on the rulings in the *Nellore Co-operative Urban Bank, Ltd.* v. *Mallikarjunayya*[4] and above all, in *Subramanian Chettiar* v. *Batcha Rowther*[5], which last ruling has been the cause for this reference to this Full Bench, owing to the conflict of views it embodies. The Bench which decided *Subramanian Chettiar* v. *Batcha Rowther*[5], consisted of Wadsworth and Patanjali Sastri, JJ. In that case they held that, where the discharge of a principal debtor is brought about, not by any voluntary act of the creditor, but by the operation of a statute subsequently passed, the surety cannot claim discharge *pro tanto* the principal debtor since section 128 of the Contract Act merely defines the obligation of the surety on the date of the contract of guarantee, and is not intended to govern future changes in the liability of the parties. On this basis they held that a non-agriculturist surety was liable to pay the whole amount of the debt, even though the agriculturist principal debtor was only liable for the debt as scaled down in accordance with Act IV of 1938. I am unable to agree with the view propounded therein or with the reasoning underlying it. The Bench relied on two main reasons, the first being that section 128 of the Contract Act is not intended to govern all future changes in the liability of the parties, when there is no warrant in that section for any such conclusion. The second reason given is that when a new statutory provision has had the effect of granting a partial discharge to the principal debtor, and the creditor has taken no part in releasing the principal debtor from his liability, the remedy of the creditor against the guarantor will not be affected. In other words, they held, like the Bench which decided the *Nellore Co-operative Urban Bank, Ltd.* v. *Mallikarjunayya*[4], (Patanjali Sastri and Thyagarajan,

1. (1887) I.L.R. 12 Bom. 71.
2. I.L.R. (1939) Nag. 175.
3. (1932) 64 M.L.J. 386.
4. (1947) 2 M.L.J. 487.
5. (1941) 2 M.L.J. 751.

JJ.) that a statutory discharge of the whole or any part of a principal debtor's debt will not discharge the surety *pro tanto* as the creditor has taken no part in releasing the principal debtor from his liability. But it is obvious that this position will not be valid when the debt itself has been extinguished as regards the principal debtor by the statute, as I have held to be the case under the Madras Agriculturists Relief Act, and there is nothing to be recovered from him, and so nothing to be recovered from the surety, who has only guaranteed the same debt, as was due from the principal debtor, his engagement being merely accessory to the principal obligation. It is clear to me therefore that the Bench ruling in *Sami Iyer* v. *Ramaswami Chettiar*[1], represents the correct state of the law regarding this matter and that *Subramanian Chettiar* v. *Batcha Rowther*[2], was wrongly decided. I may add that the same Bench which decided *Subramanian Chettiar* v. *Batcha Rowther*[2], was a party to the decision in *Satyanarayanamurthi* v. *Sathiraju*[3] and that they decided therein that a non-agriculturist purchaser of mortgaged property was entitled to redeem the mortgage as a whole after having the debt scaled down. They remarked :

> "It is therefore not correct to say, as was argued for the appellant, that the court, by allowing the mortgagors to redeem the mortgages as a whole, was conferring a benefit upon a non-agriculturist, contrary to the intendment of the Madras Agriculturists Relief Act. On the other hand, if the purchaser in such circumstances is made to pay the entire sum reserved with him for payment under the sale deed, which was executed before the passing of the said Act, the mortgagors would stand ultimately deprived of the benefit which as agriculturists they are undoubtedly entitled to claim under the Act."

The same reasoning would entitle a non-agriculturist surety to claim the benefit of the scaling down in respect of the principal debtor as he must otherwise be allowed to recover what he has paid, and the principal debtor would stand ultimately deprived of the benefit which as an agriculturist, he was entitled to claim under the Act.

The argument of Mr. Ramachandra Aiyar, that the Madras Agriculturists Relief Act allows unscaled debt to be recovered from a non-agriculturist debtor while entitling him to recover only the scaled down amount from the agriculturist debt and that therefore it would entitle him to recover the unscaled amount from the non-agriculturist surety debtor, while allowing him only to recover the scaled down amount from the agriculturist principal debtor overlooks the fact that the debt of a non-agriculturist joint principal debtor is independent of the agriculturist joint principal debtor's debt, and is not accessory to it, wholly dependent on it, going with it, and vanishing with it, as a surety debtor's debt, as pointed out in *Sami Iyer* v. *Ramaswami Chettiar*[1] and in *Babu Rao* v. *Babu Manaklal*[4]. The ruling in *Syed Fakir and another* v. *Abdul Samad Khan*[5] is not very relevant for this question but it shows that sureties cannot be held responsible for damages occurring to the creditor by acts for which they are not responsible, and those acts, in my opinion, will cover also acts of the Legislature extinguishing the debt of the principal debtor, as under the Madras Agriculturists Relief Act.

Unhampered by judicial decisions also, on a fair reading of the provisions of the Indian Contract Act, I am inclined to hold that as the liability of the surety is co-extensive with that of the principal debtor, if the latter's liability is scaled down in an amended decree, or otherwise extinguished in whole or in part by statute, the liability of the surety also is *pro tanto* reduced or extinguished. Paragraph 192 of Halsbury's Laws of England, Volume 16, 1935 edition, contains the following passage :—

> "Whatever expressly or impliedly discharges the principal debtor from liability usually discharges the surety also by implication, as his position is thereby altered without his consent, notwithstanding that the alteration is accomplished by operation of law. He is therefore discharged where he can establish that the alteration changes the nature of his liability, but not otherwise."

This shows that extinction of a debt in whole or in part by operation of law will do, and that the creditor need not take any part in releasing the principal debtor from

1. (1922) 44 M.L.J. 171.
2. (1941) 2 M.L.J. 751.
3. (1942) 1 M.L.J. 506.
4. I.L.R. (1939) Nag. 175.
5. I.L.R. (1938) Nag. 354.

his liability. Mr. Ramachandra Aiyar relied on a passage in paragraph 195 which runs as follows:

"Though an alteration in the position of the surety by the principal debtor's discharge or otherwise, accomplished by the operation of law, may discharge him, this is not always the case."

But this passage will not, in my opinion, help the appellant in this case as the exceptions given there relate to the release of the principal debtor's liability under the law of limitation, Bankruptcy Laws, etc., (which merely bar the remedy) and not the extinction of the principal debtor's liability, as here under the Madras Agriculturists Relief Act.

It was finally urged by Mr. Ramachandra Aiyar, for the appellant that the Madras Agriculturists Relief Act could not have really intended to extend the benefit of the extinguishing of the debt of the principal debtor to his surety, as otherwise the Legislature when amending various sections of the Madras Agriculturists Relief Act as soon as decisions of this Court were given against the intention of the Legislature in enacting those sections, had not amended the sections and stated that the surety's liability also would stand discharged or would be deemed to stand discharged *pro tanto* on the principal debtor's liability standing discharged by scaling down, in spite of the decision of a Bench of this Court in *Subramanian Chettiar* v. *Batcha Rowther*[1]. I cannot accept this argument. Our country has only recently become a democracy. Law is not so advanced in this country as in England and United States of America and the Legislature is not yet keeping a vigilant standing committee to watch all judicial decisions and bring about amendments of the law at once where the decisions given are contrary to the intention of the Legislature. Even under the best of conditions the argument will not have much weight, as the Court is not concerned with the lack of amendment of sections by a Legislature consequent on a wrong decision, when it is satisfied about the true import of a particular section or sections in a piece of legislation. In the circumstances mentioned above this argument has even less weight.

In the end, therefore, I hold that *Subramanian Chettiar* v. *Batcha Rowther*[1] was wrongly decided, and answer the reference made to us as below:

A non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the provisions of the Madras Agriculturists Relief Act, but will be liable only to the extent of the scaled down debt due by the principal debtor.

Subba Rao, J.—I agree. I have nothing to add to what I have already expressed in the order referring the question to the Full Bench.

Balakrishna Ayyar, J.—I agree with the answer proposed.

(This appeal coming on for final hearing on 29th August, 1950, after the expression of opinion by the Full Bench), the Court delivered the following

JUDGMENT: *Panchapakesa Aiyar, J.*—The Full Bench, to which the main question of law was referred by us on 25th January, 1950, has given its decision that a non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the Madras Agriculturists Relief Act, and that his liability will only be co-extensive with that of the agriculturist principal debtor. In view of this decision, the learned counsel for the appellant prays that the appeal may be dismissed but without costs, as the appeal was filed relying on the Bench ruling in *Subramanian Chettiar* v. *Batcha Rowther*[1], which has been held to be no longer good law by the Full Bench decision. He relied on the Bench ruling in *Ramaswami Naicken* v. *Venkataswami Naicken*[2] for the position that when a ruling has altered the legal position after filing of the appeal, which is not argued in consequence, it is a fit case for dismissing the appeal without costs. But here, the appeal was argued fully before and during the reference to the Full Bench. So we consider that the appeal should be dismissed with half the costs of the respondent, in the circumstances, and order accordingly.

K.S. ——— *Appeal dismissed.*

1. (1941) 2 M.L.J. 751. 2. (1919) I.L.R. 43 Mad. 61.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON, MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

Narayana Aiyar .. *Petitioner* *

v.

G. Veerappa Pillai .. *Respondent.*

Penal Code (XLV of 1860), sections 193 and 500—Offence under both sections—Complaint by person defamed under section 500—Maintainability—Complaint by Court under section 195, Criminal Procedure Code—If essential.

Per *Govinda Menon J.*—Even when the Court before which the alleged defamer had given evidence finds that the deposition is false, it is open to the person defamed to institute proceedings under section 499, Penal Code, without the Court filing a complaint in accordance with the provisions of section 195, Criminal Procedure Code. All the more so is such a complaint unnecessary where a defamatory statement is made by a witness in the course of a judicial proceeding and the court has not adjudicated upon the truth or falsity of it, where the Court was deprived of an opportunity of so adjudicating ; in all such cases it is open to the party defamed to take proceedings under section 499, Penal Code.

Nallappa Goundan v. *Chinnammal*, (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158, *approved.*

Per *Balakrishna Aiyar J.*—Where an alleged offence falls both under sections 193 and 500 of the Penal Code a complaint of the Court is not necessary to enable a Magistrate to take cognisance of a complaint under section 500 of the Penal Code alone.

Per *Basheer Ahmed Sayeed, J.*—Any statement or averment made in the course of judicial proceedings whether false or true could be made the subject-matter of a criminal prosecution by a person aggrieved when the said statement or averment or evidence is also capable of being brought within the scope of section 193 of the Penal Code, without a complaint given by the Court before which the statement or averment was made or evidence given.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Joint Magistrate of Kumbakonam in C.C. No. 2 of 1950, on 23rd February, 1950.

[This Criminal Revision Case came on for hearing on 1st August, 1950, before Govinda Menon and Basheer Ahmed Sayeed, JJ.]

The Order of the Court was delivered by

Govinda Menon, J.—We think that the point of law involved in this case on which there is a conflict of opinion should be decided by a Full Bench. The decision of Leach, C.J., and Chandrasekhara Aiyar, J., in *Nallappa Goundan* v. *Chinnammal*[1], runs counter to four earlier decisions *Shanmugasundaram Pillai* v. *Manicka Mudaliar*[2], and *Ammana Sastri* v. *Sitaramayya*[3] and *Gurubasayya* v. *Siddalingappa*[4] and *Ramaswami Konar* v. *Nachiar Ammal*[5]. Recently one of us considered the point in Criminal R.C. No. 1524 of 1949 and distinguished the case in *Nallappa Goundan* v. *Chinnammal*[1]. The same case was considered in *Chinnayya Goundan* v. *Emperor*[6]. Sen, J., of the Calcutta High Court in *Bushan Singh* v. *Ram Nagina Singh*[7], expresses the opinion that where an offence of defamation is committed by a person during the course of a proceeding in Court, no complaint under section 500 can be made against that person, except under a complaint filed by the Court of the Officer concerned under section 195 of the Criminal Procedure Code. The *ratio decidendi* of quite a large body of case law, namely, *Manjayya* v. *Sesha Chetti*[8], *Perianna Muthirian* v. *Vengu Aiyar*[9], In re *Ravanappa Reddi*[10] and *Dholliah* v. *Sub-Inspector of Police, Wellington Station*[11] is to the effect that in similar circumstances, where the facts constitute two

* Cr.R.C. No. 282 of 1950. (Crl. R. P. No. 266 of 1950). 29th September, 1950.

1. (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158.
2. (1939) 1 M.L.J. 412.
3. (1939) M.W.N. 45.
4. (1940) 1 M.L.J. 689.
5. (1940) 2 M.L.J. 491.
6. (1948) 1 M.L.J. 448.
7. A.I.R. 1950 Cal. 77.
8. (1888) I.L.R. 11 Mad. 447.
9. (1928) 56 M.L.J. 208.
10. (1931) 62 M.L.J. 735 : I.L.R. 55 Mad. 343.
11. (1931) 1 M.L.J. 412.

offences for one of which a complaint by the Court is necessary and for the other no such complaint is necessary, it is not possible to circumvent the provision of section 195, Criminal Procedure Code; by filing a complaint for an offence for which a previous complaint under section 195 is not necessary. Chandra Reddi, J., who referred the case to a Bench, was also of the view that there is a conflict. We therefore are of the opinion that the entire case may be posted before a Full Bench for resolving the conflict on the point of law involved.

(This case came on for hearing before the Full Bench accordingly).

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* and *Padmini Raghavan* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

M. K. Nambiar and *M. Srinivasagopalan* for Respondent.

The Court made the following

ORDER : *Govinda Menon, J.*—The petitioner was the accused in C.C. No. 2 of 1950 on the file of the Court of Joint Magistrate of Kumbakonam and he seeks to revise the order of the Joint Magistrate overruling a preliminary objection raised, that without a complaint from the Court under section 195 (1) (*b*) of the Criminal Procedure Code the proceedings now pending in C.C. No. 2 of 1950 cannot be enquired into.

The petitioner is the managing director of Messrs. Raman and Raman, Limited, a joint stock company running a fleet of motor buses in the Tanjore District. O.S. No. 37 of 1944 in the Court of the Subordinate Judge of Kumbakonam was a suit for a declaration that a sale by the third defendant therein to the first defendant (present petitioner) was void and inoperative and for recovery of possession of a number of buses which formed the subject-matter of the suit. The plaintiff in that suit is the present respondent and his claim was that he purchased the buses from the third defendant, but that after having sold the same to the plaintiff, the third defendant again purported to sell them to the first defendant firm, which sale had no authority or justification. O.S. No. 37 of 1944 filed on 3rd October, 1944, was on the ground that the plaintiff purchased the buses on 10th April, 1944. The contentions of the first defendant, the present petitioner, among others were that the sale to the plaintiff by the third defendant was a collusive transaction made with the object of resiling from the earlier sale to him. While the suit was pending, the plaintiff applied for the appointment of a receiver and he was appointed receiver on 7th March, 1945. As receiver, the plaintiff got possession of the buses and was running the same. There was a decree as prayed for in O.S. No. 37 of 1944 and the plaintiff who functioned as a receiver till then applied to continue in possession in his own right and this was ordered on 18th September, 1946. Thereupon, the first defendant filed an appeal to this Court against the decree of the Subordinate Judge and the same came up for hearing before the Hon'ble Chief Justice and Mack, J. By their judgment, dated 2nd September, 1949, they allowed the appeal and dismissed the plaintiff's suit with costs. Thereafter, the present petitioner, as first defendant, applied by E.A. No. 383 of 1949 in E.P. No. 133 of 1949 to the Subordinate Judge, Kumbakonam, for restitution of the buses taken away from his possession. In that application it was claimed that damages amounting to a lakh of rupees should be ascertained and also that before the amount was ascertained, the buses in the possession of the plaintiff-respondent should be attached. The affidavit in support of the application states that the attachment of all the properties of the plaintiff described in the schedule to the application filed along with the affidavit should be ordered under Order 21, rule 42 of the Code of Civil Procedure and that the plaintiff should be called upon to give security for Rs. 84,000 due as damages and Rs. 31,000 being the value of the buses and if the plaintiff failed to give adequate security to the satisfaction of the Court, the order of attachment should be made absolute. The third prayer

was for the appointment of a receiver. E.A. No. 389 of 1949 supported by the affidavit was filed in Court on 26th October, 1949, praying for the reliefs mentioned above. In addition to the affidavit, dated 26th October, 1949, another affidavit was also filed in support of the application.

Thereafter, the plaintiff-respondent filed a complaint on 5th January, 1950, before the Joint Magistrate of Kumbakonam alleging that in the affidavit filed by the defendant-petitioner in support of his restitution application, there are statements which are false and also defamatory of the plaintiff-respondent. He therefore prayed that as the first defendant has committed an offence under section 500, Indian Penal Code, the matter should be enquired into and the defendant punished. In the sworn statement of the same date the complainant alleged that the accused filed an affidavit containing false imputation in order to defame him and that all the defamatory statements are set out in the complaint. After summons was issued to the accused, he filed an application on 10th February, 1950, raising a preliminary objection that the complaint cannot be proceeded with in the absence of a complaint by the Court under section 195 (1) (*b*) of the Criminal Procedure Code. The reasons alleged are that the subject-matter of the complaint relates to the statements made by the accused in an affidavit filed before the Subordinate Judge of Kumbakonam in support of the prayer for attachment of the complainant's properties and the appointment of a receiver and since, according to the complainant, the statements are false, they constitute an offence under section 193, Indian Penal Code for taking cognizance of which a complaint by Court is a necessary pre-requisite. and in the absence of a complaint from the Subordinate Judge as provided for under section 195 (1) (*b*), Criminal Procedure Code, the Joint Magistrate has no jurisdiction to entertain the complaint and proceed with the enquiry. The learned Joint Magistrate overruled the preliminary objection on the ground that section 195, Criminal Procedure Code did not apply to a case of defamation. He distinguished an unreported decision of this Court and found that a complaint by the Court was not necessary for taking action for an offence of defamation under section 500, Indian Penal Code. As stated already it is against the order of the Joint Magistrate overruling the preliminary objection that this revision petition has been filed. The entire case has been posted before this Full Bench on account of a conflict of decisions in this Court and with the object of resolving this conflict.

The learned Subordinate Judge of Kumbakonam before whom the affidavits containing the alleged defamatory statements have been filed has not decided about the truth or otherwise of the averments contained therein. It is necessary to preface the discussion with that statement. This is not a case where a Court has found that false evidence has been intentionally given in any state of a judicial proceedings. It has yet to be decided as to whether the statements contained in the affidavits are false or not, though the complainant alleges that those statements are false and therefore an offence under section 193, Indian Penal Code, has been committed. The further allegation is that not only are most of the statements false to the knowledge of the person who made the same, but that all of them are defamatory intended to harm and injure the reputation of the complainant. The alleged false and defamatory statements are recited in paragraphs 5, 6, 7 and 10 of the complaint. The allegation in paragraph 7 of the complaint that the imputation that the complainant may collude with his friends and agree to have the ownership transferred to third parties is said to be a grossly defamatory one; but that is a matter which the Court, when it enquires into the truth or falsity of the other statements contained in the affidavit, would be able to decide because only a possibility is alleged and not an actuality.

We have heard elaborate and learned arguments on the various points of law arising in the case both from Mr. K. S. Jayarama Aiyar for the petitioner and from Mr. M. K. Nambiar for the respondent and a wealth of judicial authority has been cited before us by both of them to substantiate the point of view which each of them seeks to justify.

The petitioner's counsel elaborates and builds up his argument in this way. According to the complaint, the averments contained in the affidavit are false, though the petitioner disputes that description. If the averments are false, according to the respondent, then the declarant of the affidavit has given false evidence in a judicial proceeding and thereby committed an offence under section 193, Indian Penal Code. If this is so, assuming, without admitting, that false evidence has been given, the result is that an offence under section 193, Indian Penal Code, is committed, in which case, by virtue of section 195 (1) (*b*), Criminal Procedure Code, no Court can take cognizance of an offence under section 193, Indian Penal Code, committed in relation to, or in the course of, a judicial proceeding without a complaint from the Court before which the offence has been committed. There is no such complaint in the present case. If the alleged false statements partake of the nature of defamatory statements also, then the person who, as a witness, who in this case is the same as a party to the proceeding, makes such a false statement, has absolute privilege in the making of those statements, and therefore cannot be proceeded with in a criminal court for an offence under section 500, Indian Penal Code. If the plea of absolute privilege has to be accepted, then the only other imaginable offence which could have been committed is one under section 193, Indian Penal Code, for which there is no complaint from Court and hence the lower Court ought not to have entertained the complaint. Secondly, even if the declarant has no absolute privilege in relation to the statements made, still, since, according to the complaint, by the self-same statement not only an offence under section 193, Indian Penal Code, but also an offence under section 500, Indian Penal Code, is committed, according to the decisions of this and other courts, an offence under section 499, Indian Penal Code, cannot be enquired into in the absence of a complaint from the Court for an offence under section 193, Indian Penal Code. Various authorities were cited in favour of the above proposition. On the other hand, learned counsel for the respondent urges that the case of absolute privilege has not been put forward in the lower Court at all but the objection to the entertainability of the complaint was put forward on the assumption that an offence under section 500, Indian Penal Code, has been committed. It is further contended that the Indian Law of Defamation as enacted in sections 499 and 500, Indian Penal Code, is different from the law of England because the English Common Law relating to libel and slander cannot be administered in India in the face of the statutory provision contained in sections 499 and 500, Indian Penal Code. Though some earlier cases of this Court and other Courts had taken the view that witnesses have an absolute privilege in India in the same manner as they enjoy in England, later cases have veered round to the view that the question is only one of qualified privilege as enunciated in sections 499 and 500 of the Code. In England, ordinarily, libel alone is indictable in a criminal Court whereas slander is an actionable tort. But both libel and slander have been included in section 499, Indian Penal Code, and therefore even though a slanderous statement cannot ordinarily be criminally indicted in England, in India slander can be made the subject of a criminal prosecution on account of the statutory provision contained in sections 499 and 500 of the Indian Penal Code. The English Common Law regarding civil remedies for libel and slander are alone administered in India and not where it relates to a crime. Therefore the contention is raised that there is only a qualified privilege so far as witnesses are concerned. The decisions which lay down that, where one and the same set of circumstances or transaction creates offences for one of which a complaint from Court is necessary and for entertaining the other, such a complaint is not, a Court cannot take cognizance of the minor complaint and thereby circumvent the provisions of section 195, Criminal Procedure Code, cannot apply to this case, where the two offences alleged to have been committed, *viz.*, under section 193 and section 500, Indian Penal Code, cannot be termed to be offences related to each other in any way but are totally separate and independent offences. The reason put forward is that a conviction or acquittal for an offence under section 193, Indian Penal Code, does not bar the conviction or acquittal for an offence under section 500, Indian Penal Code, on the same set of facts. In other words, the merger of offences, *viz.*, a minor one being merged

in a major one, which requires a complaint from a Court, or a graver crime in which is included a less serious crime, cannot apply where the offences are giving false evidence and defamation as in this case. The two are distinct and separate, the elements of the one having nothing to do with the elements of the other. In this view, it is urged by the learned counsel for the respondent that the view taken in some of the decisions that the provisions of section 195, Criminal Procedure Code, do not apply to defamation, that a person who is defamed by a witness is at liberty to file a complaint against the person who defamed him under the Penal Code and that in such a case it is not necessary that a Court should itself complain or that the sanction of the Court should be obtained, is the more acceptable and correct view. In any event, there are statements in the affidavit *per se* defamatory and which could not possibly be made the subject of an enquiry and decision by a Court as to the truth or falsity of the same, and therefore at least with regard to these statements the complaint should be entertained. In addition, it is urged that since the Court has not adjudicated upon the truth or otherwise of the allegations in the affidavit, it cannot be surmised that simply because the complaint states that the allegations are false they are really untrue.

In support of the contention that no difference exists between sworn statements contained in an affidavit and those made orally in a Court on solemn oath, our attention has been invited to *Adapala Adivaramma* v. *Rabala Ramachandra Reddy*[1], where it is held that there is no difference between evidence given in the box and evidence given on affidavit in that they are both absolutely privileged and so suit for damages will lie in respect of evidence given therein. Wallis, J., relies upon the observations contained in *Dawkins* v. *Lord Rokeby*[2]. It is not seriously contended that we should make any difference with regard to the applicability of section 193, Indian Penal Code, between sworn statements contained in an affidavit and those given in the witness box. But as we have already stated, so far as a suit for damages is concerned, the law in India is still the common law of England, *viz.*, that witnesses are absolutely privileged and the dictum in *Dawkins* v. *Lord Rokeby*[2], holds good in this country. In that case, in response to a question from the Lord Chancellor the consulted Judges through the Lord Chief Baron (Sir F. Kelly) expressed the opinion that

> "no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove the ground. But the principle is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on allegation, whether true or false, that they acted from malice."

The House of Lords accepted the opinion of the Judges.

Dawkins v. *Lord Rokeby*[3], is a decision of the same case in the trial Court where Kelly, C.B., expressed the same opinion:

> "The authorities are clear, uniform and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law."

It is therefore clear, as already remarked by us, that in England witnesses are absolutely privileged both against criminal prosecution and against civil suits for damages. In India, since we have no codified law relating to the tort of defamation, the English law prevails. Mr. K. S. Jayarama Aiyar relied upon the decisions in *Sullivan* v. *Norton*[4], *Manjaya* v. *Sesha Shetti*[5], In the matter of *Alraja Naidu*[6], In re *Venkata Reddy*[7], In re *Muthuswami Naidu*[8], and *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhry and others*[9], for the contention that witnesses have absolute privilege in India, even against criminal prosecutions. The early case

1. (1909) 21 M.L.J. 85.
2. (1875) L.R. 7 H.L. 744 at 752 and 755.
3. (1873) L.R. 8 Q.B. 255.
4. (1887) I.L.R. 10 Mad. 28.
5. (1888) I.L.R. 11 Mad. 477.
6. (1906) I.L.R. 30 Mad. 222.
7. (1912) 23 M.L.J. 39 : I.L.R. 36 Mad. 216.
8. (1912) I.L.R. 37 Mad. 110.
9. (1872) 17 W.R. 283.

in *Sullivan* v. *Norton*[1], did not relate to a witness or to a criminal proceeding. It was a case of an advocate having made defamatory statements while in the course of his professional work and a Full Bench of this Court held that an advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as an advocate. The earlier decision of their Lordships of the Judicial Committee in *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhry and others*[2], related to a suit for damages for defamation and their Lordships held that witnesses cannot be sued in civil Courts for damages in respect of evidence given by them upon oath in a judicial proceeding. This maxim, which certainly has been recognised in this country by all the Courts, is based upon the principle of public policy in that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes, the fear of being harassed by suits for damages but that the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury.

In *Manjaya* v. *Sesha Shetti*[3], a Bench of this Court held that when a person was convicted under section 500, Indian Penal Code, for defaming another by making a statement when under cross-examination in a judicial proceeding before a criminal Court, such a conviction was bad, because the statements of witnesses are privileged and, if false, the remedy is by indictment for perjury and not for defamation. The learned Judges relied upon the decisions of the English Courts to that effect. This decision was followed in In the matter of *Alraja Naidu*[4], where Benson, J., held that it is contrary to public policy that a person bound to state the truth in answer to questions put to him by a Court should be liable to be prosecuted for defamation in respect of answers so given, though untrue and not given in good faith. The matter was elaborately discussed later on by a Full Bench in In re *Venkata Reddy*[5], where Arnold White, C.J., reviewing all the cases and relying upon the dicta contained in the English cases held that where a person was charged with an offence and when replying to the Magistrate to answer to a question put to him made a statement defamatory of one of the prosecution witnesses, that statement was absolutely privileged and that he was not liable to be punished in respect thereof for an offence under section 499, Indian Penal Code. The Full Bench further went on to hold that although the English doctrine of absolute privilege is not expressly recognised in section 499, Indian Penal Code, it does not necessarily follow that it was the intention of the Legislature to exclude its application from the law of this country. Reference was made to the observations of Lopes, L.J., in *Royal Acquarium and Summer and Winter Garden Society* v. *Parkinson*[6], as well as to the decision in *Dawkins* v. *Lord Rokeby*[7]. We need not dilate upon the observations contained in this case because it came up for consideration in a larger Full Bench in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[8]. Though In re *Venkata Reddi*[5], was followed in a later case, In re *Muthuswami Naidu*[9] where a Bench held that a defamatory statement in a complaint to a Magistrate is absolutely privileged, in *Gopal Naidu* v. *King-Emperor*[10], a Full Bench of five Judges came to the conclusion that since the criminal law of India has been codified in the Indian Penal Code and the Criminal Procedure Code, the Court is not entitled to invoke the Common Law of England in such matters at all, because the law has to be ascertained by interpreting the language used in the Codes themselves. In the judgment of Devadoss, J., reference was made to the decision in In re *Venkata Reddi*[5], though the other Judges have not adverted to that decision or expressed an opinion regarding the correctness of that particular case. What they were concerned was regarding the correctness of the decision in In re *Ramaswami*

1. (1887) I.L.R. 10 Mad. 28.
2. (1872) 17 W.R. 283.
3. (1888) I.L.R. 11 Mad. 477.
4. (1906) I.L.R. 30 Mad. 222.
5. (1912) 23 M.L.J. 39 : I.L.R. 36 Mad. 216.
6. (1892) 1 Q.B. 431 at 451.
7. (1875) L.R. 7 H.L. 744 and L.R. 8 Q.B 255.
8. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 (F.B.).
9. (1912) I.L.R. 37 Mad. 110.
10. (1922) 44 M.L.J. 655 : I.L.R. 46 Mad. 605 (F.B.).

Ayyar[1], which the Full Bench held to be correct not for the reasons given by the learned Judges in In re *Ramaswami Ayyar*[1], but on other grounds.

As mentioned a Full Bench of five Judges in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[2], was that had to consider about the correctness of In re *Venkata Reddi*[3] and in the opinion of the Full Bench In re *Venkata Reddy*[3] was wrongly decided and was therefore overruled. The actual decision in *Thiruvengada Mudali* v. *Tripurasundari Ammal*[2], was that according to the eighth exception defamatory statements made in complaint to Magistrates are not absolutely privileged, because matters specifically dealt with by the Penal Code such as the one under consideration should not be decided by the application to the English Common Law. The learned Judges of the Full Bench reserved the question as to whether absolute privilege attaches to advocates and witnesses in the following words at page 737 :

> "The question of privilege that may attach to an advocate or witness is not before us and we express no opinion as to whether it might or might not be possible to distinguish their position."

In view of the clear exposition contained in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[2], we have now to take it that In re *Venkata Reddy*[3], stands overruled. Though the matter was left open in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[2], it came up for consideration regarding the absolute privilege claimed by a witness in *Peddabba Reddi* v. *Varada Reddi*[4], where Devadoss and Waller, JJ., held, dissenting from *Manjaya* v. *Sesha Shetty*[5] that in India statements made by witnesses are entitled not to an absolute but to only a qualified privilege so far as criminal prosecutions are concerned. They further held that a witness who answers a question put to him by counsel without seeking the protection of the Court under section 132 of the Evidence Act is not entitled to that protection. Devadoss, J., notes the distinction between the English and Indian law regarding defamation both as an indictable offence as well as a civil remedy. The learned Judge exhaustively discussed the law on the point citing a large body of case-law both English and Indian and we are in entire agreement with him. It is therefore now too late in the day for Mr. Jayarama Aiyar to contend that a witness has absolute privilege with regard to evidence given by him in a Court of law when he is prosecuted for defamation under sections 499 and 500, Indian Penal Code. The other High Courts in India have also taken the same view. The whole subject is discussed in Ratanlal's Law of Crimes, seventeenth edition at page 1263, where the decisions of the various High Courts have been noted. All the High Courts have held that a person giving evidence in a Court of law is not entitled to an absolute privilege in respect of statements which he makes, and consequently he is not immune from a complaint of defamation by reason of words uttered on oath in the witness box. So far as the Bombay High Court is concerned, we need only refer to the Full Bench decision in *Bai Shanta* v. *Umrao Amir*[6]. It is unnecessary for us to refer to the decisions of the other High Courts because all of them are found collected by the author at page 1263 and 1264. In this connection we may refer to a decision by a Full Bench of five Judges in *Satish Chandra Chakravarthi* v. *Ram Dyal De*[7], where Mukerjee, Ag. C.J., after reviewing the entire body of case-law, held that the defamatory statements, on oath or otherwise, by a party to a judicial proceeding, falls within section 499 of the Penal Code and is not absolutely privilged. It is not open to the Court to engraft exceptions derived from the Common Law of England on the statute law of India. What happened in that case was this :—A party made an accusation against his vakil of professional misconduct and requested the Court to take disciplinary action. The High Court, after enquiry refused to take any action, whereupon the pleader filed a complaint before the Presidency Magistrate charging his accuser for defamation under section 500, Indian Penal Code, in respect of statements contained in the petition which he filed before the High Court. This complaint was filed despite the refusal by the High Court to sanction prosecu-

1. (1921) I.L.R. 44 Mad. 913.
2. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 (F.B.).
3. (1912) 23 M.L.J. 39 : I.L.R. 36 Mad. 216.
4. (1928) 56 M.L.J. 570 : I.L.R. 52 Mad. 432.
5. (1888) I.L.R. 11 Mad. 477.
6. (1925) I.L.R. 50 Bom. 162 (F.B.).
7. (1920) I.L.R. 48 Cal. 388.

tion of the client for an offence under sections 181 and 193, Indian Penal Code, and when objection regarding the maintainability of the complaint under section 500, Indian Penal Code, was taken on the ground that the Court had refused to file a complaint under sections 181 and 193, Indian Penal Code, the Full Bench held that there is no bar to the maintainability of the prosecution for defamation even though the Court refused to sanction the complaint for offences under sections 181 and 193, Indian Penal Code. In re *Venkata Reddy*[1], was referred to and dissented from. It seems to us that the consensus of opinion in the various High Courts in India has converged on the conclusion that the question of absolute privilege to a witness does not arise in view of section 499, Indian Penal Code, which relates to a criminal prosecution.

We have next to see how far the contention, that the alleged defamatory statement, being also one to which is attached the characteristic of an offence under section 193, Indian Penal Code, cannot be made the subject of a prosecution because of the absence of a complaint from Court under section 196, Criminal Procedure Code, can be acceded to or not. A large number of cases have been quoted in relation to this topic. The second part of the contention of the learned counsel for the petitioner is that even if there is no absolute privilege or immunity from criminal prosecution still, since the passages complained against, according to the present complainant-respondent are false and constitute an offence under section 193, Indian Penal Code, it is more in consonance with natural justice and equity that where, on the same facts, a general offence, which does not require a complaint by a Court or public servant, is committed along with a more aggravated and particularised form of offence, it is not open to the prosecution to circumvent the provisions of section 193, Criminal Procedure Code, by resorting to proceed with the general minor offence without attempting to move the Court, or the officer concerned, for taking action under section 195, Criminal Procedure Code. It is hence urged that the Court must consider the facts in the complaint as a whole and if they disclose an offence for which a special complaint is necessary under section 195, Criminal Procedure Code, the Court cannot take cognizance of the case at all unless such a complaint has been filed. Various decisions are cited in support of this contention, but it is not quite necessary to refer to them in detail. The latest case is by one of us in *Chinnayya Goundan*, In re[2], where it was held that when certain persons are prosecuted under section 143 read with section 188, Indian Penal Code, for defiance of an order under section 144, Criminal Procedure Code, the real offence committed is one under section 188, Indian Penal Code, and the accused cannot be tried for a minor general offence like the one under section 143, Indian Penal Code, without a proper complaint under section 195 (1) (*a*) of the Criminal Procedure Code, and the trial and conviction without such a complaint would be without jurisdiction. In this case reference has been made to the decision of Curgenven, J., in *Perianna Muthirian* v. *Vengu Ayyar*[3], to the decision of a Bench consisting of Jackson and Curgenven, JJ., in *Ravanappa Reddi* v. *Emperor*[4], and to other decisions. The decision of Madhavan Nair and Burn, JJ., in *Appadurai Nainar* v. *Sampath Rao Nainar*[5], has also been discussed and followed. Happell, J., in *Antervedi Sarma* In re[6], has also referred to the earlier cases and analysed them exhaustively and the learned Judge followed the decision in *Appadurai Nainar* v. *Sampath Rao Nainar*[5]. We are in entire agreement with the decision in *Perianna Muthirian* v. *Vengu Aiyar*[3], which was followed in *Ravanappa Reddi* v. *Emperor*[4], which again was followed in *Appadurai Nainar* v. *Sampath Rao Nainar*[5], where the proposition of law has been laid down that parties should not be allowed to evade the provisions of section 195 (1) (*b*) of the Criminal Procedure Code by filing a complaint under another provision of the Penal Code if, clearly, an offence under section 193, Indian Penal Code, or any other section mentioned in section 195 (1) (*b*), Criminal Procedure Code, has been committed. This view is supported not only by the three

1. (1912) 23 M.L.J. 39 : I.L.R. 36 Mad. 216.
2. (1948) 1 M.L.J. 448.
3. (1928) 56 M.L.J. 208.
4. (1931) 62 M.L.J. 735 : I.L.R. 55 Mad. 343.
5. (1935) 69 M.L.J. 812 : I.L.R. 59 Mad. 165.
6. (1946) 1 M.L.J. 466.

cases adverted to above but also by *Antarvedi Sarma, In re*[1], *Chinnayya Goundan, In re*[2], *Srinivasa* v. *Ramaswami*[3], *Subramanya Aiyar* v. *Swaminathan Chetty*[4], *Somayya* v. *Satyanarayana*[5] and *Gopalaswami Kurukondar* v. *Emperor*[6].

But the question is does this principle apply where, on the same set of facts, an offence under section 499, Indian Penal Code, as well as one for which a complaint is required under section 195 (1) (*b*), Criminal Procedure Code, are both committed? Section 195 to 198 of the Criminal Procedure Code deal with the conditions requisite for taking cognisance of cases by Courts and section 195 enumerates the classes of cases dealing with contempt of lawful authority of public servants, false evidence and offences against public justice, as well as using as genuine a false document, counterfeiting device or mark used for authenticating documents, etc. Section 196, Criminal Procedure Code, deals with prosecution of offences against the State and section 196-A, Criminal Procedure Code, with prosecution for certain classes of criminal conspiracy. Section 197, Criminal Procedure Code, deals with prosecution of Judges and public servants; section 198, Criminal Procedure Code, with prosecution for breach of contract, defamation and offences against marriage. Each of these sections deals with a separate class or classes of cases and provide for different contingencies. Whereas under section 195, Criminal Procedure Code, the complaint should be by the public servant or Court, under sections 196 and 196-A, Criminal Procedure Code, the complaint should be under the authority of the Provincial Government or the officer empowered by the Provincial Government. In the case of section 197, Criminal Procedure Code, the complaint should be after getting the previous sanction of the President or the Governor of the State. All these sections refer to offences against the public and do not have any concern whatever with crimes committed as against the individuals. Section 198, Criminal Procedure Code makes it obligatory that for offences falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 of the same Code, the aggrieved person must be the complainant. Therefore, what is sought to be complained against is an infringement of a personal right and in such a case no Court can take cognizance of a complaint except upon a complaint made by the person aggrieved. We have to decide as to whether, when the same set of facts or circumstances constitute an offence against public justice, say under section 193, Indian Penal Code, as well as an infringement of a personal right of an individual, for example one of defamation, the personal right of the individual should be subordinated to the supreme interests of the public as controlled by the State and whether a person can be permitted to invoke the provisions of section 499, Indian Penal Code by filing a complaint under section 198, Criminal Procedure Code, without having recourse to moving the Court, or the public officer concerned, before whom the offence under section 193, Indian Penal Code, was committed. On the facts of the case in *Mallappa Goundan* v. *Chinnammal*[7], there was no finding by the Court before which the defamer had given evidence that what he had stated was false evidence punishable under section 193, Indian Penal Code. All that is gatherable from the report of the case is that the defamatory words were uttered by the defamer when giving evidence in support of a complaint filed by him to the effect that his wife had been guilty of theft. The Court before which that evidence was given did not give a finding that the complainant-witness had committed an offence under section 193, Indian Penal Code. Such being the case, the view adumbrated by the learned Judges that the provisions of section 195, Criminal Procedure Code, do not apply to defamation and that a person who is defamed by a witness when in the witness box is at liberty to file a complaint against his defamer, cannot be said to be unjustified, and has got to be upheld. If the Court before which the evidence had been given had come to a conclusion

1. (1946) 1 M.L.J. 466.
2. (1948) 1 M.L.J. 448.
3. (1944) 2 M.L.J. 157 : I.L.R. (1945) Mad. 459.
4. (1933) M.W.N. 217.
5. (1934) M.W.N. 694.
6. (1935) M.W.N. 1344.
7. (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158.

that the evidence was false, which evidence at the same time amounted to a defamatory statement as well, in such a case the question as to whether the supreme interests of the public as controlled by the State should override the personal right of the individual, would have to be considered. As the decision stands, we cannot say that the ruling in *Nallappa Goundan* v. *Chinnammal*[1] is unsound. The three cases decided by Lakshmana Rao, J., are referred to in *Nallappa Goundan* v. *Chinnammal*[1], viz., *Shanmugasundaram Pillai* v. *Manicka Mudaliar*[2], *Ganapathi Asari* v. *Kuppuswami Asari*[3] and *Ramaswami Konar* v. *Nachiar Ammal*[4]. In two out of the three cases decided by Lakshmana Rao, J., there had been a finding by the Court before which the evidence was let in that the party had given false evidence. Under these circumstances, Lakshmana Rao, J., held that without a complaint by the Court under section 193, Indian Penal Code, the party aggrieved should not be allowed to take advantage of the provisions contained in section 499, Indian Penal Code and prosecute the defamer for an offence under section 499, Indian Penal Code. The following cases, viz., *Krishna Row* v. *Appaswami Aiyar*[5], *Venkataramanjulu Chetty* v. *Kanniah Chetty*[6], *Segu Moideen* v. *Sheik Muhammad*[7] and *Muhammad Isa* v. *Nazim Hussain*[8] are all cases where it has been held that if the defamatory words were uttered in the course of giving evidence in a judicial proceeding, then there is no necessity for the filing of a complaint by the Court if the aggrieved person seeks recourse to a criminal prosecution for an offence under section 499, Indian Penal Code. The question then arises as to what shall be the position when there is no finding by the Court as to the falsity or otherwise of the evidence given or statements made by the witness. For example let us take a case where the Court has had no opportunity of adjudging whether the alleged defamatory statement amounted to giving false evidence at all as for instance where, after the evidence was given the proceedings were withdrawn without affording an opportunity for the Court to pronounce upon the truth or otherwise of the statement, or a case where the Court found that the statement is not false but at the same time it may be defamatory. In such a case, it is impossible for the Court to file a complaint under section 195, Criminal Procedure Code. Can it be said that the personal right of the aggrieved party, *i.e.*, the party defamed, will be taken away by the non-existence of a complaint by Court? In our opinion it cannot be. The only way of reconciling the various decisions of this and the other High Courts is to confine the pre-requisite of a complaint by the Court, where the statement amounted to false evidence as well as to defamation, to cases where the Court or the public officer before whom the evidence was given on oath has already found, in the judicial proceeding, that such statement was false. If that were so, without a complaint by the Court, the aggrieved person who claims to have been defamed should not be permitted to proceed with a complaint of defamation without a complaint by the Court. But we think any such reconciliation will defeat the very purpose and object of section 198, Criminal Procedure Code. For, after all the Court can file a complaint only in respect of offences mentioned in section 195, Criminal Procedure Code and the offence of defamation is not one mentioned by the said section. The aggrieved party must be left to his own right and remedy as it will not be within the province of the Court to prosecute for private wrongs.

Mr. Nambiar contends that even where the Court has found that an offence under section 193, Indian Penal Code has been committed, still, if the party defamed wants to proceed against the deponent of the false evidence on a charge of defamation, there can be no impediment even if a complaint by Court has not been filed. For this argument he places reliance upon the distinctive nature of the two offences, *viz.*, that of giving false evidence and of defamation. The ingredients of the one cannot be said to be the ingredients of the other; nor can it be said that the offence of false evidence relates to the same group as that of defamation. The

1. (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158.
2. (1939) 1 M.L.J. 412.
3. (1939) 1 M.L.J. 614.
4. (1940) 2 M.L.J. 491.
5. (1891) 1 Weir. 585.
6. (1933) M.W.N. 1263.
7. (1936) M.W.N. 490.
8. I.L.R. (1940) All. 314.

learned counsel invites our attention to the observations of the Calcutta High Court in *Ramsebak Lal* v. *Muneswar Singh*[1] and to the Full Bench Judgment of the same Court in *Satish Chandra Chakravarti* v. *Ram Doyal De*[2]. He also stresses that the Federal Court in *Hori Ram Singh* v. *The Crown*[3], has held that where a person has committed two offences one of which can be tried only with the pre-requisite of a sanction by the Government and the other can be tried without such a sanction, it is possible to try the case for which no sanction is necessary and convict the offender. Observations of Sulaiman, J. and Varadachariar, J., in that case were relied upon. What their Lordships held was that if a public servant were to commit the offence of embezzling property entrusted and thereby commits a breach of trust under section 409, Indian Penal Code, it cannot be said that he is doing an act or purporting to do an act in execution of his duty as a servant of the Crown. But where he falsifies an account and thereby commits an offence under section 477-A of the Penal Code, he is certainly purporting to act, though not actually acting, in the execution of his duty. The case there is a converse one for the reason that the more serious offence under section 409, Indian Penal Code, does not require any sanction by the authority under whom the public servant was working and it seems to us that not much support can be gained for the proposition enunciated by the learned counsel from the observations of their Lordships of the Federal Court. The other case on which he places reliance is the full bench decision in *U Aung Po* v. *The King*[4], where the decision was that there is no exception to section 499, Indian Penal Code, saying that, when the defamation is made in a statement to a public servant or in Court proceedings, by virtue of which the offence was punishable under section 182 or section 211, Indian Penal Code or some other section, then no prosecution under section 500, Indian Penal Code would lie, and hence a complaint under section 500, Indian Penal Code cannot be dismissed even if the same facts constitute also an offence under section 182 and sanction required by section 195, Criminal Procedure Code is not obtained. Even here there was no finding given by the Court before which the defamatory statement was made that an offence under section 193, Indian Penal Code, had been committed.

Mr. Jayarama Ayyar, on the other hand, wants us to follow the observations contained in *Prafulla Kumar Ghose* v. *Harendra Nath Chatterjee*[5] as well as the observations of Rankin, C.J. and Ghose J. in *Ibrahim* v. *Emperor*[6] both of which were considered by a single Judge, Sen, J. in *Bishan Singh* v. *Ram Nagina Singh*[7]. In our opinion, in view of the dissenting note sounded in *Satish Chandra Chakravarti* v. *Ram Doyal De*[2], *Prafulla Kumar Ghose* v. *Harendra Nath Chatterjee*[5] cannot be considered as good law, even though Sen, J., in *Bishan Singh* v. *Ram Nagina Singh*[7] was of a contrary view. Both in *Prafulla Kumar Ghose* v. *Harendra Nath Chatterjee*[5] and *Bishan Singh* v. *Ram Nagina Singh*[7], there had already been a finding by the Court before which the evidence was given that the testimony was false and therefore an offence under section 193, Indian Penal Code, had been committed. So far as *Ibrahim* v. *Emperor*[6] is concerned there was an adjudication that the complaint was false. Though on the facts of the particular cases, the decisions in *Ibrahim* v. *Emperor*[6] and *Bishan Singh* v. *Ram Nagina Singh*[7] can be justified as correct, we cannot, in view of the Full Bench judgment in *Satish Chandra Chakravarti* v. *Ram Doyal De*[2], subscribe to some of the very wide observations contained in these judgments.

Another case on which the learned counsel for the respondent places some reliance is in *Guru Prosad* v. *Rameshwar*[8] where Jack and Khundkar, JJ., following *Satish Chandra Chakravarti* v. *Ram Doyal De*[2] were of opinion that since the Legislature has not chosen to include section 500, Indian Penal Code, amongst those sections in which the prosecution must be initiated by the Court in connection with which the offence has been committed, there is no provision of law by which the Court can refuse to permit a prosecution under section 500, Indian Penal

1. (1910) I.L.R. 37 Cal. 604 at 608.
2. (1920) I.L.R. 48 Cal. 388 (F.B.).
3. (1939) 2 M.L.J. Supp. 23 : I.L.R. 1940 Lah. 400 (F.C.).
4. A.I.R. 1938 Rang. 232.
5. (1916) I.L.R. 44 Cal. 970, 973 and 974.
6. (1928) 111 I.C. 433.
7. A.I.R. 1950 Cal. 77.
8. A.I.R. 1938 Cal. 527.

Code, where the facts appear to justify such a prosecution, on the ground that the proceedings have not been initiated under section 476, Criminal Procedure Code, by the Court before which the offence is alleged to have been committed and that the prosecution is designed to evade the provisions of section 195, Criminal Procedure Code. This decision only reiterates what has been exhaustively considered by Mukerjee, A.C.J., in *Satish Chandra Chakravarthi* v. *Ram Doyal De*[1]. If the offences of giving false evidence in a judicial proceeding and defamation do not belong to the same genus, but are distinct and separate in their characteristics and ingredients, we are not able to perceive any serious inhibition by the Criminal Procedure Code for initiation and trial of one of these offences independently of anterior resort to fulfilling the conditions necessary to commence a prosecution for the other. Therefore it is not possible to hold that section 195, Criminal Procedure Code, should supersede the later provision in section 198, Criminal Procedure Code.

My conclusion therefore is that even when the Court before which the alleged defamer had given evidence finds that the deposition is false, it is open to the person defamed to institute proceedings under section 499, Indian Penal Code without the Court filing a complaint in accordance with the provisions laid down in section 195, Criminal Procedure Code. All the more so is such a complaint unnecessary where a defamatory statement is made by a witness in the course of a judicial proceeding and the Court has not adjudicated upon the truth or falsity of it, or where the Court was deprived of an opportunity of so adjudicating; in all such cases it is open to the party defamed to take proceedings under section 499, Indian Penal Code. It is not essential to emphasise the point of difference (*viz.*) that the prior decision by the Court regarding the falsity of the statement made would deprive the party defamed from proceeding with the complaint. In the present case the Subordinate Judge of Kumbakonam has not even adjudicated upon the allegations made in the affidavits and therefore it is premature to say that an offence under section 193, Indian Penal Code, has been committed.

It has been pressed upon us that if a party against whom a witness deposes is permitted to run to a Criminal Court and file a complaint of defamation, then, the safeguard of protection given to witnesses would be lost and that even truthful and honest witnesses would be reluctant to come forward and give evidence. We do not think that the picture so presented, is real. It is more than eight years since the decision in *Nallappa Goundan* v. *Chinnammal*[2] has been passed. No serious calamity has so far occurred. It is safer to depend upon the good sense of the common man rather than provide for extreme contingencies. Witnesses can always seek the protection of the Court under section 132 of the Evidence Act if they are compelled to answer questions involving defamatory answers. As I have already stated, in the present case as the Sub-Court has not even adjudicated upon the truth of the allegations contained in the affidavits, the Criminal Revision Petition has to be dismissed and we order accordingly.

Balakrishna Ayyar, J.—One Narayana Ayyar, the accused in C. C. No. 2 of 1950 on the file of the Joint Magistrate of Kumbakonam is the petitioner before this Court. In October, 1949, he filed an execution application No. 383 of 1949, in the Court of the Subordinate Judge of Kumbakonam in which among other reliefs he prayed for: (1) the attachment of all the properties of Veerappa Pillai, the plaintiff in the suit; (2) an order requiring Veerappa Pillai to give security for certain amounts and (3) the appointment of a receiver. In support of this application he filed two affidavits in the course of which he alleged: (1) "I am now reliably informed that there are several other claims of a very huge magnitude against the plaintiff". (2) Veerappa Pillai owed on 31st July, 1949, over Rs. 42,000 to the Hanuman Bank and the balance due to the bank was still very large; (3) Veerappa Pillai had borrowed large amounts from several other persons; (4) Veerappa Pillai's properties consisted largely of shares which "are of no value now;" and his immoveable properties were only of insignificant worth; (5) there are various

1. (1920) I.L.R. 48 Cal. 388 (F.B.). 2. (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158.

criminal charges against him ; (6) Veerappa Pillai was in such embarrassed circumstances that " I am reliably informed that he is arranging to dispose of all his properties and secrete the money so as to defraud me and the other creditors ; " and (7) it was understood that the Official Liquidator, Madras, was about to institute proceedings against Veerappa Pillai for the appointment of a receiver. Narayana Aiyar also prayed in his affidavit that after the Court had effected the attachment of some buses in the possession of Veerappa Pillai the District Superintendent of Police, Tanjore, should be informed of the fact as

> " I am afraid that to frustrate the application that is now filed by me, the plaintiff may collude with his friends and agree to the ownership being transferred to third parties and if the District Superintendent of Police, Tanjore, orders the transfer it will be later difficult for the receiver to run the buses even if one is appointed."

According to Veerappa Pillai, all these allegations and others appearing in the affidavits of Narayana Aiyar are false and defamatory and were made maliciously in order to lower his reputation. He therefore filed a complaint under section 500 of the Indian Penal Code against Narayana Aiyar before the Joint Magistrate, Kumbakonam. The Magistrate recorded a sworn statement from Veerappa Pillai and thereafter took the complaint on file under section 500, Indian Penal Code and issued processes. After Narayana Aiyar appeared before the Magistrate, a petition was filed on his behalf raising a preliminary objection to the jurisdiction of the Magistrate on the ground that since the averments in the complaint of Veerappa Pillai " primarily disclose offences which come within the purview of section 195, Criminal Procedure Code ", a complaint by the appropriate Court was necessary and that in the absence of such a complaint the accused should be discharged under section 253 (2), Criminal Procedure Code. The learned Magistrate overruled this objection and Narayana Aiyar has now come to this Court to have that order quashed.

The main question of law that we have now to determine is whether when the allegations in a private cmplaint are tantamount to an accusation of an offence which falls both under section 193, and section 500, Indian Penal Code a complaint of the court is necessary where the prosecutor desires to proceed only in respect of the offence under section 500, Indian Penal Code. On this question there has been a sharp cleavage of opinion and that is why this case has been referred to a Full Bench.

A large number of decisions was cited on both sides, but it is unnecessary for me to examine them. In the judgment which he has just delivered, my learned brother Govinda Menon, J., has reviewed them as comprehensively as is possible. It is therefore sufficient for me to say which of the two opposing views I prefer and why.

Mr. K. S. Jayarama Aiyar, the learned advocate for the accused argued that in this country a witness is entitled to absolute privilege against proceedings both civil and criminal. In support of this view he referred to some of the earlier decisions of this court two of which are reported in *Manjaya* v. *Sesha Shetti*[1] and *In the matter of Alraja Naidu*[2].

But all these decisions are seen to be based to on a rule of the English Common Law which though it still holds good so far as civil proceedings are concerned, has ceased to apply to criminal proceedings. As has been explained in the later decisions of this court—vide *Gopal Naidu* v. *King Emperor*[3] and *Tiruvengada Mudali* v. *Tripurasundari Ammal*[4], the rule of the English Common Law has in this respect been superseded by the provisions contained in the Indian Penal Code. The Penal Code insists on good faith and does not confer absolute privilege on witnesses when they are being proceeded against in a criminal Court for defamation.. Where a law on a particular subject has been codified by Statute, it is not permissible to add to it, or subtract from it or modify it by referring to the earlier rules of the common law which occupied

1. (1888) I.L.R. 11 Mad. 477.
2. (1906) I.L.R. 30 Mad. 222.
3. (1922) 44 M.L.J. 655 : I.L.R. 46 Mad. 605 (F.B.).
4. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 (F.B.).

the field before the enactment of the Statute. The resulting position, is no doubt anomalous, that where a witness is being sued in tort for damages he can plead absolute privilege but that when he is being prosecuted before a criminal Court and therefore presumably placed in greater peril, his privilege should be more qualified and his protection correspondingly circumscribed. But as has been pointed out in some of the decisions that anomaly can be rectified only by the Legislature.

Mr. Jayarama Aiyar next contended that the accused in the present case has only filed an affidavit in court and that, therefore, there has been no "publication" of the defamatory matter and in support of this argument referred to some passages in the decisions in *Dawkins* v. *Lord Rokeby*[1]. But the observations read out by Mr. Jayarama Aiyar stem out of the peculiarities of the English Law and it does not appear that these observations have been followed by any Court in this country. This argument also must be repelled.

Mr. Jayarama Aiyar next elaborated an argument based on section 195 (1) (*b*) of the Criminal Procedure Code. So far as is now material that section runs as follows.

> "No Court shall take cognizance . . . . . (*b*) of any offence punishable under any of "the following sections of the same code, namely section 193 . . . . 211 . . . . when such offence is alleged to have been committed in; or in relation to, any proceeding in any Court, except on the complaint in writing of such Court . . . . ."

The word 'offence' has been defined in section 4 (*c*) of the same Code as :

> "any act or omission made punishable by any law for the time being in force . . . . . ."

Now, argued Mr. Jayarama Aiyer, if we insert the definition of 'offence' occurring in section 4 (*c*) in section 195 (1) (*b*), the passage will read as follows :

> "No Court shall take cognizance of any act or omission made punishable under section 193 . . except on the complaint in writing of the Court."

In other words, where the act or omission falls under section 193, Indian Penal Code, a complaint of the Court is necessary.

This argument looks straightforward and attractive but if followed to its logical end it would produce some very startling results. Section 198 of the Code of Criminal Procedure enacts that :

> "No Court shall take cognizance of an offence falling under Chapter XXI of the Indian Penal Code . . . . except upon a complaint made by some person aggrieved by such offence."

Chapter XXI of the Indian Penal Code is the one dealing with defamation. Now, if the argument of Mr. Jayarama Aiyar on this point were sound and if a complaint of the Court were necessary in respect of an offence on the ground that it falls under section 193, it would also follow that a complaint of the person aggrieved would be necessary if the alleged illegal act or omission falls under section 500, Indian Penal Code also. That means that where an offence falls both under section 193 and under section 500, Indian Penal Code, two complaints would be necessary, one by the Court and the other by the person aggrieved. Now, it is perfectly evident that the Criminal Procedure Code does not envisage such a situation. It would mean that where a witness has committed perjury by making a statement which is at the same time defamatory it would be impossible for the Court to prosecute the offender except with the concurrence of the person defamed. It has to be borne in mind here that though there are provisions in the Code which enables an aggrieved person to move the Court to lay a complaint under section 193, Indian Penal Code—he can proceed by way of an application under Chapter XXXV of the Code—it does not contain any provision whereby the Court can obtain the concurrence of the person aggrieved by the making of a defamatory statement. It is not to be supposed that if the legislature intended that there should be two separate complaints it would not have made some clear provisions for co-ordinating the two complaints and the further conduct of the

1. (1873) L.R. 8 Q.B. 255.

prosecution. If the argument of Mr. Jayarama Aiyar is accepted two complaints would, as already stated, become necessary; who would then be in charge of the prosecution? Who would decide which witnesses should be examined and which witness given up? The Public Prosecutor representing the State and the Court or the private party and his advocate? It is easy to see that there will be an impasse.

This is not the only aspect of the matter. An offence under section 193, Indian Penal Code, is not compoundable under any circumstances while an offence under section 500, Indian Penal Code, can be compounded by the person defamed even without the leave of the Court. If, therefore, the contention of Mr. Jayarama Aiyar is acceded to, it would become possible for a person who is being prosecuted for perjury to circumvent the prohibition against the compounding of such an offence, by compounding the offence of defamation with the person aggrieved. He could thus effectively bar a prosecution under section 193, Indian Penal Code. It is a familiar rule that you cannot do indirectly what you are prohibited from doing directly and an argument which would enable an accused person indirectly to compound a non-compoundable offence cannot be countenanced.

The difficulty raised by the argument of Mr. Jayarama Aiyar would apply not merely to an offence under section 193; it would extend to a series of other offences enumerated in sections 195 to 199, Criminal Procedure Code. I would mention only one more. Let us take for instance a case where *X* goes to a Magistrate and fasely states on oath that *A* murdered *B*. Now by making such a false statement *X* would have committed three offences; he would have committed perjury under section 193; he would have made a false charge with intent to injure punishable under the 2nd Part of section 211, Indian Penal Code, with imprisonment for a period of seven years; he would have also defamed *A*. Now, if the view that Mr. Jayarama Aiyar pressed before us were accepted, *X* could compound the offence of defamation with *A* and thus effectively prevent his being prosecuted either for the offence under section 193 or for the offence under section 211, Indian Penal Code. It is thus clear that the contention put forward by Mr. Jayarama Aiyar would permit the law to be evaded in a manner and in circumstances which the Legislature could never have intended.

These considerations suggest that the better view would be that where an offence falls both under section 193 and under section 500, Indian Penal Code, a prosecution under section 500, Indian Penal Code, would lie without a complaint by a Court for the offence under section 193. One objection to this view would be that to a certain extent it would enable a private individual to circumvent the prohibition imposed by section 195 (1) (*b*) of the Criminal Procedure Code against prosecuting a person for an offence under section 193, Indian Penal Code, without the leave of the Court. It must be recognised that to some extent this is so. But then, this does appear to be a contingency which if not mainfestly envisaged is provided for in our criminal law. Section 235 (2), Criminal Procedure Code, enacts:

"If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences."

Section 403 (1) and (2) run as follows:

"(1) A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)."

It will be seen from these provisions that though they prohibit a person who has been tried and either acquitted or convicted from being again prosecuted for an offence for which a different charge might have been framed against him under section 236 or 237, Criminal Procedure Code, they do not cover cases falling under

section 235 (2) of the Code. Section 236 makes provision in respect of offences of such a nature that it is doubtful which of several offences the facts which can be proved will constitute as for instance whether the offence would amount to theft or receipt of stolen property or criminal misappropriation. Section 235 deals not with such cases but with cases where the acts alleged constitute an offence falling under two or more different sections *e.g.*, sections 193, Indian Penal Code; 500, Indian Penal Code, and others if any. Section 235, Criminal Procedure Code, is not referred to in section 403, Criminal Procedure Code. This would suggest that if an act constitutes an offence falling under sections 193 and 211 and 500, Indian Penal Code, a conviction or an acquittal under section 500, Indian Penal Code, will not bar a prosecution for an offence either under section 193, or under section 211, Indian Penal Code. Similarly a conviction or an acquittal with respect to an offence under section 193, Indian Penal Code, would not bar a subsequent prosecution for an offence under section 211, Indian Penal Code, or section 500, Indian Penal Code. Likewise, a conviction or acquittal under section 211 will not bar a prosecution for an offence under section 193, or 500, Indian Penal Code.

But, it might be objected this would mean that for one and the very same act a person is liable to be punished several times over and this is manifestly unjust. But sufficient safeguard against any possible injustice exists in section 71, Indian Penal Code, the second paragraph of which reads:

> "Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished . . . . the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

By applying this section we would get this result: A person who has by the same act committed an offence under sections 193, 211 and 500, Indian Penal Code, and who has been convicted and sentenced under either section 193 or section 211 and sentenced, let us suppose for seven years, would not when he is subsequently prosecuted under section 500, Indian Penal Code, be given any additional sentence. If, on the other hand, he is first prosecuted and convicted under section 500, Indian Penal Code and he is subsequently prosecuted under section 193 or section 211, Indian Penal Code, the sentence imposed on the second conviction would not after taking into account the punishment already imposed exceed the maximum prescribed for the offence under section 211, Indian Penal Code.

Another objection that has been urged against the view that a complaint by a Court is not necessary is that witnesses who give evidence would have before them a standing threat of a prosecution for defamation; that this would naturally make them hesitate to speak the truth and that the administration of Justice, with which the interests of the community are bound up, would suffer. One answer to this objection is that this is really a matter of substantive law, that the Legislature, for reasons it thought sufficient, declined to grant absolute privilege to witnesses when it codified the criminal law on this matter, and that when the substantive law deliberately declined to confer absolute privilege it does not seem to be appropriate that the procedural law should be strained to confer such absolute privilege.

In the second place a certain measure of protection is conferred on witnesses by section 132 of the Evidence Act which after laying down:

> "That a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind"

goes on to provide that:

> "No such answer, which a witness *shall be compelled* to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

No doubt, there are observations in the decision in *Peddabba Reddi* v. *Varada Reddi*[1], which suggest that before the protection conferred by this proviso can be claimed something more must appear than that a witness has been put into the box and sworn to tell the truth and nothing but the truth. It seems to us that the requirement of this section has been laid down too stringently in the above case. Ordinarily when a witness is sworn and a question is put to him and no objection is raised to the question everybody expects him to answer it; the command of the Court to answer the question is implicit and there is nothing improper in inferring that the witness has been compelled to answer the question. Of course, the position would be different where the witness to whom a question is put makes that a pretext for launching out into something wholly irrelevant. We think that where a question is put to a witness and no objection is taken to the question and his answer is a relevant answer to the question, we may properly presume that he has been compelled to answer the question within the meaning of the proviso and that therefore he cannot be prosecuted.

If section 132 of the Evidence Act is understood in this manner, the risk of witnesses being threatened with vexatious prosecutions would be practically confined to cases where they have sworn to affidavits. These figure more in civil proceedings than in criminal and even there only in respect of matters in which *viva voce* examination of the witnesses is considered unnecessary and proof by affidavit sufficient. If the position be such that it is necessary to make in an affidavit a statement that might expose the person making it to a prosecution under section 500, Indian Penal Code, it is always open to the party who wants to avail himself of such evidence to move the court to examine the witness *viva voce* when section 132 of the Evidence Act will come into operation. We recognise that there would still be a residuary field wherein persons who swear to affidavits would run the risk of being prosecuted for defamation; but it is to be doubted whether the risks are large and in any case that would be a matter for the Legislature.

For these reasons we take the view that where an alleged offence falls both under sections 193 and 500, of the Indian Penal Code, a complaint of the Court is not necessary to enable a Magistrate to take cognizance of a complaint under section 500, Indian Penal Code, alone.

It follows that the Revision Petition must be dismissed.

Basheer Ahmed Sayeed, J.:—I agree with my learned brother Govinda Menon, J., and I wish to add only a few words. The common law of England allows an absolute privilege, both in the criminal and civil spheres, to advocates, parties and witnesses in regard to statements and averments made and evidence given in the course of any judicial proceedings. When such is the state of law in English society which is one of the most advanced societies, in every respect, one would very much wish that in our country, where the society has yet to make considerable advance in education and other spheres of life, the state of law had been similar. Actually, such was the position prior to the decision in *Gopal Naidu* v. *King Emperor*[2], notwithstanding the fact that the criminal law in force in the country had been codified long prior thereto. But, after that decision such absolute privilege obtains only in the civil sphere in regard to statements and averments made and evidence given in the course of judicial proceedings. However eminently desirable it may be that such absolute privilege should also be made available in the field of criminal law, in the interests of the promotion of justice, in so far as the Full Bench decisions in *Gopal Naidu* v. *King Emperor*[2], and *Tiruvengada Mudali* v. *Tirupurasundari Ammal*[3], have held that the criminal law in this country having been codified, the common law doctrine could not be imported any more in this country, they leave no room for us to hold that there is anything more than a qualified privilege available to parties and witnesses in regard to statements and averments made and evidence

1. (1928) 56 M.L.J. 570 : I.L.R. 52 Mad. 605 (F.B.).
2. (1922) 44 M.L.J. 655 : I.L.R. 46 Mad. 432.
3. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 (F.B.).

given in the course of judicial proceedings. Until the law is amended by the competent Legislature they must hold the field and we are bound by these decisions.

But the question which is referred to us for decision is whether any statement or averment made in the course of judicial proceedings, whether false or true could be made the subject-matter of a criminal prosecution by the person aggrieved, when the said statement or averment or evidence is also capable of being brought within the scope of section 193 of the Indian Penal Code, without a complaint being given by the Court before which the statement or averment was made or evidence given. This point has been elaborately dealt with by my learned brother Govinda Menon, J., and I think, in view of the authorities discussed by him, the only safe conclusion to arrive at is to give an answer to the question in the affirmative. The answer has to be in the affirmative notwithstanding the fact that this is likely to give enough room for abuse of the process of law by parties to litigation such abuse tending not merely to harass opposing parties and their witnesses but also to defeat and delay the ends of justice. My learned brother Balakrishna Aiyar, J., however thinks that there is sufficient protection afforded to witnesses and parties by the provisions contained in section 132 of the Evidence Act and other provisions of the criminal law, and that if witnesses seek to avail of these there need be no difficulty in securing immunity from harassment by criminal prosecution. But how far section 132 of the Evidence Act should be availed of by parties or witnesses giving evidence by means of affidavits or averments in plaints and written statements is a doubtful matter. However that be, it seems to me that a negative answer to the question referred to us will be fraught with more serious consequences in the shape of unjustly affecting the rights of individual citizens to vindicate the wrongs done to them by statements and evidence of a nature tending to damage the reputation and character of parties. It is unnecessary for me to say that it is within the province of the Legislature to prevent the abuse of the process of law in this matter by amending section 195 of the Criminal Procedure Code, in a suitable manner. In the result this petition must be dismissed.

K. S. *Petition dismissed.*

[THE SUPREME COURT OF INDIA.]

[Appellate Jurisdiction (Civil).]

(On appeal from the judgment of the High Court of Bombay[1].)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND S. R. DAS, JJ.

The Province of Bombay .. *Appellant**

v.

1. Khushaldas S. Advani (since deceased) and after him his legal representatives (*a*) Govindram Khushaldas Advani, and (*b*) Ram Chand Khushaldas Advani—(substituted by order of High Court, dated 10th March, 1950).
2. P. V. Rao, Assistant Secretary to the Government of Bombay, Health and Local Self-Government Department.
3. G. D. Vartak, The Hon'ble Minister, Health and Local Self-Government Department, Bombay .. *Respondents.*

Certiorari, *writ of—Conditions under which may issue—Availability of the writ to remove or quash an order of the Government of Bombay requisitioning certain premises under section* 3 *of the Bombay Land Requisition Ordinance V of* 1947—*Writ, if lies against the Government of a Province.*

The main question for decision was whether a writ of *certiorari* was available to an aggrieved party to remove or quash an order made by the Government of Bombay requisitioning certain premises under section 3 of the Bombay Land Requisition Ordinance V of 1947.

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* Case No. III of 1949. 15th September, 1950.

1. (1949) 51 Bom.L.R. 342.

Held (*Mahajan and Mukherjea, JJ., contra*) :—As the decision of the Provincial Government about the existence of a public purpose in regard to the requisitioning of a property is not a judicial or quasi-judicial decision there was no scope for an application for a writ of *certiorari*.

Per Kania, C.J.—Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, a writ of *certiorari* may issue.

It is not correct to say that whenever there is a determination of a fact which affects the rights of parties, the decision is quasi-judicial. The word "quasi-judicial" itself necessarily implies the existence of the judicial element in the process leading to the decision. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. Where the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative nature and are not amenable to the writ of *certiorari*. The true position seems to be that when the law under which the Court is making a decision, itself requires a judicial approach, the decision will be quasi-judicial.

There appears nothing in the Bombay Land Requisition Ordinance, to show that in arriving at its decision about a public purpose, the Provincial Government has to act judicially. The words of section 3 of the Ordinance read with the proviso, and the words of section 4 taken along with the scheme of the whole Ordinance do not import into the decision of the public purpose the judicial element required to make the decision judicial or quasi-judicial. The decision of the Provincial Government about public purpose is therefore an administrative act.

Inconvenience or want of adequate remedy does not create a right to a writ of *certiorari*.

Per Fazl Ali, J.—There is nothing in the Bombay Land Requisition Ordinance, to suggest that the public purpose is to be determined in a judicial way.

A petition for a writ of *certiorari* can succeed only if two conditions are fulfilled: firstly, the order to be quashed is passed by an inferior Court or a person or authority exercising a judicial or quasi-judicial function and secondly, such Court or quasi-judicial body has acted in excess of its legal authority. Though the second element would seem to be present in this case, that would not be enough for the purpose of granting a writ of *certiorari* to the applicant. Since the requisitioning of the premises under section 3 of the Ordinance was a purely administrative act and did not involve any duty to decide the existence of a public purpose or any other matter judicially or quasi-judicially, the remedy of the aggrieved party is clearly by action and not by asking for a writ of *certiorari*.

Per Mahajan, J.—The Provincial Government of Bombay acting under the Bombay Land Requisition Ordinance is a body of persons having legal authority to determine questions affecting the rights of subjects and its duty is to act judicially. It cannot arrive at its determination on a mental process of its own. The questions that have to be decided under section 3 of the Ordinance are not questions for the mere determination of the Government subjectively by its own opinion but are matters of determination objectively.

A writ of *certiorari* lies against the Government of Bombay.

Per Mukherjea, J.—The Provincial Government when acting under the Bombay Land Requisition Ordinance, has to satisfy itself that there is a public purpose before it proceeds to requisition any property. As this is an objective condition which has not been made dependent on the personal opinion of the executive it has got to be determined judicially and whether a public purpose exists or not is itself a mixed question of facts and law which could be determined by an application of well-established principles of law to the circumstances of a particular case. There is undoubtedly a *lis* or point in controversy—or what is called a proposal and an opposition.

The act of requisition being an executive act, the determination of the existence of a public purpose upon which the exercise of powers is dependent is either a part of the executive act itself or is something collateral to it. As in the present case it is a thing collateral and preliminary to the exercise of executive authority and not a part of it, the determination of this collateral matter by the executive authority which is a judicial function cannot be regarded as final and if the determination is erroneous, it can be corrected and removed by a writ of *certiorari*.

A writ of *certiorari* will lie against the Provincial Government.

Das, J.—When the Legislature leaves it to the opinion or satisfaction of the executive authority as to whether it is necessary or expedient to requisition a land for a public purpose the executive authority is constituted the sole Judge of the composite matter, that is to say of the existence of the public purpose as well as the necessity or expediency for requisitioning the land for that public purpose, call it a condition precedent or an objective fact or what you will. On a proper construction of section 3 of the Bombay Land Requisition Ordinance, there can be no doubt that the section left it to the Provincial Government to form its own opinion on the entire matter, namely, whether it was necessary or expedient to requisition any land for a public purpose and to act upon that opinion. So construed, the formation of opinion on the whole matter and the act founded thereon was nothing but a purely administrative (*i.e.*) executive act. If the acts were done in good faith and within the four corners of the Ordinance the Court cannot interfere with it in any proceeding and far less by the prerogative of *certiorari* or prohibition.

Apart from the question of construction and assuming that the matter had not been left to its opinion the determination of the existence of a public purpose or the necessity or expediency for making the order could not be regarded as a quasi-judicial act, because (*a*) there was no *lis* in the sense of dispute between two contesting parties to be decided by the Provincial Government; and (*b*) the Provincial Government was not required by the Ordinance to hold any judicial inquiry or to act judicially and the determination of the existence of a public purpose was only a step in the process of the exercise of the administrative power and, if erroneous, the decision could at best be challenged by an action, but a *certiorari* would be a wholly inappropriate remedy.

Appeal under section 205 of the Government of India Act, 1935, from the judgment of the Bombay High Court (Chagla, C.J. and Tendolkar, J.), dated the 4th day of January, 1949, in Appeal No. 65 of 1948.

M. C. Setalvad, Attorney-General for India, *C. K. Daphtary*, Advocate-General of Bombay (*G. N. Joshi* and *M. M. Desai*, Advocates, Supreme Court, with him) for Appellant.

H. M. Seervai, R. J. Joshi and *Rameshwar Nath*, Advocates, Supreme Court, for Respondents Nos. 1 (*a*) and 1 (*b*).

The Court delivered the following

JUDGMENTS: *Kania, C.J.*—This is an appeal from a judgment of the High Court at Bombay and it relates to the power of the High Court to issue a writ of *certiorari* against the Province of Bombay to quash an order to requisition certain premises. The material facts, as stated in the judgment of the High Court, are these. One Abdul Hamid Ismail was, prior to the 29th of January, 1948, the tenant of the first floor of a building known as "Paradise" at Warden Road, Bombay, the landlord of which was one Dr. M. D. Vakil. On the 29th January, 1948, Ismail assigned his tenancy to the petitioner and two others, the son and brother's daughter's son of the petitioner (the respondent). All the three assignees were refugees from Sind. On the 4th February, 1948, the petitioner went into possession of the flat. On the 26th February, 1948, the Government of Bombay issued an order requisitioning the flat under section 3 of the Bombay Land Requisition Ordinance (V of 1947) which came into force on the 4th December, 1947. On the same day Dr. Vakil was informed that the Government had allotted the premises to Mrs. C. Dayaram who was also a refugee from Sind. Further orders were issued authorising an Inspector to take possession of the premises. On the 4th March, 1948, the petitioner filed a petition for a writ of *certiorari* and an order under section 45 of the Specific Relief Act. The petition was heard by Mr. Justice Bhagwati who, *inter alia*, granted the writ against the Province of Bombay and the Secretary, etc. On appeal, the appellate Court confirmed the order as regards the issue of the writ of *certiorari* against the appellant, but cancelled the order as regards the other parties. The appellant has come on appeal to this Court.

The learned Attorney-General, on behalf of the appellant, urged the following three points for the Court's consideration:

(1) (*a*) Having regard to the provisions of Ordinance V of 1947, whether the order in question was quasi-judicial or only administrative?

(*b*) Assuming the order to be of a quasi-judicial nature, whether it was a case of want or excess of jurisdiction, or it was only a case of mistake of law?

(2) Whether a writ of *certiorari* can be issued against the appellant, which for its actions under the Ordinance, represents the Crown?

(3) Whether the order in question was made for a public purpose?

Sections 3, 4, 10 and 12 of the Ordinance which are material for the discussion in this appeal run as follows:

"3. *Requisition of land.*—If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose:

Provided that no land used for the purpose of public religious worship or for any purpose which the Provincial Government may specify by notification in the Official Gazette shall be requisitioned under this section.

4. *Requisition of vacant premises.*—(1) If any premises situate in an area specified by the Provincial Government by notification in the Official Gazette are vacant on the date of such notification and whenever any such premises become vacant after such date either by the landlord ceasing to occupy the premises, or by the termination of a tenancy, or by the eviction of a tenant, or by the release of the premises from requisition or otherwise, the landlord of such premises shall give intimation thereof in the prescribed form to an officer authorized in this behalf by the Provincial Government.

(2) Such intimation shall be given by post within one month of the date of such notification in the case of premises which are vacant on such date, and in other cases within seven days of the premises being vacant.

(3) A landlord shall not, without the permission of the Provincial Government, let the premises before giving such intimation and for a period of one month from the date on which such intimation is given.

(4) Whether or not an intimation under sub-section (1) is given, and notwithstanding anything contained in section 3, the Provincial Government may by order in writing requisition the premises and may use or deal with the premises in such manner as may appear to it to be expedient.

(5) Any landlord who fails to give such intimation within the period specified in sub-section (2), shall, on conviction, be punishable with fine which may extend to one thousand rupees and any landlord who lets the premises in contravention of the provisions of sub-section (3), shall, on conviction, be punishable with imprisonment which may extend to three months or with fine or with both.

10. *Power to obtain information.*—(1) The Provincial Government may, with a view to carrying out the purposes of this Ordinance, by order require any person to furnish to such authority as may be specified in the order such information in his possession relating to any land which is requisitioned or is continued under requisition or is intended to be requisitioned or continued under requisition.

(2) Every person required to furnish such information as is referred to in sub-section (1) shall be deemed to be legally bound to do so within the meaning of sections 176 and 177 of the Indian Penal Code (XLV of 1860).

12. *Power to enter and inspect land.*—Without prejudice to any powers otherwise conferred by this Ordinance any officer or person empowered in this behalf by the Provincial Government by general or special order may enter and inspect any land for the purpose of determining whether, and, if so, in what manner, an order under this Ordinance should be made in relation to such land, or with a view to securing compliance with any order made under this Ordinance."

On the first question, it was pointed out that under section 3 of the Ordinance the decision of the Provincial Government to requisition certain premises is clearly a matter of its opinion and therefore not liable to be tested by any objective standard. It was urged that the decision as to whether the premises were required for a public purpose was also a matter for the opinion of the Provincial Government, and not a matter for judicial investigation, and therefore the making of the order was in no sense a quasi-judicial decision, but an administrative or ministerial order. In this connection it was pointed out that unlike the Land Acquisition Act there was no provision in the Ordinance for issuing a notice, or for inquiries to be made, or for rival contentions to be examined and evidence to be weighed before a decision is arrived at. It was pointed out that if public purpose was outside the scope of the opinion of the Provincial Government, the section would have run : " If for any public purpose in the opinion of Government . . . ."

A discussion about the distinction between judicial and quasi-judicial functions is not useful in this case as the point for determination is whether the order in question is a quasi-judicial order or an administrative or ministerial order. In *Regina (John M'Evoy)* v. *Dublin Corporation*[1], May, C.J., in dealing with this point observed as follows :—

" It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection, the term ' judicial ' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

This definition was approved by Lord Atkinson in *Frome United Breweries Co.* v. *Bath Justices*[2] as the best definition of a judicial act as distinguished from an administrative act.

1. (1878) 2 L.R. Irish 371, 376. 2. (1926) A.C. 586, 602.

A distinction between the nature of the two acts has been noticed in a series of decisions. This Irish case is one of the very early decisions. On behalf of the respondent it was contended that as stated by Chief Justice May, whenever there is the determination of a fact which affects the rights of parties, that determination is a quasi-judicial decision and, if so, a writ of *certiorari* will lie against the body entrusted with the work of making such decision. As against this, it was pointed out that in several English cases emphasis is laid on the fact that the decision should be a judicial decision and the obligation to act judicially is to be found in the Act establishing the body which makes the decision. This point appears to have been brought out clearly in *The King* v. *The Electricity Commissioners*[1], where Lord Justice Atkin (as he then was) laid down the following test :

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This passage has been cited with approval in numerous subsequent decisions and accepted as laying down the correct test. A slightly more detailed examination of the distinction is found in *The King* v. *London County Council*[2], where Scrutton, L.J., observed as follows :

> "It is not necessary that it should be a Court in the sense in which this Court is a Court ; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition ; and it is not necessary to be strictly a Court ; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of *certiorari*."

Lord Justice Slesser in his judgment at page 243 separated the four conditions laid down by Atkin, L.J., under which a rule for *certiorari* may issue. They are : wherever any body of persons (1) having legal authority, (2) to determine questions affecting rights of subjects, and (3) having the duty to act judicially, (4) act in excess of their legal authority—a writ of *certiorari* may issue. He examined each of these conditions separately and came to the conclusion that the existence of each was necessary to determine the nature of the act in question. In the *Ryots of Garabandho and other villages* v. *Zamindar of Parlakimedi*[3], Viscount Simon, L.C., in delivering the judgment of the Board, accepted the test of these four conditions to determine the nature of the act. He stated :

> "This writ does not issue to correct purely executive acts but, on the other hand, its application is not narrowly limited to inferior 'Courts' in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, *certiorari* will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign's superior Courts and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of King's Dominions and operates, within certain limits in British India."

In *Franklin* v. *The Minister of Town and Country Planning*[4], the points of distinction are again noticed. The question arose in respect of the town and country planning undertaken under the relevant Statute on the order of the Minister following a public local inquiry under the provisions of the Act. The question was whether the order of the Minister was a quasi-judicial act or a purely administrative one. Lord Thankerton pointed out that the duty was purely administrative but the Act prescribed certain methods or steps in the discharge of that duty. Before making the draft order, the Minister must have made elaborate inquiry into the matter and have consulted any local authorities who appear to him to be concerned and other departments of the Government. The Minister was required to satisfy himself that it was a sound scheme before he took the serious step of issuing a draft order. For the purpose of inviting objections and where they were not withdrawn, of having a public inquiry to be held by someone other than the respondent to whom that person reports, was for the further information of the respondent for the final consideration of the soundness of the scheme. He observed :

1. (1924) 1 K.B. 171.
2. (1931) 2 K.B. 215, 233.
3. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 (P.C.).
4. (1948) A.C. 87, 102.

"I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry and to consider that person's report."

Learned counsel for the respondent referred to several cases but in none of them the dicta of Atkin, L.J., or the four conditions analysed by Slesser, L.J., have been suggested, much less stated, to be not the correct tests. The respondent's argument that whenever there is a determination of a fact which affects the rights of parties, the decision is quasi-judicial, does not appear to be sound. The observations of May, C.J., when properly read, included the judicial aspect of the determination in the words used by him. I am led to that conclusion because after the test of judicial duty of the body making the decision was expressly stated and emphasized by Atkin and Slesser, L.JJ., in no subsequent decision it is even suggested that the dictum of May, C.J., was different from the statement of law of the two Lord Justices or that the latter, in any way, required to be modified. The word "quasi-judicial" itself necessarily implies the existence of the judicial element in the process leading to the decision. Indeed, in the judgment of the lower Court, while it is stated at one place that if the act done by the inferior body is a judicial act, as distinguished from a ministerial act, *certiorari* will lie, a little later the idea has got mixed up where it is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of someone, the decision or act is quasi-judicial. This last statement overlooks the aspect that every decision of the executive generally is a decision of fact and in most cases affects the rights of someone or the other. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of *certiorari*. Observations from different decisions of the English Courts were relied upon to find out whether a particular determination was quasi-judicial or ministerial. In some cases it was stated that you require a proposition and an opposition, or that a *lis* was necessary, or that it was necessary to have a right to examine, cross-examine and re-examine witnesses. As has often been stated, the observations in a case have to be read along with the facts thereof and the emphasis in the cases on these different aspects is not necessarily the complete or exhaustive statements of the requirements to make a decision quasi-judicial or otherwise. It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed. In my opinion the conditions laid down by Slesser, L.J., in his judgment correctly bring out the distinction between a judicial or quasi-judicial decision on the one hand and a ministerial decision on the other.

On behalf of the respondent it was strongly urged that even applying these tests the decision of the Provincial Government under section 3 is quasi-judicial. The decision whether the premises were required for a public purpose was contended not to be a matter of opinion. The power to make inquiries under sections 10 and 12 were strongly relied upon in this connection.

Two cases were strongly relied upon by the learned counsel for the respondent in support of his contention that the order in the present case was quasi-judicial. The first is *The King* v. *Postmaster-General*[1]. In that case an employee claimed compensation under the Workmen's Compensation Act. The compensation was payable to him if the workman obtained a certificate of the certifying surgeon that he was suffering from the telegraphists' cramp and was thereby disabled. A medical practitioner was appointed by the Secretary of State and was given

1. (1928) 1 K.B. 291.

powers and duties of a certifying surgeon under section 4 of the relevant Act. By an order of the Secretary of State made in pursuance of that section it was provided that so far as regards the post office employees, the post office medical officer "under whose charge the workman is placed shall, if authorized to act," be substituted for the certifying surgeon in cases of telegraphists' cramp. It was the practice of the post office to refer all cases of such cramp to the chief medical officer of the post office and this reference was relied on as constituting him the substitute for the certifying surgeon under the Act and Order. The applicant suffering from telegraphists' cramp was on the capitation list of the local post office medical officer but in fact never consulted him. On her claiming compensation for telegraphists' cramp the case was referred to the chief medical officer in accordance with the usual practice who certified that the applicant was not suffering from such cramp. It was held that the giving of the certificate was therefore the appropriate subject of proceedings by way of *certiorari*. In rejecting the argument that on the issue of such certificate no right to obtain a writ came into existence, because the certificate was a mere nothing as it had to be followed by another examination and inquiry, Lord Hewart, C.J., observed as follows:

"I do not think that it was contemplated at all that the judgment of the medical referee should, in the smallest degree, be fettered or influenced by a certificate given by a wholly unauthorized person and I do not think Mrs. Carmichael would be in the same position before the medical referee as that in which she would have been if there had been a refusal on the part of the proper officer to give her any certificate at all."

A surgeon's certificate which gave or deprived a person of right to compensation was thus considered a judicial act and if the person had no jurisdiction to give such a certificate a writ of *certiorari* was considered the proper remedy. It should be noticed that in this case a procedure of inquiry was provided under the Act. The case was under entirely different provisions of the Workmen's Compensation Act, which, *inter alia*, gave a right of appeal against the surgeon's decision. It may be further noticed that the subsequent right to obtain compensation started with the certificate in question and was not an independent act of the deciding authority having no connection or concern and not influenced by this decision. A similar decision in respect of the mental capacity of a boy in a school is in *Rex* v. *Boycott and others*[1]. In that case also the opinion of the examining doctor, which had to be followed by subsequent examination and inquiry, was considered subject to a writ of *certiorari* because that decision directly related to the boy and was the starting point for proceeding under the Detention Act and the Mental Deficiency Act.

Bearing in mind the important factor which distinguishes a quasi-judicial decision from an administrative act, it is next necessary to find out whether the action of the Provincial Government permitted under section 3 of the Ordinance, read along with the scheme of the Ordinance is a quasi-judicial decision or an administrative act. Section 3 of the Ordinance permits the Provincial Government, if in its opinion it is necessary or expedient to do so to make an order in writing to requisition any land for any public purpose. Keeping aside for the moment the proviso to the section, it is not seriously disputed that the subjective opinion of the Provincial Government in respect of the order of requisition is not open to challenge by a writ of *certiorari*. The Ordinance has left that decision to the discretion of the Provincial Government and that opinion cannot be revised by another authority. It appears therefore that except when *mala fides* are clearly proved, that opinion cannot be questioned. The next question is whether the requirement "for any public purpose" stands on the same footing. On behalf of the appellant, it was argued that the opinion of the Government that it is necessary or expedient to pass an order of requisition, stands on the same footing as its decision on the public purpose. In the alternative it was urged that the two factors, *viz*., necessity to requisition and decision about public purpose, form one composite opinion and the composite decision is the subjective opinion of the Provincial

1. (1939) 2 K.B. 651.

Government. The third alternative contention was that the decision of the Government about a public purpose is a fact which it has to ascertain or decide, and thereafter the order of requisition has to follow. The decision of the Provincial Government as to the public purpose contains no judicial element in it. Just as the Government has to see that its order of requisition is not made in respect of land which is used for public religious worship or is not in respect of land used for a purpose specified by the Provincial Government in the Official Gazette, (as mentioned in the proviso to section 3) or that the premises are vacant on the date when the notification is issued (as mentioned in section 4 of the Ordinance), the Government has to decide whether a particular object, for which it is suggested that land should be requisitioned, was a public purpose.

In my opinion, this third alternative contention is clearly correct and it is unnecessary therefore to deal with the first two arguments. There appears nothing in the Ordinance to show that in arriving at its decision on this point the Provincial Government has to act judicially. Sections 10 and 12, which were relied upon to show that the decision was quasi-judicial, in my opinion, do not support the plea. The inquiries mentioned in those sections are only permissive and the Government is not obliged to make them. Moreover, they do not relate to the purpose for which the land may be required. They are in respect of the condition of the land and such other matters affecting land. Every decision of the Government, followed by the exercise of certain power given to it by any law is not necessarily judicial or quasi-judicial. The words of section 3 read with the proviso, and the words of section 4 taken along with the scheme of the whole Ordinance, in my opinion, do not import into the decision of the public purpose the judicial element required to make the decision judicial or quasi-judicial. The decision of the Provincial Government about public purpose is therefore an administrative act. If the Government erroneously decides that fact it is open to question in a Court of law in a regular suit, just as its action, on its decision on the facts mentioned in the proviso to section 3 and in section 4, is open to question in a similar way. The argument that a suit may be infructuous because a notice under section 80 of the Code of Civil Procedure is essential and that remedy is therefore inadequate, is unhelpful. Inconvenience or want of adequate remedy does not create a right to a writ of *certiorari*. It is clear that such writ can be asked for if two conditions are fulfilled. Firstly, the decision of the authority must be judicial or quasi-judicial, and, secondly, the challenge must be in respect of the excess or want of jurisdiction of the deciding authority. Unless both those conditions are fulfilled no application for a writ of *certiorari* can succeed. As, in my opinion, the decision of the Provincial Government about public purpose is not a judicial or quasi-judicial decision, there is no scope for an application for a writ of *certiorari*.

Having regard to my conclusion, it is not necessary to discuss the other points urged by the Attorney-General against the issue of a writ against the Province of Bombay and I pronounce no opinion on the same.

The result is that the appeal is allowed and the petition dismissed. The order of costs made by the lower Courts in favour of the respondents is cancelled. The respondents will pay the costs throughout. The costs of the lower Courts will be taxed in favour of the appellant on the terms allowed by those Courts in favour of the respondents. The respondent will pay the costs of the appeal here. The order of costs against the respondents will be limited to the assets of the deceased come to their hands, as the original applicant has died pending these proceedings.

Fazl Ali, J.—This is, in my opinion, quite a simple case, but it has been greatly complicated by the citation of a mass of decisions by the parties and by an attempt on their part to extract from them some principle to support their respective contentions.

The principal question to be decided in this appeal is whether a writ of *certiorari* is available to the respondent to remove or quash an order made by the Government of Bombay requisitioning certain premises under section 3 of Bombay Ordinance

No. V of 1947. It is well settled that a writ of *certiorari* can be issued only against inferior courts or persons or authorities who are required by law to act judicially or quasi-judicially, in those cases where they act in excess of their legal authority. Such a writ is not available to remove or correct executive or administrative acts. The first question therefore to be decided in this case is whether the order passed by the Government of Bombay requisitioning the premises in question is a judicial or quasi-judicial order or an executive or administrative order.

Without going into the numerous cases cited before us, it may be safely laid down that an order will be a judicial or quasi-judicial order if it is made by a Court or a judge, or by some person or authority who is legally bound or authorized to act as if he was a Court or a judge. To act as a Court or a judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation, making some kind of inquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of a controversy, before any decision affecting the rights of one or more parties is arrived at. The procedure to be followed may not be as elaborate as in a Court of law and it may be very summary, but it must contain the essential elements of judicial procedure as indicated by me. In some of the cases which were cited before us and which have been discussed in the elaborate judgments under appeal, an attempt has been made to lay down certain formulæ for determining whether an order is a judicial or quasi-judicial order or not, but in my opinion it is safer to grasp the principle than to depend on the application of any formula or formulæ. Again, a large number of cases were cited to show various instances in which a person or persons was or were held to act judicially or quasi-judicially, but those cases, as I have already indicated, often obscure what may otherwise be a simple question; and apart from the fact that this Court is not bound to refer to cases unless it finds it necessary to do so, I fully share the view expressed by the Privy Council in *Wijeyesekara* v. *Festing*[1] as to why cases decided under different enactments are often not very helpful. In that case, which related to a Ceylon Ordinance, one of the provisions of which appears to be similar in certain respects to section 3 of the Ordinance before us, the Privy Council observed :

"Reference has been made to cases dealing with similar questions arising under statutory enactments in India. Their Lordships do not refer to those cases because the wording of the enactment is not the same, and their discussion might, to some extent, complicate what appears to their Lordships to be a very simple issue."

Having made these observations, they proceeded to say :

"The whole case is decided, in the opinion of their Lordships, in the last three lines of section 6 of the Ordinance."

In the present case also the simplest way to decide it is to try to construe correctly section 3 of the Ordinance under which this case has arisen. That section runs as follows :

"If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose :

Provided that no land used for the purpose of public religious worship or for any purpose which the Provincial Government may specify by notification in the Official Gazette shall be requisitioned under this section."

In construing this section, it is our first duty to enter into the mind of the framers of the Ordinance and look at the whole matter as they must have looked at it. Proceeding in this way, two things seem to me to be clear : (1) The existence of a public purpose is the foundation of the power (or jurisdiction, if that term may appropriately be used with reference to an executive body) of the Provincial Government to requisition premises under section 3, or, as is sometimes said, it is a condition precedent to the exercise of that power. I think that this aspect of the matter has been very lucidly summed up by Bhagwati, J., in these words :

"Unless and until there was a public purpose in existence for the achievement of which they would exercise the power invested in them under section 3, there would be no jurisdiction at all in the

1. (1919) A.C. 646.

Provincial Government to make any order for requisition of land. It is only when that public purpose existed that the jurisdiction of the Provincial Government would come to be exercised and then and then only would they be invested with the discretion of deciding whether it is necessary or expedient to requisition any land for the achievement of that purpose. It therefore follows that the existence of a public purpose is a condition precedent to the exercise of the power of requisitioning invested in the Provincial Government by section 3 of the Ordinance. The Provincial Government are not constituted the sole judges of what that public purpose is. The public purpose has to exist before they can exercise any power of requisition of land within the meaning of that section."

The framers of the Ordinance never intended to impose any duty on the Provincial Government to determine judicially whether a certain purpose is a public purpose or not. There are no express words in section 3 or any other section, to impose such a duty ; nor is there anything to compel us to hold that such a duty is implied. A reference to section 6 of the Ordinance wherein an inquiry is specifically provided for with a view to assess the compensation and sections 10 and 12 under which the Provincial Government is empowered to obtain certain information and enable its officer to inspect land, show that where an inquiry or anything like an inquiry was intended to be made it was specifically provided for. There is however no provision for any inquiry being made for determining the public purpose. Indeed it appears to me that in a large majority of cases no inquiry should be necessary as the existence of a public purpose would be self-evident or obvious, and a mere reference to the purpose will make anyone say : This is of course a public purpose. It may be that just in a few exceptional cases, legalistic or some other considerations may make the position obscure, but in an Act or Ordinance which has to provide for prompt action and which in its day-to-day application must be confined to normal and not exceptional cases, the Legislature may not attach too much importance to such cases and may credit the Provincial Government with sufficient intelligence to know before acting under the Ordinance whether a certain purpose is a public purpose or not. However that may be, the fact remains that there is nothing in the Ordinance to suggest that the public purpose is to be determined in a judicial way.

In this appeal, two principal contentions, which in the view I am inclined to take are the only contentions which need be referred to, were raised in the course of the arguments, one on behalf of the respondent and the other on behalf of the appellant. The contention of the respondent was that the Provincial Government has to act judicially in determining the public purpose and its action is therefore subject to a writ of *certiorari* if it acts beyond its legal authority. The contention on behalf of the appellant is that section 3 empowers the Government to form an opinion on two matters : (1) whether there is a public purpose ; and (2) whether it is necessary or expedient in the interests of that purpose to requisition certain premises. Such being the case, the opinion of the Provincial Government on both these matters is final and cannot be questioned in any Court of law.

I have said enough with regard to the first contention, but I shall add just a few words more. For prompt action the executive authorities have often to take quick decisions and it will be going too far to say that in doing so they are discharging any judicial or quasi-judicial functions. The word " decision " in common parlance is more or less a neutral expression and it can be used with reference to purely executive acts as well as judicial orders. The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference, and the real test is : Is there any duty to decide judicially ? As I have already said, there is nothing in the Ordinance to show that the Provincial Government has to decide the existence of a public purpose judicially or quasi-judicially. It is not obliged to call for or consider any objections, make any inquiry or hear evidence, but it may proceed in its own way—*ex parte*, on *prima facie* grounds, just to see that it is acting within the limits of the power granted to it. Besides the determination of the public purpose *per se* does not affect the rights of any person. It is only when the further step is taken, namely, when the Provincial Government forms an opinion that it is necessary or expedient in the interests of public purpose to requisition certain premises that the rights of others can be said

to be affected. In these circumstances, I am unable to hold that the Provincial Government has to act judicially or quasi-judicially under section 3 of the Ordinance.

The contention on behalf of the appellant, to which I have referred, raises the question as to whether, if certain premises are requisitioned by the Provincial Government for a non-public purpose, the matter is open to challenge in a Court of law. It is well settled that where an Act or regulation commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. Therefore, since the question as to whether it is necessary or expedient to acquire land (given a public purpose) has been left entirely to the satisfaction of the Provincial Government, the opinion formed by it, provided it is formed in good faith, cannot be questioned. In other words, if there is a public purpose, the mere fact that to the Court or to any other person the requisition of the premises does not appear necessary or expedient in the public interest will not make the requisition bad. But the same cannot be said with regard to the decision of the Provincial Government as to the existence of a public purpose, which is the foundation of its power and is a condition precedent to its exercise. If the executive authority requisitions land under section 3 without there being any public purpose in existence, its action is a nullity and the position in law is as if the authority did not act under section 3 at all. Such being the legal position, a person whose right is said to have been affected can always go to a proper Court and claim a declaration that in law his right cannot be affected. I am not prepared to subscribe to the view that the determination of a public purpose and the opinion formed as to the necessity or expediency of requisition form one psychological process and not two distinct and independent steps ; and therefore the rule which applies to one applies to the other. The correct position in my opinion is that the determination of the public purpose is the first step so that if the Provincial Government decided that there is no public purpose the second step need not follow. Besides, whereas the subjective opinion of the Government as to necessity or expediency is not capable of being accurately tested objectively, the existence of a public purpose can be so tested, because there are well-known definitions of public purpose and those definitions can form the common basis for the ascertainment of a public purpose by different individuals. I think that the following dictum of Lord Halsbury in *Mayor, etc., of Westminster* v. *London and North Western Ry. Co.*[1] sums up the legal position correctly :

"Where the Legislature has confided the power to a particular body with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised.

A number of cases were cited before us by the appellant to show that in construing certain provisions in other enactments which are drafted in similar language, the Courts have held that the existence or otherwise of a public purpose is as completely left to the satisfaction of the executive authority as the question as to whether it is necessary or expedient to acquire land. The leading case in support of this proposition is *Wijeyesekera* v. *Festing*[2]. The decision of that case turned on the construction of sections 4 and 6 of Ceylon Ordinance No. 3 of 1876, which run as follows :

"4. Whenever it shall appear to the Governor that land in any locality is likely to be needed for any public purpose, it shall be lawful for the Governor to direct the Surveyor-General or other officer generally or specially authorized by the Governor in this behalf, to examine such land and report whether the same is fitted for such purpose.

6. The Surveyor-General or other officer as authorized as aforesaid shall then make his report to the Governor, whether the possession of the land is needed for the purposes for which it appeared likely to be needed as aforesaid. And upon the receipt of such report it shall be lawful for the Governor, with the advice of the Executive Council, to direct the Government Agent to take order for the acquisition of the land."

It appears that the procedure prescribed by the Ordinance in the above sections was followed and an order was made by the Governor of Ceylon directing the Government Agent to make an order for the acquisition of certain land

1. (1905) A.C. 426.
2. (1919) A.C. 646.

for a public purpose, namely, the making of a road. The appellant to the Privy Council, who was the person whose land had been acquired, contended that the land was not required for any public purpose and that the direction of the Governor was invalid. The Privy Council repelled this contention and held that it was not open to the appellant to contend that the land was not needed for a public purpose. Lord Finlay who delivered the judgment of the Board quoted with approval a previous decision of the Ceylon Court, *Government Agent* v. *Perera*[1], in which the first two paragraphs of the headnote run as follows :

> "In the acquisition of a private land for a public purpose, the Governor is not bound to take the report of the Surveyor-General as to the fitness for such a purpose. His decision on the question whether a land is needed or not for a public purpose is final, and the District Court has no power to entertain objections to His Excellency's decisions."

In my opinion, this case does not go so far as it is supposed to have gone and it is apt to be misunderstood and misapplied. The land was acquired there for the purpose of making a road, and it could not have been argued that the making of a road was not a public purpose. The emphasis was on whether the land was actually needed or wanted for a public purpose and not on the character of the purpose and their Lordships held that the question *whether the land was or was not needed for a public purpose* had been left to the satisfaction of the executive authority. It seems to me that if the land had been acquired not for the purpose of making a road but for a purpose which was evidently not a public purpose at all, the Courts could not have held that the Governor's action in acquiring the land for a non-public purpose was not open to challenge.

I do not wish to refer to cases decided under the Land Acquisition Acts, such as *Ezra* v. *The Secretary of State*[2] and others because, apart from other things, as was pointed out by the Privy Council in the course of the arguments in *Wijeyesekara* v. *Festing*[3], the Indian Land Acquisition Acts expressly provide that the order of the local Government directing the acquisition of land is conclusive.

A third class of cases are those arising under certain war and emergency laws, of which *Carltona, Ltd.* v. *Commissioners of Works and others*[4] may be taken to be a specimen. That case was decided under regulation 51 (1) of the Defence (General) Regulations which ran as follows :

> "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

In that case and other similar cases, it was held that the Parliament had completely entrusted to the executive the discretion of deciding when it would be necessary or expedient to requisition land in the interests of public safety, the defence of the realm, etc., and therefore with that discretion if *bona fide* exercised no Court could interfere. It is clear that the relevant provisions under which those cases have been decided refer to matters such as interest of public safety, defence of the realm, efficient prosecution of the war, etc., of which the executive authorities alone could be the best judges. So far as these matters are concerned, it is difficult to lay down an objective test for determining when the conditions upon which the executive authorities are to act should be deemed to be fulfilled. Thus there is no true analogy between this case and the case before us. An analogy to be complete must rest not only on similarity of language but also on similarity of objects. In certain complicated or border-line cases, the Courts may find it difficult to decide whether a certain matter has been committed to the judgment of the executive authority and made entirely dependent on its satisfaction or whether it is a condition precedent to the exercise of its jurisdiction or power. The line of demarcation between these two matters may appear to be a thin one but it has to be drawn for arriving at a correct conclusion.

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1. 7 Cey. N.L.R. 313.
2. (1902) I.L.R. 30 Cal. 36.
3. (1919) A.C. 646.
4. (1943) 2 All E.R. 560.

As I have already stated, a petition for a writ of *certiorari* can succeed only if two conditions are fulfilled : firstly, the order to be quashed is passed by an inferior Court or a person or authority exercising a judicial or quasi-judicial function, and secondly, such Court or quasi-judicial body has acted in excess of its legal authority. The second element would seem to be present in this case on the concurrent findings of the three judges of the Bombay High Court which are clear and well-reasoned. But that does not seem to be enough for the purpose of granting a writ of *certiorari* to the respondent, since the requisitioning of the premises under section 3 of the Ordinance was a purely administrative act and did not involve any duty to decide the existence of a public purpose or any other matter judicially or quasi-judicially. The remedy of the respondent is clearly by action and not by asking for a writ of *certiorari*. In the circumstances, the further points raised in the case do not call for decision, and I agree that this appeal should be allowed. It would however be for the Provincial Government to consider whether in view of the findings of the Bombay High Court it is desirable to pursue the matter any further.

Patanjali Sastri, J.—I agree that the appeal should be allowed for the reasons indicated in the judgment of my Lord and have nothing useful to add.

Mahajan, J.—I agree with the judgment which my brother Mukherjea proposes to deliver and wish to add some observations of my own out of respect for my Lord the Chief Justice from whose judgment we feel constrained to differ.

The principal questions raised by this appeal are :

(1) Whether the order of requisition, dated 26th February, 1948, made under section 3 of the Bombay Land Requisition Ordinance (Ordinance No. V of 1947) is a quasi-judicial order ?

(2) Whether a writ of *certiorari* lies against the Government of Bombay ?

(3) Whether the High Court has jurisdiction to issue a writ of *certiorari* against the Provincial Government ?

(4) Whether the requisition of the said flat and its allotment to Mrs. C. Dayaram, a refugee from Sindh, was for a public purpose ?

The case of the appellant is that the said requisition order is an administrative order, hence no writ of *certiorari* can issue, that no writ of *certiorari* lies against the Provincial Government, that the High Court has no jurisdiction to issue a writ of *certiorari* against the Provincial Government which in law means and includes the Governor and that the requisition and the allotment of the said flat to Mrs. C. Dayaram was for a public purpose.

It is well settled that a writ of *certiorari* lies if the order complained of is either a judicial or a quasi-judicial order but it is not competent if the order is an administrative or an executive order. The circumstances under which a writ of *certiorari* can be issued are succinctly stated by Atkin, L.J., in *Rex* v. *Electricity Commissioners*[1] in these terms :

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

It was said in *Rex* v. *London County Council*[2] that four conditions have to be fulfilled before a writ of *certiorari* can issue, (1) there must be a body of persons, (2) it must have legal authority to determine questions affecting the rights of subjects, (3) it has the duty laid upon it to act judicially, and (4) it acts in excess of its legal authority.

The learned trial Judge as well as the Judges of the Court of appeal have not in any way departed from these conditions. On the other hand, they have stood firmly by them. Mr. Justice Bhagwati, the learned trial Judge, observed that it is only when these conditions are fulfilled that the body of persons is

1. (1924) 1 K.B. 171 at 205. 2. (1931) 2 K.B. 215 at 243.

subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. In the Court of appeal the learned Chief Justice said that the very basis and foundation of the writ is that the act complained of must be a judicial or a quasi-judicial act. The fundamental rules governing the writ were not disputed before us during the course of the arguments. The real controversy centred round the definition of a judicial and a quasi-judicial act as distinguished from an administrative or a purely ministerial act. The question is where to draw a line which demarcates the executive or purely administrative act from a quasi-judicial or a judicial act. The learned Chief Justice in the Court below summed up the result of the authorities on the point in these terms :

"In the first place, a duty must be cast by the Legislature upon the person or persons who is or are empowered to act to determine or decide some fact or facts. There must also be some *lis* or dispute resulting from there being two sides to the question he has to decide. There must be a proposal and an opposition. It must be necessary that he should have to weigh the *pros* and *cons* before he can come to a conclusion. He would also have to consider facts and circumstances bearing upon the subject. In other words, the duty cast must not only be to determine and decide a question, but there must also be a duty to determine or decide that fact judicially."

The statement of the law seems unexceptionable. It is based on high authority. The classic definition of the term "judicial" was given by May, C.J., in *The Queen* v. *The Corporation of Dublin*[1], and this definition is in these terms :

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

These observations of May, C.J., were quoted by Lord Atkinson in *Frome United Breweries* v. *Bath Justices*[2] as "one of the best definitions of a judicial act as distinguished from an administrative act". They seem to have been approved by Lord Greene, M.R., in *Rex* v. *Archbishop of Canterbury*[3]. In *Rex* v. *Woodhouse*[4], Lord Fletcher Moulton, L.J., observed as follows :

"The term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty in order to provide scope for a writ of *certiorari* at common law."

In *Juggilal Kamlapat* v. *The Collector of Bombay*[5], Bhagwati, J., after a consideration of a number of English authorities reached the conclusion that the phrase "judicial act" must be taken in a very wide sense including many acts that would not ordinarily be termed judicial. The cases cited at the Bar fully bear out this conclusion. Reference may be made to *The King* v. *Postmaster General*[6], where it was held that the giving of a certificate by a medical man was of the nature of a judicial act, and that the certificate was a proper object of proceedings by way of *certiorari*. By the effect of section 1, sub-section (1) (i) of the Workmen's Compensation Act, 1925, and an order extending its provisions to include telegraphists' cramp, a post office workman obtaining the certificate of the certifying surgeon that he was suffering from that complaint and was thereby disabled, was entitled to compensation. By section 44, sub-section (3), a medical practitioner appointed by the Secretary of State was given the powers and duties of a certifying surgeon. An order made by the Secretary of State in pursuance of that sub-section provided that so far as regards post office employees the post office medical officer under whose charge the workman was placed shall, if authorised to act, be substituted for the certifying surgeon in cases of telegraphists' cramp. It was the practice of the post office to refer all cases of telegraphists' cramp to the Chief Medical Officer of the post office and this reference was relied on as constituting him the substitute for the certifying surgeon under the above sub-section and order. The applicant

1. (1878) 2 L.R. Ir. 371.
2. (1926) A.C. 586.
3. (1944) 1 K.B. 282.
4. (1906) 2 K.B. 501.
5. (1945) 47 Bom. L.R. 1070.
6. (1928) 1 K.B. 291.

in that case claimed compensation for telegraphists' cramp and the case was referred to the Chief Medical Officer in accordance with the usual practice. He certified that she was not suffering from telegraphists' cramp. It was the giving of this certificate that was treated in the nature of a judicial act. Lord Hewart, C.J., observed as follows :

"There was a moment in this case when it was argued that the document was of such a kind as not to be proper for the writ of *certiorari*. But I am satisfied, when I look at the part which a certificate of this nature must play in the making of any claim for compensation by a post office worker suffering from telegraphists' cramp, that the certificate of the certifying surgeon is of the nature of a judicial act, and is a fit subject for *certiorari*."

In *Rex* v. *Boycott*[1], certification as to mental deficiency of a boy was held to be a quasi-judicial act within the mischief of the remedy of *certiorari*. By section 31 of the Mental Deficiency Act, 1913, it is provided that in case of doubt whether a child is or is not capable of receiving benefit from instruction in a special school or class, or whether his retention in such school or class would be detrimental to the interests of the other children, the matter shall be determined by the board of Education. A certificate that the boy was incapable by reason of mental defect, of receiving further benefit from instruction in a special school or class and was an imbecile was issued by the medical officer. The father of the boy moved for an order of *certiorari* to remove and quash the certificate. Lord Hewart, C.J., in issuing the writ made the following observations :

"In my opinion, on the facts of this case, this certificate of October 5, 1938, created in the way in which we know that it was created, purported to be and to look like the decision of a quasi-judicial authority."

Reliance was placed on the observations of Atkin, L.J., in *Rex* v. *Electricity Commissioners*[2].

In *The King* v. *The London County Council*[3], a writ of *certiorari* was issued to the London County Council who had exercised the power to grant a licence under the Cinematograph Act, 1909, and had given permission to open the premises on a Sunday under the Sunday Observance Act, 1780. By section 2, sub-section (1) of the Cinematograph Act, 1909, it was provided that a county council may grant licences to persons to use premises for the exhibition of pictures or other optical effects by means of a cinematograph on such conditions and under such restrictions as the council may determine. The council had also power to modify or waive any of the conditions or restrictions attached by the council to the licence. Section 1 of the Sunday Observance Act, 1780, provided that any house, room or other place which shall be opened or used for public entertainment or amusement upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, shall be deemed a disorderly house. A company applied for a licence to open and use premises for cinematograph entertainments and also for permission to open the premises for such purposes on Sundays, Christmas Day and Good Friday. In compliance with this application the County Council made an order accordingly provided a sum of £35 was paid to charity in respect of each Sunday, Christmas Day or Good Friday. Scrutton, L.J., in issuing the writ made the following observations :

"It is quite clear that every proceeding of magistrates or confirming authorities in granting new or renewing old licences is in the nature of a Court, excess of jurisdiction in which can be dealt with by the writ of *certiorari* ; and the procedure in granting licences under the Cinematograph Act, and proceedings consequential thereon, appear to me to stand exactly on the same footing as the proceedings of magistrates or confirming authorities dealing with licences for public houses. When the question is, on what terms and conditions shall a licence be granted, and when the committee proceeds to require that notice of the proposal shall be given, and to hear the applicant and his opponents, and to take evidence, the proceeding seems to me to be exactly that of a tribunal which the King's Bench Division, by the writ of *certiorari*, restrains within its jurisdiction."

Slesser, L.J., in the same case discussed this matter at some length and in the concluding portion of the judgment made the following observations :

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1. (1939) 2 K.B. 651.
2. (1924) 1 K.B. 171.
3. (1931) 2 K.B. 215.

"The legal authority is clearly given by the section to grant the licences, and I have pointed out how it affects the rights of the subject. But the third question is the one which was most strenuously debated in the argument before us: Are the Council under a duty to act judicially? It is said that what has here been done is not a judicial act, or not an act of an administrative body having judicial duties to perform, but is in substance an administrative act for the review of which the writ of *certiorari* is not appropriate. I am unable to distinguish in principle between the application for a licence under the Cinematograph Act, 1909, and an application made with regard to a licence for a public house, which for many years, as to the Confirming Authority, and later, as to the whole proceedings, has been held to be a judicial act. It was suggested, so far as I understood the argument which attempts to differentiate this application from an application for a public house licence, that there is not provided in terms in section 2 any provision for opposition; and that is perfectly true. There is an obligation to notify the police, but there is not in terms there any provision for dealing with opposition, though the County Council have made an elaborate code under which opposition may be heard. I have examined other statutes which similarly contain powers to grant licences, but do not in terms mention opposition, and I find that in one, at any rate, the action of the magistrates was treated as a judicial act, although the statute contained no express provision for opposition . . . *Reg* v. *Justices of Walsall*[1] is an authority that where, on the face of it, it appears that a licence is to be granted to certain persons and not to others, conferring upon them certain rights and obligations, the mere fact that a statute does not in terms provide for opposition to be heard, does not any the less make the duty of the magistrates a judicial duty and therefore it is clear that they were acting or purporting to act judicially in hearing this application, assuming that it was an application, to modify the licence. Of course, as was pointed out by Greer, L.J., in the course of the argument, unless the body was usurping a jurisdiction or acting contrary to their juridical powers, it would not be necessary to have a *certiorari* at all; and to argue that, because they have gone beyond their powers, therefore *certiorari* would not lie, would be to defeat the whole purpose of the writ. But the question is, have they purported under the statute, and have they a duty under the statute, to perform a judicial function in hearing applications for these licences? In my opinion they certainly have."

The learned Attorney-General cited the case of *Franklin* v. *Minister of Town and Country Planning*[2], for the proposition that the mere circumstance that an enquiry may have to be made publicly and objections may have to be heard of persons affected does not necessarily convert the act into a judicial or quasi-judicial act. That case related to the functions of a Minister under the Town and Country Planning Act and the New Towns Act, 1946. Lord Thankerton made the following observations:

"In my opinion, no judicial or quasi-judicial duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under section 1 of the Act and Schedule 1 thereto, are in my opinion purely administrative, but the Act prescribes certain methods of or steps in, discharge of that duty. It is obvious that, before making the draft order, which must contain a definite proposal to designate the area concerned as the site of a new town, the respondent must have made elaborate inquiry into the matter and have consulted any local authorities who appear to him to be concerned, and obviously other departments of the Government, such as the Ministry of Health, would naturally require to be consulted. It would seem, accordingly, that the respondent was required to satisfy himself that it was a sound scheme before he took the serious step of issuing a draft order. It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent, in order to the final consideration of the soundness of the scheme of the designation; and it is important to note that the development of the site, after the order is made, is primarily the duty of the development corporation established under section 2 of the Act. I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report."

In view of these authorities all that can be said is that there is an indefinable, yet an appreciable, difference between the doing of an executive or administrative act and a judicial or a quasi-judicial act. The question, however, whether an act is a purely ministerial or a judicial one depends on the facts and circumstances of each case. As observed by my brother Das in In re *Banwarilal Roy*[3], the question whether an act is a judicial or a quasi-judicial one or a purely executive act depends on the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which the act may be done. In the actual application of the abstract propositions to the circumstances of different cases the exercise of jurisdiction to issue a writ of *certiorari* varies according to the foot of the Chancellor.

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1. (1854) 3 W.R. 69.
2. (1948) A.C. 87.
3. (1944) 48 C.W.N. 766.

The question therefore for decision in this case is whether the Government is a body of persons having legal authority to determine questions affecting the rights of subjects, and secondly, to the extent to which it has and in performing that duty has it the duty to act judicially. In my opinion, the position and duties of the Government under the Bombay Land Acquisition Ordinance are such that it satisfies both the tests. It is a body of persons having legal authority to determine questions affecting the rights of subjects and I think its duty is to act judicially. It cannot arrive at its determination on a mental process of its own.

An examination of the provisions of this Ordinance shows that before the Government forms the opinion that it is necessary and expedient to requisition any land it has to determine the following questions of fact and law—

(1) whether the land is required for a public purpose;

(2) whether the land, the subject-matter of the requisition is being used for public religious worship;

(3) whether the land which it is intended to requisition is being used for a purpose which the Provincial Government has specified by a notification; and

(4) whether the premises are vacant premises.

All these questions are mixed questions of law and fact. No precise definition of the phrase "public purpose" can be attempted and none has been given in judicial decisions. It was, however, observed in *Hamabai Framjee Petit* v. *Secretary of State for India*[1] that in order to constitute a "public purpose" in taking land it is not necessary that the land when taken is to be made available to the public at large, but that it includes a purpose, that is an object in which the general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned. It was said in that case that *prima facie* the Government are good judges of the question whether the purpose is one in which the general interests of the community is concerned but that they are not absolute judges, that is, they cannot say "I desire it, therefore I order it". Under the proviso the question whether the land is being used for public religious worship is again a matter which involves difficult questions of fact and law and the determination of these questions may seriously affect legal rights of worshippers, trustees and other people interested in a place of worship. Similarly the question whether the premises are vacant is a matter that has to be determined in view of the definition of "vacant premises" given in section 4. It involves the determination of the question whether the vacancy was caused by the termination of a tenancy, or by the eviction of a tenant, or by the release of the premises from requisition, etc. A duty has been cast on the landlord to give information of the vacancy of a premises to Government and any failure in the performance of that duty is punishable under the law. The determination by the Government that certain property is required for a public purpose and therefore in its opinion it should be requisitioned entitles the person whose premises are requisitioned to a right to compensation which has to be determined admittedly in a judicial manner under the provisions of the Act. The point therefore arises whether it was intended by the provisions of the order that all these questions of fact and law which have to be determined before Government forms an opinion as to the expediency or necessity of requisitioning certain premises, were to be subjectively determined and the rights of persons were to be affected merely on the opinion of the Government; or whether the determination was intended to be of a judicial or quasi-judicial nature; in other words, whether the determination of these important questions has to be in the infinite mind of the Government or is in the truth of the facts themselves. Are these questions to be determined by the mental operations or the idiosyncracy of the officers of Government or does their determination depend on existence of material facts? If the decision of all the questions is to be arrived at by a subjective process, then there can be no doubt that the act of the Government

1. (1915) 28 M.L.J. 179 : L.R. 42 I.A. 44 : I.L.R. 39 Bom. 279 (P.C.).

in making the requisition will be a purely ministerial act and will not fall within the mischief of the writ; if, on the other hand, these questions of fact and law have to be determined objectively, then the inference is irresistible that the determination will be of a judicial nature. The method and manner of reaching it will be a judicial process. It will consider a proposition and an opposition; both sides of the question will have to be considered, *i.e.*, the Government's point of view as well as the point of view of the person affected and the determination would only be reached on a consideration of facts and circumstances. The line of approach in the matter is, does section 3 of the Ordinance contemplate a thinking on the part of the Government that the place is not being used for the purpose of public religious worship, or does it contemplate a finding on facts that the place is not a place of public worship. As stated by Lord Atkin in *Liversidge* v. *Sir John Anderson*[1], does the Ordinance contemplate a case of thinking that a person has a broken ankle and not a case of his really having a broken ankle? Similarly, can it be said that section 4 contemplates merely a vacancy in the mind of the Government, not a vacancy in fact as a real thing. After a careful consideration of the matter I have no hesitation in holding that these questions are not questions for the mere determination of the Government subjectively by its own opinion but are matters of determination objectively. That being so, the determination of these questions depends on materials which the Government have sufficient power to call for under the Ordinance. It is not only the duty of the Government to determine these questions but its duty is to determine them in a judicial manner, that is, by hearing any opposition to the proposal and by placing its determination on some materials which it has called for under the provisions of section 10 or 12 of the Ordinance. The determination affects valuable rights of persons as to property, it affects rights of worship and any such determination may entail serious consequences. The case of *The King* v. *Bradford*[2] furnishes an apposite illustration. In that case authority was given to take materials for a period of five years from a certain enclosed land which in the opinion of the High Court was a park. It was held that the justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter. In my opinion, the Government by wrongly deciding that the place is not a place of public worship cannot acquire jurisdiction for requisitioning the land. Similarly they cannot by describing a private purpose as a public purpose acquire jurisdiction to make an order of requisition. The Ordinance contemplates the making of necessary enquiries and enabling provisions have been made in it for facilitating them. It seems that a duty is cast on Government before reaching its decision on such important matters to make enquiries and hear persons concerned. Though no express provision exists that objections have to be heard, the power given under section 12 to make enquiries from the person occupying the premises or owning them show that no sooner enquiries are made all that a person has to say on the matter will be said and heard.

For the reasons given above I cannot accede to the contention of the learned Attorney-General as to the construction of section 3 of the Ordinance when he says that it means that the determination of "public purpose" is a matter which rests in the opinion of the Government alone and that the decision of the facts mentioned in the proviso also depends on that opinion. I cannot also agree in the contention that even if these matters required determination objectively, they can be so determined by making administrative enquiries and without hearing persons concerned. In my judgment the learned trial Judge as well as the Judges of the Court of appeal reached a correct decision in this case which is a case on the border line and I do not think that there are any substantial grounds for reversing their well-considered decision.

As regards the second question, I have no hesitation in holding that a writ of *certiorari* lies against the Government of Bombay. Section 306 read with section 176 of the Government of India Act, 1935, expressly preserves the right to sue in all cases where such a right could be exercised as against the East India Company. The

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1. (1942) A.C. 206. 2. (1908) 1 K.B. 365.

learned Attorney-General argued that the section was confined to suits and to actions and did not cover the case of a writ of *certiorari*. It was said that there is no power to issue a command to the Sovereign. My simple answer is that the Provincial Government is not the sovereign and that the Government of India Act expressly says that there is a right to sue the Province. The expression "sue" means "the enforcement of a claim or a civil right by means of legal proceedings." When a right is in jeopardy, then any proceedings that can be adopted to put it out of jeopardy fall within the expression "sue". Any remedy that can be taken to vindicate the right is included within the expression. A writ of *certiorari* therefore falls within the expression "sue" used in section 176 of the Government of India Act, 1935, and the remedy therefore is within the express terms of the statute. The immunity granted by section 306 is to the Governor and not to the Province. It was argued that the word "Governor" in the section is synonymous with "Provincial Government" by reason of the definition of the phrase "Provincial Government" given in section 46 (3) of the General Clauses Act. In my opinion this definition cannot affect the interpretation of the Government of India Act. In that Act the Provincial Government and the Governor have been used in two different senses and not in one sense. Immunity from suits is given to the Governor and not to the Provincial Government, though the Governor may be one of the important component parts of the Provincial Government. Reference in this connection was made to the East India Company Act, 1780 (21 Geo. 3, c. vii) and to various statutes which eventually culminated in sections 306 and 176 of the Government of India Act, 1935. On the basis of the Act of 1780 it was contended that the High Court had no jurisdiction to issue a writ against the Governor. That statute, however, didnot prohibit the issue of a writ against the East India Company. On the other hand, there are cases which show that such writs were being issued against the East India Company. In my opinion the matter has to be decided exclusively under the terms of the Government of India Act, 1935, and not on the terms of any repealed statute. Clauses 4 and 13 of the Charter of the Supreme Court gave the power to issue a writ of *certiorari* to the High Court against the East India Company and the same jurisdiction has been kept alive by the Government of India Act, 1935. Reference was made to a number of Madras cases but, in my opinion, those cases have not been correctly decided inasmuch as they have placed the Governor on the same footing as the Provincial Government by a process of reasoning which to my mind is not correct.

On the merits of the case whether the land in the present case was required for a public purpose, there is a concurrent finding of fact to the effect that the object of this requisition was to benefit an individual and no public purpose was involved in it. That being so, the writ was in my opinion properly issued in this case and the appeal is without force. I would accordingly dismiss it with costs.

Mukherjea, J.—This appeal is on behalf of the Province of Bombay and is directed against a judgment of an appellate bench of the Bombay High Court (consisting of Chagla, C.J. and Tendolkar, J.) dated 4th January, 1949, by which the learned Judges affirmed an order of Bhagawati, J., dated 27th September, 1948, in so far as it granted a writ of *certiorari*, for bringing up and quashing a requisition order made by the Provincial Government under section 3 of the Bombay Land Requisitioning Ordinance (V of 1947). There is not much controversy about the facts of the case which lie within a short compass. The requisition order was made by the Province of Bombay on 26th February, 1948, in respect of the first floor of a building known as "Paradise" situated at 22, Warden Road, Mahalakshmi, Bombay. The entire building is owned by one Dr. M. B. Vakil, and one Abdul Hamid was in occupation of the first floor as a tenant under Dr. Vakil, prior to 29th January, 1948. Abdul Hamid intended to go to Pakistan and was in look out for some premises at Karachi where he might reside and carry on business. The petitioner Khusal Das, who was the main respondent in this appeal and is now dead and represented by his heirs, was a refugee from Karachi where he owned a Bungalow worth more than Rs. 50,000 and also a running business in which a considerable sum of money was invested. On 29th January, 1948, there was an

agreement entered into by and between Abdul Hamid on the one hand, and the petitioner Khusal Das, his son Gobind Ram and his brother's daughter's son Hiranand on the other, by which the former assigned to the latter his tenancy right in the first floor of the Paradise in exchange of his getting a leasehold interest in the petitioner's Bungalow at Karachi. There were other terms of this transaction which are not relevant for our present purpose. The petitioner went into possession of the flat on 4th February, 1948. On 26th February, 1948, the Government of Bombay issued an order requisitioning the flat, the order being made under section 3 of the Bombay Land Requisitioning Ordinance (Ordinance No. V of 1947) which came into force on and from the 4th of December, 1947. The order was signed by Mr. P. L. Rao as Secretary to the Government of Bombay, Health and Local Government Department. On the same day a letter was addressed by Mr. Rao to Dr. Vakil intimating to him that the said flat had been requisitioned as per copy of the Requisition Order enclosed therewith and that Government had allotted the flat to one Mrs. C. Dayaram at a rental of Rs. 85 per month. Mrs. Dayaram, it may be mentioned here, was also a refugee from Sind. On 27th February, 1948, a further order was passed under the signature of Mr. Rao authorising one Lalwani, an Inspector in the Health and Local Government Department of the Government of Bombay, to take possession of the requisitioned flat under the provision of section 9 of the Requisitioning Ordinance. On 4th March, 1948, the petitioner Khusal Das filed an application in the Original Side of the Bombay High Court against P. L. Rao, Secretary to the Government of Bombay as party respondent alleging that the order of requisition was illegal and *ultra vires* on various grounds and praying for writs of *certiorari*, prohibition and an order under section 45 of the Specific Relief Act against the respondent. On this application, an interim injunction was granted by Coyajee, J., restraining the Government from obtaining possession of the flat. By a subsequent amendment of the petition the Province of Bombay as well as Mr. G. D. Vartak, the Minister-in-charge of the Health and Local Government Department were added as parties respondents. A large number of defences were taken by the respondents in answer to the prayers of the petitioner. It was contended *inter alia* that the orders made under the Ordinance were not judicial or quasi-judicial orders, but executive orders made by the Province of Bombay and no writs of *certiorari* or prohibition would lie against orders of this description. On behalf of Mr. Rao it was urged that he did not make any order himself and had merely authenticated and signed the orders in accordance with the provisions of section 59 (2) of the Government of India Act. As regards the Province of Bombay a point was taken that no writ could be issued against the Provincial Government which meant and included the Governor of the Province, he being immune from all proceedings in, and processes from any Court of India under section 306 of the Government of India Act. The Minister respondent, it was said, was not personally responsible for the orders or for the consequences thereof under the Constitution. It was contended further that the requisition of the flat, and the allotment of it to Mrs. Dayaram were for public purpose. The petition was heard by Bhagawati, J., who overruled all the contentions of the respondents and granted the petitioner's prayer. Writs of *certiorari* and prohibition were directed to be issued against all the respondents and there were also orders of *mandamus* granted against respondents other than the Province of Bombay. Against this decision an appeal was taken to the appeal bench of the High Court (being Appeal No. 65 of 1948) and the appeal was heard by Chagla, C.J. and Tendolkar, J. By their judgment dated 4th January, 1949, the learned Judges allowed the appeal in favour of the two respondents other than the Province of Bombay and set aside the orders made against them. They affirmed however the judgment of Bhagawati, J., so far as it related to the Province of Bombay, and maintained the writ of *certiorari* issued against it. The Province of Bombay has now come up on appeal to this Court.

The learned Attorney-General who appeared in support of the appeal contended before us, that having regard to the provisions of the Ordinance under which the requisition order was made no writ of *certiorari* would be at all available

in law. It has been argued in the first place that the order complained of is a ministerial or administrative order which does not involve exercise of any judicial or quasi-judicial function and to a purely administrative order of this character no writ of *certiorari* lies. It is argued in the alternative that assuming that the Provincial Government has any semi-judicial function to exercise while making an order under section 3 of the Ordinance, the question as to whether the requisition was for a public purpose or not, was a question of fact which the Provincial Government was competent to entertain and decide, under the terms of the Ordinance itself, and no writ of *certiorari* would lie to bring up an order of the Provincial Government on the ground that its decision on this point was erroneous or unsound. Lastly, it is contended that the Provincial Government is immune from all Court processes and no writ of *certiorari* could be issued to it.

The first and the second points are really inter-connected, and I may have to discuss them together. They raise questions of considerable nicety and general importance, and we had arguments of the most elaborate character advanced on them by the learned counsel on both sides.

The first and the most important point for our consideration is whether the act of requisition against which the writ of *certiorari* has been issued by the High Court is a judicial or an administrative act. It is not disputed that the writ does not lie to remove an act which is purely ministerial. It can be availed of only to remove and adjudicate on the validity of judicial acts.[1] To ascertain the exact connotation of the expression "judicial act" in connection with the issuing of a writ of *certiorari* and to determine whether the act complained of in the present case is a judicial act or not it would be necessary and convenient to set out briefly how the law on the point as developed by the Courts in England stands at present. A writ of *certiorari* like the writ of prohibition is a judicial writ of antiquity and it is the ordinary process by which the Court of King's Bench Division exercises control over the acts of bodies vested with inferior jurisdiction. The writ is intended to bring up before the High Court the records of proceedings or determinations of inferior tribunals and to quash them if the tribunals are found to have acted in excess of their jurisdiction.

It is well settled that the writ is not limited to bringing up the acts of bodies that are ordinarily considered to be Courts.

"The procedure of *certiorari*" as has been observed by Fletcher Moulton, L.J., in *Rex* v. *Woodhouse*[2] "applies in many cases in which the body whose acts are criticised would not ordinarily be called a 'Court' nor would its acts be ordinarily termed judicial acts. The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

There can be no doubt that originally the writ of *certiorari* was issued only to inferior Courts using the word 'Court' in its ordinary sense. As bodies of various types and denominations exercising semi-judicial functions came to be introduced, the writ was extended to these bodies also. There is a long line of decided cases showing that the writ of *certiorari* has been issued to rating authorities, licensing Justices, Electricity Commissioners, the Board of Education, the General Medical Council, the Inns of Court, Assessment Committees, the Commissioner of Taxation and various other authorities who could be regarded as performing some sort of judicial or semi-judicial function though they have no authority to try cases, or pass judgments in the proper sense of the word.[3] It would be interesting to note that in *King* v. *Postmaster-General*[4], a writ of *certiorari* was issued to quash a disablement certificate granted by the Chief Medical Officer of the Post Office on the ground that he was not the certifying surgeon

1. *Per* May, C.J., in *Reg.* v. *Dublin Corporation*, (1878) L.R. 2 Ir. 371 at p. 376.
2. (1906) 2 K.B. 501 at p. 535.
3. *Vide* Halsbury's Laws of England (2nd Edition), Vol. 26, p. 284.
4. (1928) 1 K.B. 291.

under the Workmen's Compensation Act, 1925, and the granting of a certificate was held to be a judicial act. In *Rex* v. *Boycott*[1], one Russel Keanely moved on behalf of his infant son Stanley for an order of *certiorari* to remove and quash a medical certificate granted by the respondent to the effect that Stanley was incapable by reason of mental defect of receiving benefit from instruction in special school under section 56 of the Education Act, and two other connected documents. The Court was of opinion that as doubts did arise as to whether the boy was ineducable, it was a proper case to be determined by the Board of Education under section 31. It was held in these circumstances that the three documents which were parts and parcel of one and the same transaction constituted the determination of a quasi-judicial authority, and "exhibited all the mischief which a writ of *certiorari* was intended and well fitted to correct." The result was that all the three documents were directed to be brought up and quashed. Even a report made by a Chief Gas Examiner has been removed and quashed by a writ of *certiorari*[2].

In the words of Banks, L.J., the course of development of law on the subject demonstrates what has been the boast of English Common Law that it will, whenever possible and where necessary, apply existing principles to new set of circumstances[3]; and it was in very general terms that opinion was expressed in *Rex* v. *Inhabitants of Glamorganshire*[4] that the Court would examine the proceedings of all jurisdictions erected by Acts of Parliament and if under pretence of such an Act they proceeded to encroach jurisdiction to themselves greater than the Act warrants, the Court would send a *certiorari* to them to have their proceedings returned to the Court to the end that the Court might see that they keep themselves within their jurisdiction, and if they exceed it, to restrain them.

The whole law on the subject relating to issuing of writs of *certiorari* was thus summed up by Atkin, L.J., in *Rex* v. *Electricity Commissioners*[5]:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This statement of law has been affirmed and reiterated in various cases since then[6] and its correctness has never been questioned. But unexceptionable though the statement is, it does not by itself afford any assistance in solving the real difficulty that arises in cases of this description. It postulates the existence of a duty in the authority to decide judicially, but it does not enumerate or give any indication of the circumstances under which such duty shall be held to be imposed. It has been pointed out very rightly by my learned brother Das, J., in a recent Calcutta case[7] that of the four elements involved in the proposition of law enunciated by Lord Atkin, three may be present in an administrative or executive act as well.

A valid executive act undoubtedly presupposes the existence of a legal authority in the officer or department to do the act. Such executive acts may and in fact do affect the rights of subjects. Cases are also not infrequent where an executive authority transgresses the limits of its jurisdiction, and acts in excess of its powers. Yet, it is not disputed that no writ of *certiorari* can be issued to restrain or invalidate such executive acts. As was observed by Lord Hewart, C.J., in *Rex* v. *Legislative Committee of the Church Assembly*[8], "in order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects, there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially." The material points for consideration therefore are what is the true criterion of a judicial act,

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1. (1939) 2 K.B. 651.
2. *R.* v. *London County Council*, 11 T.L.R. 337.
3. Vide *Rex* v. *Electricity Commissioners*, (1924) 1 K.B. 171 at p. 192.
4. 1 Ld. Raym. 580.
5. (1924) 1 K.B. 171 at p. 205.
6. Vide *R.* v. *North Worcestershire Assessment Committee*, (1929) 2 K.B. 397 at pp. 405-6; *R.* v. *London County Council*, (1931) 2 K.B. 215.
7. In re *Banwarilal*, (1944) 48 C.W.N. 766.
8. (1928) 1 K.B. 411 at p. 415.

and how it is to be ascertained whether an authority is bound to act judicially in a particular matter or not.

It is said that one of the best definitions of a judicial act, as distinguished from an administrative act is that given by May, C.J., in the Irish case of *Reg* v. *Dublin Corporation*[1]. The question raised in that case was whether a borough rate levied by a Corporation was illegal or not. It was found that the borough fund of the Corporation was otherwise sufficient for all legitimate purposes, but it was rendered insufficient by reason of certain illegal payments made out of it. To make up the deficiency, the Corporation levied a borough rate, the legality of which was challenged and writ of *certiorari* was prayed for to quash all the orders and resolutions of the Corporation in connection with the imposition of the rate. The writ was granted and May, C.J., while discussing in his judgment the meaning of the expression 'judicial act' observed as follows :

"In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others. And if there be a body empowered by law to enquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts."

This definition was approved by Palles, C.B., in Re *Local Government Board: Ex parte Kensington Commissioners*[2], and was quoted *in extenso* by Lord Atkinson in *Frome United Breweries Company* v. *Bath Justices*[3].

In the passage quoted above, the learned Chief Justice really describes what may be called the judicial process. There cannot indeed be a judicial act which does not create rights or impose obligations ; but an act, as has been already pointed out is not necessarily judicial because it affects the rights of subjects. Every judicial act presupposes the application of judicial process. There is a well-marked distinction between forming a personal or private opinion about a matter, and determining it judicially. In the performance of an executive act, the authority has certainly to apply his mind to the materials before him ; but the opinion he forms is a purely subjective matter which depends entirely upon his state of mind. It is of course necessary that he must act in good faith, and if it is established that he was not influenced by any extraneous consideration, there is nothing further to be said about it. In a judicial proceeding, on the other hand, the process or method of application is different.

"The judicial process involves the application of a body of rules or principles by the technique of a particular psychological method."[4]

It involves a proposal and an opposition, and arriving at a decision upon the same on consideration of facts and circumstances according to the rules of reason and justice.[5] It is not necessary that the strict rules of evidence should be followed ; the procedure for investigation of facts or for reception of evidence may vary according to the requirements of a particular case. There need not be any hard and fast rule on such matters, but the decision which the authority arrives at, must not be his 'subjective,' 'personal' or 'private' opinion. It must be something which conforms to an objective standard or criterion laid down or recognised by law, and the soundness or otherwise of the determination must be capable of being tested by the same external standard.

This is the essence of a judicial function which differentiates it from an administrative function ; and whether an authority is required to exercise one kind of function or the other depends entirely upon the provisions of the particular enactment. Where the statute itself is clear on this point, no difficulty is likely to arise, but where the language of the enactment does not indicate with precision what kind of function is to be exercised by an authority, considerable difficulties

1. (1878) L.R. 2 Ir. 371.
2. 16 L.R. Ir. 150.
3. (1926) A.C. 586.
4. Robson's Justice and Administrative Law, p. 33.
5. Vide *R.* v. *London County Council*, (1931) 2 K.B. 215 at p. 233.

are bound to be experienced. There are numerous decided cases, which deal with questions of this character, and quite a number of them were cited to us by the learned counsel on both sides. As they relate to the powers and duties of various types of authorities under various statutes and war regulations, dealing with different subject-matters and not uniformly worded, they are of no direct assistance to us in the present case. I think however that we can cull a few general principles from some of the pronouncements of the English Courts, which may throw light on the interpretation of the Ordinance before us.

Generally speaking, where the language of a statute indicates with sufficient clearness that the personal satisfaction of the authority on certain matters about which he has to form an opinion founds his jurisdiction to do certain acts or make certain orders, the function should be regarded as an executive function. The decision of the House of Lords in *Liversidge* v. *Anderson*[1], is the leading illustration of this type of cases. Even Lord Atkin observed, in course of his dissenting judgment in this case, that when the discretion is left to the Minister or any other authority without qualification, by use of expressions like the following :

> "A Secretary of State . . . if it appears to him necessary may order ; if it appears to the Secretary of State that any person is concerned . . . . ; if the Secretary of State is satisfied that it is necessary or expedient,"

the act cannot but be held to be an executive act. Lord Atkin was however inclined to hold that the words "if the Secretary of State has reasonable cause to believe," should be construed as meaning "if there is in fact reasonable cause for believing," and according to his Lordship "reasonable cause" for an action or belief is as much a positive fact for determination by a third party as any other objective condition. This view was not accepted by the majority of the House and it was held that the words meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. Provided there was good faith the maker of the order was the only possible Judge of the conditions of his own jurisdiction.[2]

After the law was settled in this way by the House of Lords, a large number of cases came up before the Courts in England which involved consideration of the provisions contained in various other orders and regulations relating to taking control of business or requisition of property. The language of these orders was very similar to that of Regulation 18 (B) under which the detention order was made in *Liversidge's case*[1]. In *Point of Ayr Collieries, Ltd.* v. *Lloyd George*[3], the control of the appellant's undertaking was taken by the Ministry of Fuel and Power by an order made under the Defence (General) Regulations, 1939, Reg. 55 (4). The relevant provision of the regulation stood as follows :

> "If it appears to the competent authority that in the interest of the public safety, the defence of the realm or the efficient prosecution of the war or for maintaining of supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking. . . . . . the competent authority may by order authorise. . . ."

The appellant's contention was that there were no adequate grounds upon which the Minister could find, as he stated, he had found, that it was necessary to take control in the interests of the realm or the efficient prosecution of war. It was held that there was no jurisdiction in the Court to interfere with what was an executive order passed *bona fide*.

In *Carltona, Ltd.* v. *Commissioners of Works and others*[4], which was decided near about the same time, the appellant's factory was requisitioned by the Commissioner of Works under the provisions of the Defence (General) Regulations, 1939, Reg. 51 (1). The requisition order was challenged *inter alia* on the ground that the requisitioning authority never brought their minds to bear upon the question and had they done so they could not possibly come to the conclusion to which in fact they came. In this case the regulation was almost in the same language as that in

1. (1942) A.C. 206.
2. Vide observation of Lord Radcliffe in *Nakkuda Ali* v. *M. F. De S. Jayaratne*, (1950) 54 C.W.N. 883 at p. 888 (P.C.).
3. (1943) 2 A.E.R. 546.
4. (1943) 2 A.E.R. 560.

the earlier case. The words were " If it appears to the competent authority to be necessary or expedient so to do . . . . ."

The Court held that the Parliament had committed to the executive the discretion of deciding when an order for the requisition of the premises should be made under the regulation, and with that discretion if *bona fide* exercised no Court could interfere.

Even when the language of the statute is such that it confers an unlimited discretion on the executive, there are cases where a duty on the part of the authority to act judicially has been sought to be spelt out of the other provisions in the statute, particularly those which relate to the holding of public enquiries and consideration of objections by the authorities concerned.

Thus in *Phoenix Association Company* v. *Minister of Town and Country Planning*[1] an application was made to quash an order made under section 1 (1) of the Town and Country Planning Act, 1944, which empowered the Minister of Town and Country Planning to make an order declaring land in any area to be subject to compulsory purchase, if he was satisfied that it was requisite for the purpose of dealing satisfactorily with extensive war damage in the area of a local Town Planning authority that such lands should be laid out afresh and redeveloped as a whole. It was held by Henn Collins, J., that the matter was not so peculiarly within the administrative capacity of the Minister that it could be regarded as one of pure discretion. Reliance was placed on the fact that the statute was not a piece of temporary legislation like Regulation 18 (B), and the provisions relating to holding of public enquiry, and hearing of objections, indicated according to the learned Judge that the function was of a quasi-judicial character.

There was no appeal against this judgment, but quite a contrary view was taken by the Court of Appeal in another case which involved consideration of the same provisions of the same Act. This was the case of *Robinson and others* v. *Minister of Town and Country Planning*[2] and it was held there that the order under section 1 (1) of the Town and Country Planning Act is made by the Minister as an executive authority and he is at liberty to base his opinion on whatever he thinks proper. Stress was laid on the words " requisite " and " satisfactory " used in the section and these words indicated according to the learned Judges that the question was one of opinion and policy, matters which were peculiarly for the Minister himself to decide, and as to which, assuming always that he acted *bona fide*, he was the sole Judge. It was further observed that no objective test was here indicated, and that different considerations might apply where a Minister could be shown to have overstepped the limits of his power, *e.g.*, where the conditions in which they may be exercised were laid down in the statute and he purported to act in a case where the conditions did not exist.

In *Errington and others* v. *Minister of Health*[3], the question arose as to whether an order of the Minister of Health confirming a clearance order made by a local authority under section 1 of the Housing Act of 1930 was an executive or judicial order. It was held that if there was no objection raised to the clearance order by persons interested in the property and it was confirmed by the Minister, there was no exercise by the latter of any judicial or quasi-judicial function. But the position becomes different if objections are raised. Then the Minister would have to hold a public local enquiry as provided for by the Act and consider the report of the person who held the enquiry. In such circumstances the decision to confirm the clearance order amounts to an exercise of quasi-judicial function.

This was a case under the Housing Act of 1930. In *Franklin* v. *Minister of Town and Country Planning*[4] however, which was a case under the New Towns Act, 1946, and contained very similar provisions it was held by the House of Lords that in considering the report of the person who held a public enquiry after objections

1. (1947) 1 A.E.R. 454.
2. (1947) 1 A.E.R. 851.
3. (1935) 1 K.B. 249.
4. (1948) A.C. 87.

have been made to an order under section 1 (1) of the New Towns Act, the Minister has no judicial or quasi-judicial duty imposed on him, so that considerations of bias in the execution of such duties was altogether irrelevant.

It would be seen from the cases referred to above that the distinction between judicial and executive function often turns out to be a very fine one, and difference of opinion amongst Judges is not uncommon on these matters even when they have got to construe provisions of Acts which employ language very similar to each other.

Leaving aside the cases, where the existence of a duty to act judicially is sought to be inferred from the provisions of a statute relating to holding of enquiry or hearing of objections, the general rule that all the cases lay down is that if the foundation of the exercise of the powers by an authority is his personal satisfaction or subjective opinion about certain facts, the function is to be regarded as executive and not judicial. The facts may undoubtedly be and often are objective facts about which the authority has got to form his opinion. When a statute says that a Minister can requisition property or order compulsory purchase if he deems it expedient to do so in the interest of public safety or the defence of the realm, the condition precedent to the exercise of his powers is not the *actual* existence of national interest but his own opinion or belief that it exists. To quote the words of Lord Radcliffe :

"If the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in fact nothing[1]."

On the other hand, if the statute imposes an objective condition precedent of fact to the exercise of powers by an authority, and not merely his subjective opinion about it, the function would be *prima facie* judicial. The distinction is beautifully illustrated by Lord Atkin in his classic judgment in *Liversidge's case*[2]. If it is a condition to the exercise of powers by *A* that *X* has a right of way or *Y* has a broken ankle, the authority is charged with determining these facts and it must ascertain judicially whether the conditions are fulfilled or not. If on the other hand, the condition is that the authority thinks or is of opinion that *X* has a right of way or *Y* has a broken ankle, the condition is a purely subjective condition and the act cannot be a judicial act, as the existence of the condition is incapable of being determined by a third party by application of any rule of law or procedure.

One other question arises in this connection and that relates to the second and alternative contention raised by the learned Attorney-General. When the Legislature delegates powers to an authority, and lays down that the powers could be exercised only if a certain state of facts exists, obviously the authority cannot act if the condition is not fulfilled. If it wrongly holds or assumes that the condition exists although it actually does not exist, its assumption of jurisdiction would be unsupportable, and could be removed by a writ of *certiorari*. The Legislature however may entrust the authority with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists. In such cases even if the authority makes a wrong decision either of facts or law, it can be corrected by an appellate tribunal if there is any, but not by a writ of *certiorari*, as every authority if it acts within jurisdiction is competent to decide both rightly, or wrongly[3].

Keeping in view the principles mentioned above, I would now turn to the provision of the Bombay Land Requisitioning Ordinance, 1947, and try to ascertain from the nature and scope of the provisions, whether the act of requisition which section 3 of the Ordinance contemplates is a judicial or a purely administrative order.

The title of the Ordinance shows that it was passed to provide for the requisition of land, for continuance of requisition already made and for other purposes. The first preamble sets out the fact that the Governor-General in

1. Vide *Nakkuda Ali* v. *M. F. De S. Jayaratne*, (1950) 54 C.W.N. 883, 888 (P.C.).
2. (1942) A.C. 206, at p. 227.
3. Per Esher, L.J., in *Queen* v. *Commissioners for Special Purposes of the Income Tax*, 21 Q.B.D. 313 at p. 319.

exercise of the powers conferred on him under section 104 of the Government of India Act, 1935, has empowered all Provincial Legislatures to enact laws with respect to requisition of land. The second preamble really gives the reason for passing of the Ordinance; it recites that the Bombay Legislature is not in session and the Governor of Bombay is satisfied that circumstances exist which render it necessary for him to take immediate action to enable the Provincial Government to make provisions for requisitioning of land and for continuance of requisition of lands already subject to requisition. Section 3 of the Ordinance is the most material section for our present purpose and it stands as follows :—

"If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose : "

There is a proviso added to the section which is worded thus :

" Provided that no land used for the purpose of a public religious worship or any purpose which the Provincial Government may specify by notification in the official gazette shall be requisitioned under this section."

The language of the section taken along with the proviso indicates in my opinion, that whereas the act of requisitioning land is left to the executive discretion of the Provincial Government and the latter can requisition land whenever it considers necessary or expedient to do so, certain conditions have been laid down which are conditions precedent to the exercise of the powers. The first condition is specified in the section itself and it postulates the existence of a public purpose as an essential pre-requisite to the taking of steps by the Provincial Government in the matter of requisitioning any property. Even where this condition is satisfied, there is another condition imposed by the proviso which is in the nature of an exception engrafted upon the entire section and which prevents the Provincial Government from exercising its powers at all if the land sought to be requisitioned is used for public religious worship or for any other purpose which the Provincial Government has specified in the official gazette.

In my opinion the existence of a public purpose as an objective fact, and not the subjective opinion of the Provincial Government that such fact exists, has been made the essential preliminary which founds the jurisdiction of the Provincial Government to proceed with any act of requisition.

This would be apparent from the collocation of words as they occur in section 3 and also from other provisions of the Ordinance which indicate the scheme which the framers of the Ordinance had in view.

Section 3 does not say that if in the opinion of the Provincial Government it is necessary or expedient to requisition land for any public purpose, it may do so by an order in writing. In that case it might be argued that it was left as a matter of subjective opinion to Provincial Government to decide whether there was or not any public purpose justifying the requisition ; and provided the authority acted in a *bona fide* manner, the Courts would have no say in the matter. The words " public purpose ", it would be seen, have been placed at the end of the sentence, and this indicates that it is a thing collateral to, and not included in, the act which has been described before, and which has been left to the discretion of the executive. It is an independent fact, the existence of which enables the executive to move in the matter of requisitioning property, but it is itself not dependent on the personal opinion of the executive. I agree entirely with Chagla, C.J., that the words " to do so " refer to the act of requisition, that is to say, to the nature of the act and not to the purpose for which it is done. There is no indication here, as there is in various statutes and regulations which I have referred to above that not merely the necessity or expediency of requisitioning property, but the existence of a public purpose which gives occasion for exercising the powers of requisition, is also a matter of personal opinion of the executive.

Reference was made in course of arguments to the language of section 4 of the Indian Land Acquisition Act, and similar provisions in other Land Acquisition enactments, where the expression 'public purpose' occurs.

It will be seen at once that the language of these provisions is materially different from that of section 3 of the Ordinance.

In *Wijeyesekera* v. *Festing*[1], the Privy Council had to deal with a case under the Ceylon Acquisition of Land Ordinance. Section 4 of the Ordinance provides as follows :

> "Whenever it shall appear to the Governor that land in any locality is likely to be needed for any *public purpose*, it shall be lawful for the Governor to direct the Surveyor General or other officer . . . . . to examine such land and report whether the same is fitted for such purpose."

Section 6 then says :

> "The Surveyor General or other officer . . . . . shall make his report to the Governor whether the possession of the land is needed for the purpose for which it appeared likely to be needed as aforesaid, and upon the receipt of such report it shall be lawful for the Governor with the advice of the Executive Council to direct the Government Agent to take order for the acquisition of the land."

The question raised was whether the decision of the Governor that the land is wanted for public purpose is final, and the question was answered in the affirmative. It seems clear that on the language of the two sections referred to above no other answer was possible. It is not the existence of a public purpose which is a condition precedent to the exercise of powers by the Governor under the Ceylon Ordinance. The Governor has been made the sole Judge of the existence of public purpose as well as of the necessity of acquiring land for that purpose. There is no condition limiting or restricting his powers in any way.

The language of section 4 of the Land Acquisition Act of India is very much the same. The section begins with these words :

> "Whenever it appears to the local Government that land in any locality is needed or likely to be needed for any public purpose. . . . ."

Moreover, under section 6 (3) of the Act, a declaration made by the Government that any land is needed for public purpose is conclusive evidence of the existence of such purpose.

What exactly is the extent of powers conferred by the Legislature upon a body or tribunal is to be gathered from the language used by the Legislature. Mere similarity or even identity of objects cannot justify us in coming to the conclusion that the Legislature must have meant the same thing in one piece of legislation as it meant in another when the language is not identical. In cases of this description utmost stress should be laid on the actual words used, for there is no presumption that the Legislature intended to confer one kind of power on the authority rather than another in cases of particular type. If there is any presumption at all it is in favour of the liberty of the subject, and any law which encroaches upon such liberty must be construed strictly and should not be carried beyond what the actual words used mean in their plain grammatical sense. It may be pertinent to point out in this connection that a similar provision in section 3 (1) of the West Bengal Premises Requisition and Control Act, has been expressed in a different language and the actual existence of public purpose has not been made a condition precedent to the exercise of powers by the Provincial Government. The section is worded as follows :

> "Whenever it appears to the Provincial Government that any premises in any locality are needed or are likely to be needed for any public purpose, it may by order in writing requisition such premises."

There has been a recent decision[2] of the Calcutta High Court on the above provision of the Bengal Act, but the particular point which has arisen for our consideration in this case, was not and could not be raised there.

A conspectus of the whole of the Bombay Ordinance leaves a clear impression that it was not the intention of the framers of the Ordinance to give an unlimited and unfettered discretion to the Executive Government in the matter of requisitioning property. The powers are to be exercised within defined limits. Section 3 as

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1. (1919) A.C. 646.
2. *A. C. Mohamed* v. *Sailendra Nath*, (1950) 54 C.W.N. 642.

stated above imposes a twofold restriction, one by postulating the objective existence of public purpose as a pre-requisite to the exercise of discretionary powers, the other by excluding the powers altogether when the land is used for a public religious purpose. Thus the proviso which excepts the cases specified therein from the sphere of operation of the general provision of the entire section has also set up an objective condition, the existence of which would exclude the exercise of powers by the Provincial Government. Section 4 again deals with requisition of vacant premises and instead of leaving it to the executive to determine whether a premises is vacant or not, sub-clause (i) gives an elaborate description of the circumstances under which vacancy would be deemed to arise in law. The power of requisitioning vacant premises can be made only if the conditions laid down in section 4 are fulfilled. Section 8 deals with powers of enquiry for purposes of payment of compensation as is provided for in section 6 and is not material for our purpose. Section 10 makes a general provision and the Provincial Government under this section may, with a view to carry out any of the purposes of the Ordinance, by order, require any person to furnish any information in his possession relating to the land requisitioned or to be requisitioned. This is certainly an enabling provision and I am unable to say that this provision by itself indicates that the function exercisable by the Provincial Government is a judicial function. The duty to act judicially is, in my opinion, implicit in section 3 itself.

It must not be overlooked that the determination of the existence of 'public purpose' involves decision on questions of both facts and law. As was observed by Lord Loreburn in *Board of Education* v. *Rice*[1],

"comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion involving no law. It will, I suppose, be usually of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the fact."

This was held by his Lordship to be a clear index of a duty to act judicially.

It was suggested, in course of arguments that as admittedly the actual act of requisition is discretionary with the Provincial Government, no writ of *certiorari* can possibly be issued. There is not much substance in this argument, for the very jurisdiction or authority to exercise discretion is dependent on a condition precedent which if unfulfilled would make the exercise of discretion void altogether. It is a commonplace feature of this class of legislation that an authority is often required to exercise both ministerial and quasi-judicial functions. Whether he acts administratively throughout or is put at one stage in a quasi-judicial position has to be gathered from the provisions of the Act. The case of *Errington* v. *Minister of Health*[2] is a leading authority which holds that the same proceeding may be administrative at one stage and quasi-judicial at another.

The position in my opinion may be summed up as follows:

The Provincial Government has to satisfy itself that there is a public purpose before it proceeds to requisition any property. As this is an objective condition which has not been made dependent on the personal opinion of the Executive it has got to be determined judicially and whether a public purpose exists or not is itself a mixed question of facts and law which could be determined by application of well-established principles of law to the circumstances of a particular case. There is undoubtedly a *lis* or point in controversy—or what is called a proposal and an opposition. On the one hand, there is the interest of the public, and on the other, the interest of the individual whose property is being requisitioned. No formal array of parties is necessary. It is enough that there is a point in issue which has got to be decided between parties having conflicting interests in respect to the same. The fact that the Provincial Government represents the interests of the public also

1. (1911) A.C. 179 at p. 182. 2. (1935) 1 K.B. 249.

is to my mind immaterial. If there is a duty to decide judicially it would be a judicial act, and it is not necessary that there must be two opposing parties other than the deciding authority appearing in a regular or formal manner.

My conclusion, therefore, is that on the first point the decision of the High Court is right, and the contentions raised by the learned Attorney-General must fail.

The question now arises whether the Ordinance has conferred upon the Provincial Government the jurisdiction or authority to decide finally as a part of the requisition proceeding itself whether any public purpose exists or not. If it has the error, if any, committed by the Provincial Government, may be an error of fact or law, but would not be one of jurisdiction, and whatever other remedy might be open to the aggrieved party, a writ of *certiorari* would not lie. As has been said already, it is clear from the language of section 3 of the Ordinance that the act of requisition itself, provided the condition precedent is fulfilled, is a pure executive act, in regard to which an untrammelled discretion has been left to the Provincial Government. If the state of fact exists which entitles the Provincial Government to act, the function that the Provincial Government exercises is a purely administrative function, which does not involve performance of any judicial duty. In such circumstance the existence of public purpose is either a matter of personal opinion of the Provincial Government in which case no question of exercising a judicial function at all arises, or it is wholly independent of and collateral to the executive act and is an objective condition which must be fulfilled before the Provincial Government can take any steps in the matter. As I have stated already on a proper interpretation of section 3 of the Ordinance, the latter is the proper view to take. This being the position, whether or not a public purpose exists is a preliminary question which is collateral to the merits of the executive act which is to be performed by the Government under section 3 of the Ordinance.

Public purpose must exist as a fact, and the Provincial Government must satisfy itself as to its existence before it can take any steps in requisitioning property; but it is not for the Provincial Government to decide the matter finally or conclusively, and its decision on this preliminary point would be open to enquiry by superior Courts. These principles are laid down in *Bunbury* v. *Fuller*[1], *Pease* v. *Chaytor*[2] and *Colonial Bank of Australasia* v. *Willan*[3]. By way of illustration of these principles reference may be made to two well-known English cases.

In *Rex* v. *Woodhouse*,[4] there was an application to bring up an order made by Licensing Justices under the Licensing Act referring an application for renewal of a licence to quarter sessions. One of the points raised in the case was whether or not the Justices were right in deciding that the applicants were qualified to apply for licence under the provisions of the Beer House Act, 1840, which required that the applicant should be real resident holder and occupier of the dwelling house in which he should apply to be licensed. It was held by the majority of Judges in the Court of Appeal that the fact that the applicants were not the real resident holders of the Beer houses excluded them from the class to whom licences whether absolute or conditional could be granted and no erroneous decision on this question of fact by the Magistrates could give them jurisdiction.

Reference was made by Fletcher Moulton, L.J., to certain passages in *Bunbury* v. *Fuller*[1] and *Pease* v. *Chaytor*[2] and it was held that if the licensing Magistrates did decide these points of fact, it is the duty of the Court to review their decisions, and if it is erroneous to quash the licences and references.

The other case is that of *Rex* v. *Bedford*,[5] and it arose upon a rule for a *certiorari* to bring up an order of Justices authorising the entry upon certain enclosed land for the purpose of taking materials for the repair of certain roads

1. 9 Ex. Ch. 111.
2. 3 B. & S. 620.
3. (1874) 5 P.C. 417 at 442.
4. (1906) 2 K.B. 501.
5. (1908) 1 K. B. 365.

under sections 53 and 54 of the Highways Act, 1835. Under sections 53 and 54 of the Highways Act, the Justices may license the Surveyor of Highways to take materials for repair of the Highways "at such time or times as to such justices may seem proper from the enclosed land of any person . . . . not being a park." On a licence being granted by the Justices to the Newton Abbot Rural District Council, authorising them by their Surveyor, to take materials for the repairs of the Highway from a place known as Grange Quarry in the said Parish, a rule was obtained for a writ of *certiorari* to bring up the order to be quashed, *inter alia* on the ground that it was made in respect of a land which was a park. It was held that the land was in fact a park, and the Justices cannot give themselves jurisdiction by finding that it was not a park. The question whether the place is a park or not is a matter which is preliminary to exercise of the Justices' jurisdiction, and one which is not for the Justices to determine finally.

"The Enquiry is not in the course of exercise of jurisdiction but as a preliminary to it. The case therefore falls within the rule laid down in *Bunbury* v. *Fuller*[1] and the Justices' decision in the matter is subject to review."

It must be admitted that in both these cases there was no dispute that the Justices had to exercise quasi-judicial powers, and the only question was whether the facts upon which the exercise of jurisdiction was made to depend were preliminary matters collateral to the enquiry or were matters to be adjudicated upon as part of the enquiry itself. In the case before us the act of requisition, as said already, is an executive and not a judicial act, and to this extent therefore there is no similarity between the present case and those referred to above. But the principles underlying these authorities can certainly be invoked for our present purpose. The act of requisition being an executive act, the determination of the existence of a public purpose upon which the exercise of powers is dependent is either a part of the executive act itself or is something collateral to it. I have attempted to show that it is a thing collateral and preliminary to the exercise of Executive authority and not a part of it. That being so, the determination of this collateral matter by the Executive authority which is, in my opinion, a judicial function cannot be regarded as final and if the determination is erroneous, it can be corrected and removed by a writ of *certiorari*.

It may be stated here that before the learned Judges of the appellate bench in the High Court no attempt was made on behalf of the Government to establish that the premises in question were requisitioned for any public purpose. A public purpose involves some benefit to the community as a whole, as opposed to the personal gain or interest of particular individuals. Housing of refugees may certainly be a public purpose, and under certain circumstances even securing a house for an individual may be in the interests of the community, but it cannot be to the general interest of the community to requisition the property of one refugee for the benefit of another refugee.

The only other question that remains to be considered is whether a writ of *certiorari* lies against the Provincial Government?

On this point the contentions raised by the learned Attorney-General fall under two heads. The first branch of the argument is that the expression "Provincial Government" occurring in section 3 of the Ordinance means the same thing as the Governor of the Province. This being the position there is complete immunity enjoyed by the Provincial Government in respect of all judicial processes under section 306 (1) of the Constitution Act, and the powers of the High Court itself are restricted and limited in this respect by certain enactments.

The other branch of the contention is that under section 176 of the Constitution Act, no action of this character could be brought against the Province of Bombay, and in any view the expressions "sue or be sued" as used in section 176, do not include an application for a writ of *certiorari*.

As regards the first branch of the argument it may be pointed out at the outset that no definition of the term "Provincial Government" has been given in the

1. 9 Ex. Ch. 111.

Constitution Act, 1935. Part III of the Act deals with Governors' Provinces. Section 49 (1) which occurs in this part provides that

"the executive authority of a Province shall be exercised on behalf of His Majesty by the Governors either directly or through officers subordinate to him."

Section 50 lays down that

"there shall be a Council of Ministers to aid and advise the Governor in the exercise of his function, except in so far as he is by or under the Act required to exercise the function or any of them at his discretion."

Section 51 provides *inter alia* how the ministers are to be chosen and section 52 deals with the special responsibilities of the Governor. Section 59 (1) provides that

"all executive action of the Governor of a Province shall be expressed to be taken in the name of the Governor."

The Governor is thus the executive head of a Province and all executive acts are done in his name. This does not mean that Government of a Province is vested solely in the Governor, or that the expressions "Governor" and "Provincial Government" have the same meaning and connotation in the Constitution Act.

It is only a form adopted for purpose of convenience that in a Governor's Province, all acts of the Provincial Government would be done in the name of the Governor, no matter wherever under the Constitution, the responsibility might actually lie. Section 3 (43) (*a*) of the General Clauses Act (as amended by the Adaptation Order of 1947) which is relied upon in this connection does not in any way affect this position. It says that

"as respects anything done or to be done after the establishment of the Dominion of India, 'Provincial Government' shall mean in the Governor's Province the Governor."

This is a mere description as will be apparent from the fact that under the same clause, the expression "Provincial Government" used with reference to a Chief Commissioner's Province means the Central Government. Section 306 (1) of the Constitution Act however is based on an absolutely different principle and it is not concerned with the acts of any Provincial Government no matter in whose name the acts are expressed to be taken. The section runs as follows:

"No proceedings whatsoever shall lie in, and no process whatsoever shall issue from any Court in India against the Governor-General, against the Governor of a Province, or against the Secretary of State . . . . . . whether in a personal capacity or otherwise, and except with the sanction of His Majesty in Council no proceedings whatsoever shall lie in any Court in India against any person, who has been the Governor-General, the Governor of a Province or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof:

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act."

The language of the section is perfectly clear and indicates that its whole object is to grant personal immunity to the Governor-General, the Secretary of State or the Governor of a Province from all proceedings in or processes from any Court in India, both during the term of their office and afterwards. The protection is given in the interests of administration itself for it would really be productive of disastrous consequences if the Governor-General or the Governor of a Province could be hauled up before any Court in India in respect of acts committed by them in their personal capacity or otherwise. That this protection is purely personal follows clearly from the latter part of the section which interdicts any proceeding against the Governor-General, the Governor of a Province or the Secretary of State, after they have ceased to be in office, for any act of omission or commission during the term of their office. This part of the section would be wholly devoid of any meaning, if the Governor of a Province, is taken to be synonymous with the Provincial Government. The Governor of a Province is certainly a part of the Government of the Province and formally he is the mouthpiece of all executive acts done in the Province, but section 306 (1) does not purport to protect any of the official acts. It grants a personal exemption to the Governor from any judicial processes in India,

no matter whether they arise out of official or non-official acts committed by him, and this exemption continues even after he has ceased to be in office, except where His Majesty chooses to relax the rule. I agree with the learned Judges of the High Court in holding that even the possibility of a misconstruction of this section has been removed by the proviso engrafted on it, which lays down in clear terms that the provision of the section shall not be construed as restricting in any way the right of any person to bring against the Federation, a Province or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of the Act.

The material provision in Chapter III, Part VII of the Act is that contained in section 176, and I will come to that presently; but before I do so, it would be convenient to dispose of the other point raised by the learned Attorney-General in connection with the first branch of his argument. The point raised is that apart from the protection afforded by section 306 (1) of the Constitution Act there is a limitation on the powers of the High Court, to grant processes against the Provincial Government and we have been referred in this connection to section 1 of the East India Company Act (21 George III, Ch. 17) and certain provisions in the Act of 1823 under which the Supreme Court was established in Bombay. This contention again in my opinion would be of no avail, if as I have stated above, the Provincial Government is not identifiable with the Governor personally. It may be mentioned here that the Supreme Court was established at Fort William in Bengal under the Statute 13 George III, Ch. 63 commonly known as the Regulating Act, and the Charter establishing the Court was issued by King George III on March 26, 1874. It is a historical fact that there was conflict of an unseemly character between the Judges of the Supreme Court and the Executive Government headed by the Governor-General in Council. In view of this conflict an Act was passed in 1781 (21 George III, Ch. 17) section 1 of which provided that the Governor-General in Council in Bengal

> "should not be subject to the jurisdiction of the Supreme Court for or by reason of any act or order or any other matter of thing whatsoever counselled or ordered or done by them in their public capacity only."

Bombay got its Supreme Court in 1823, under Statute 3 George IV, Ch. 71 and clause VII laid down

> "that it shall be lawful for His Majesty to establish a Supreme Court at Bombay, to be invested with such powers and authorities and privileges, limitations, restrictions and control . . . as the said Supreme Court of Judicature at Fort William in Bengal by virtue of any law, now in force . . . is invested or subject to."

The charter expressly provided that

> "the Governor and Council at Bombay and the Governor-General and Council of Fort William shall enjoy the same exemptions and no other from the authority of the Supreme Court to be erected at Bombay as is enjoyed by the said Governor in Council at Fort William from the Judicature of the Supreme Court of Judicature there already established."

Assuming that these powers and disabilities of the Supreme Court continued even after the establishment of High Courts by reason of section 9 of the High Court Act, 1861, and that these limitations were implicitly recognised in section 106 of the Government of India Act, 1915, and section 223 of the Act of 1935, it is quite clear from the language of the provisions set out above that they granted only a personal exemption to the Governor and Members of the Council. As the Governor in his personal capacity is different from the Provincial Government, these provisions are of no assistance to the appellant in the present case. It would be seen that these exemptive provisions were substantially embodied in section 110 of the Government of India Act, 1915, and were later on placed in a much more comprehensive form in section 306 (1) of the Constitution Act. As the jurisdiction of the old Supreme Court was inherited by the Original Side of the three Presidency High Courts, section 110 of the Government of India Act, 1915, granted exemption to the Governor-General, the Governor and members of the Council from the Original Jurisdiction of High Courts both civil and criminal, the only exception being when there were charges of treason and felony against these officials. Section 306 (1) of the Act of 1935 is more comprehensive and includes proceedings

and processes of any kind either civil or criminal side of a High Court, or in any other Court in the moffusil. As there were no members of the Council under the Constitution Act of 1935, there is no mention of such members in section 306 (1) of the Act.

The first branch of the contention advanced by the learned Attorney-General cannot therefore be supported.

As regards the other branch of the appellant's contention the decision really hinges on the true construction of section 176 of the Constitution Act. Section 176 (1) stands as follows :

"The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like case as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

The first part of the sub-section relates to parties and procedure, and lays down in what form a suit is to be instituted against Government in respect to matters relating to the Federation or Provinces of India. The latter part enacts that subject to any statutory provision that might be made, suits would lie against the Provincial Government in the name of the Province, and against the Federal Government in the name of the Federation of India, in relation to their respective affairs, where such suits would have laid against the Secretary of State in Council if the Act of 1935 had not been passed. The present proceeding which has been started against the Province of Bombay, would therefore be competent if such proceeding could have been instituted against the Secretary of State in Council under the law as it stood prior to the passing of the Constitution Act.

The right and liability of the Secretary of State for India to sue or to be sued were created for the first time by section 65 of Act 21 and 22 Victoria, Ch. 106, which was passed in 1858 on the transfer of the Government of India from the East India Company to the Crown. The section runs as follows :

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate, and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable against the Secretary of State in Council of India, as they could have done against the said company."

The object of the Act was to transfer to Her Majesty the possession and government of the British territories in India which were then vested in the East India Company in trust for the Crown ; but as the Queen could not be sued in her own Court, it was provided that the Secretary of State in Council as a body corporate would have the same rights of suit as the East India Company had and would be subject to the same liability of being sued as previously attached to the East India Company.

This provision of the Act of 1858 was reproduced in section 32 of the Government of India Act, 1915, in the following terms :

"(1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act, 1858, and this Act had not been passed."

The question therefore narrows down to this as to whether an action of the character that has been brought against the Province of Bombay could have been brought against the East India Company prior to 1858. In my opinion the answer to this question must be given in the affirmative. All the relevant authorities on this point have been very carefully reviewed by the learned Judges of the Bombay High Court, and I am in entire agreement with the reasons assigned by them in support of their conclusion. It is true that the East India Company was invested with powers and functions of a two-fold character. They had on the one hand powers to carry on trade as merchants ; on the other hand they had delegated to them powers to

acquire, retain and govern territories to raise and maintain armies and to make peace and war with native powers in India. But the liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons ; but other claims if not arising out of acts of State could be entertained by civil courts, if the acts were done under sanction of municipal law and in exercise of powers conferred by such law. The law on this point was discussed very ably by the Madras High Court in *Secretary of State* v. *Hari Bhanji*[1]. The learned Chief Justice in course of his judgment contrasted the decisions in *Secretary of State* v. *Kamachee Boye Saheba*[2] with that in *Forester* v. *Secretary of State*[3]. In the first of these cases, on the death of Raja Sivaji who enjoyed the status of a sovereign the East India Company seized the whole of his property as an escheat to the Paramount Power. A bill was filed by the widow of the deceased to recover possession of the properties. It was held by the Privy Council that the suit was not maintainable.

Lord Kingsdown laid down that the real point for determination in such cases was whether it was seizure by arbitrary power on behalf of the Crown of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law ; or whether it was in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore in trust for those who by law might be entitled to it on the death of the last possessor. On the facts of the case it was held that the seizure was an exercise of sovereign power effected at the arbitrary discretion of the Company by the aid of military force and consequently the Court had no jurisdiction to try the case.

In the other case the Government had recovered the lands held by one Begum Sumaroo as a Jagirdar after her death and the plaintiff filed a suit to recover the property, on the basis of a deed of will executed by her. It was held by the Privy Council that as Begum Sumaroo was not a Sovereign Princess and the act of resumption was done under colour of legal title of lands previously held from Government by a subject, it was not an act of State, and the suit was consequently triable by a civil Court. As was observed by Lord Atkin in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[4] :

> " This phrase (act of State) is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to enquire into the legality of the Act."

Much importance, cannot in my opinion be attached to the observation of Sir B. Peacock in *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State*[5]. In that case the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the Court to decide.

In the case before us the act of requisition which purports to have been done under the sanction of municipal law, and in exercise of powers conferred by such law cannot be an act of State. An action on the ground of the powers being illegally exercised could certainly have been brought against the Secretary of State, if the Constitution Act of 1935 had not been passed.

I am not much impressed by the argument of the learned Attorney-General that the expression " sue or to be sued " occurring in section 176 does not include an application for a writ of *certiorari*. The expression ' sue ' in its plain grammatical sense connotes the " enforcement of a claim or civil right by means of legal proceedings." The proceedings may be initiated by a plaint or by a petition of motion, and

1. (1882) I.L.R. 5 Mad. 273.
2. (1859) 7 M.I.A. 461.
3. (1871-72) I.A. Supplement Vol., p. 10.
4. (1931) A.C. 662, 671.
5. (1861) 5 Bom. H.C.R. App. 1.

it cannot be said that what section 176 of the Constitution Act contemplates is a proceeding which must begin with a plaint and end in a decree as laid down in the Civil Procedure Code.

No argument can also in my opinion be founded upon the fact that there was no express mention of prerogative writs in clause (13) of the Chapter by which the Supreme Court was first established in Bengal. The Supreme Court was invested under clause (5) of the Charter with all the powers and privileges of the Court of King's Bench in England and these undoubtedly included the power of issuing *certiorari* and other prerogative writs. There are reported cases to show that writs of *mandamus* were issued to the Directors of East India Company by the Court of King's Bench in England.[1]

On the whole, it seems to me that the view taken by the learned Judges of the appeal bench of the Bombay High Court is right, and this appeal should stand dismissed with costs.

Das, J.—In my opinion this appeal should be allowed. As I have taken a view different from those of three eminent Judges of the Bombay High Court and some of my learned brethren of this Court, for all of whom I always have the highest respect, I consider it right to give the reasons for my conclusions in some detail.

This appeal is directed against the judgment and order of an appellate Bench of the Bombay High Court[2] (Chagla, C.J., and Tendolkar, J.) affirming an order of Bhagwati, J., sitting on the Original Side of that Court. The order appealed from is a mandate in the nature of a writ of *certiorari* quashing an order of requisition of a certain premises in Bombay made by the appellant in exercise of powers vested in it by Bombay Ordinance No. V of 1947.

There is no substantial dispute as to the facts leading up to the proceedings out of which the present appeal has arisen. They have been sufficiently stated in the judgments just delivered and need not be recapitulated by me.

Learned Attorney-General appearing in support of the present appeal has confined himself to two main points, namely, (i) that, having regard to the provisions of Bombay Ordinance V of 1947, under which the impugned order was made, a writ of *certiorari* does not lie at all, and (ii) that a writ of *certiorari* does not lie against the Province of Bombay. Mr. Seervai appearing for the respondents has, quite properly, not sought to raise any of the several subsidiary points which were unsuccessfully canvassed before the Courts below and his endeavour has been to support the judgment under appeal on the two points mentioned above and to reinforce them with fresh reasonings and rulings.

The writ of *certiorari* is a very well-known ancient high prerogative writ that used to be issued by the Court of King's Bench to correct the errors of the inferior Courts strictly so called. It is with this writ that the Judges of the King's Bench used to exercise control over Courts of inferior jurisdiction where the latter acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Gradually the scope of these writs was enlarged so as to exercise control over various bodies which were not, strictly speaking, Courts at all, but which were by statute vested with powers and duties that resembled those of the ordinary inferior Courts. These statutory bodies were called quasi-judicial bodies and their decisions were called quasi-judicial acts and the Court of King's Bench freely began to bring up the records of these quasi-judicial bodies, examine them and, if thought fit, quash them. The real reason for this extension of the scope of the writ of *certiorari* was the distrust with which the Judges looked upon the numerous statutory bodies that were being brought into existence and vested with large powers of affecting the rights of the subject and this extension was founded on the plausible plea that these statutory bodies exercised quasi-judicial functions. The law is now

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1. Vide *The King* v. *The Directors of East India Company*, 4 B. and Ad. 530. *The King* v. *The Court of Directors of the East India Company*, 4 M. & S. 279.
2. (1949) 51 Bom.L.R. 342.

well settled that a writ of *certiorari* will lie to control a statutory body if it purports to act without jurisdiction or in excess of it or in violation of the principles of natural justice, provided that, on a true construction of the statute creating the body, it can be said to be a quasi-judicial body entrusted with quasi-judicial functions. It is equally well settled that a *certiorari* will not lie to correct the errors of a statutory body which is entrusted with purely administrative functions. It is, therefore, necessary, in order to determine the correctness of the order appealed from, to ascertain the true nature of the functions entrusted to, and exercised by, the Provincial Government under the Ordinance in question.

The title of the Ordinance was " An Ordinance to provide for the requisition of land, for the continuance of requisition of land and for certain other purposes. " The second preamble recited that the Governor of Bombay was satisfied that circumstances existed which rendered it necessary for him to take immediate action to enable the Provincial Government to make provision for requisition of land and for the continuance of the requisition of land already subject to requisition. The Bombay Legislature not being in session at the date of this Ordinance and the instructions of the Governor-General under the proviso to sub-section (1) of section 88 of the Act having been obtained, the Governor of Bombay had legislative power and authority and the Ordinance promulgated by him had, for the requisite period, the force of an Act of the Legislature. The Ordinance has since been replaced by an Act but this appeal must be decided on the terms of the Ordinance which was in force at the material times. The preambles to the Ordinance clearly indicated that the Ordinance had been promulgated under circumstances at considerable urgency. This is a fact which should be borne in mind in interpreting the operative provisions of the Ordinance.

Section 3 of the Ordinance under which the order of requisition was made was in the terms following :

" 3. *Requisition of land.*—If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose :

Provided that no land used for the purpose of public religious worship or for any purpose which the Provincial Government may specify by notification in the Official Gazette shall be requisitioned under this section."

It is clear, and, indeed, there can be no dispute, that the words " If in the opinion of the Provincial Government " governed the words " it is necessary or expedient to do so " and that whatever those latter words might mean or imply had been left entirely to the opinion of the Provincial Government. What then, were the meaning and implication of the words " it is necessary or expedient to do so "?

The main section read as a whole clearly implied a close and intimate correlation between the two parts, namely, the power conferred on the Provincial Government by the operative part and the formation of opinion as to the necessity or expediency for exercising that power under the earlier part of the section and this correlation was brought about by the use of the word " so " in conjunction with the words " to do." To my mind, the words " to do so " covered and included within their meaning whatever Provincial Government had been authorised to do. By the operative part of the section the Provincial Government had been empowered, not to requisition simpliciter but to requisition for a public purpose. The words " to do so " in the opening part of the sentence necessarily, therefore, referred to the act of requisitioning for a public purpose and it must follow, therefore, that the necessity or expediency for requisitioning for a public purpose was left to the opinion of the Provincial Government. Strictly, as a matter of construction of the section, both grammatically and according to the necessary intendment of the Ordinance, as it appears from its language, the conclusion is irresistible that the words " to do so " meant and stood for the words " to requisition any land for a public purpose." It is to avoid the repetition of the words " requisition any land for any public purpose " that the words " to do so " were used in the earlier part. It would have served the purpose equally well if in the earlier part of the sentence

the words " to requisition any land for any public purpose" had been used instead of the words " to do so " and the words " do so " had been used at the end of the section instead of the words " requisition any land for any public purpose." It appears to me to be entirely fallacious to say that because the words " for a public purpose " were to be found at the end of the section, therefore, the existence of a public purpose must have been a collateral fact which could not come within the scope of the formation of the opinion. The truth is that the earlier part of the section by the use of the words " to do so " included the question of a public purpose and the entire composite matter, namely, the necessity or expediency for requisitioning land for a public purpose had been left to the subjective opinion of the Provincial Government.

Learned counsel for the respondents contends—and in this he has the judgments of the High Court in his favour—that although it had been left to the Provincial Government to form its own opinion as to the necessity or expediency of requisitioning land and to make an order of requisition founded on that opinion, the existence of a public purpose was a condition precedent to the exercise of the power and the question of the fulfilment of the condition precedent had not been left to the subjective opinion of the Provincial Government but had to be determined as an objective fact by the Provincial Government before it proceeded to form its opinion and to make the order. The words " to do so ", according to learned counsel for the respondents, referred to the act of requisition only but not to the purpose of such requisition. I am unable to accept this line of argument which appears to me to be open to the following several objections :

(i) It overlooks the word " so " and gives no meaning to it.

(ii) If that interpretation were correct then the section would have read as follows :

" If in the opinion of the Provincial Government it is necessary or expedient to requisition any land, the Provincial Government may, by an order in writing, requisition any land for a public purpose."

So read, the section would mean that the Provincial Government would, in order of sequence, first have to form its opinion as to the necessity or expediency for requisitioning any land without reference to any purpose. On this interpretation it is clear that the Provincial Government could not act directly upon the opinion so formed, because the exercise of the power depended on the existence of a public purpose as an objective fact which had yet to be determined. If that were to be so then what was the necessity for the anterior formation of opinion by the Provincial Government? A formation of opininon as to the necessity or expediency of a purposeless requisitioning would be an entirely useless, incomplete and futile mental exercise for such formation of opinion would not have in any way helped the Provincial Government in making an order of requisition at all.

(iii) According to the respondents' interpretation the existence of a public purpose as an objective fact had to be determined first before the Provincial Government would form its opinion as to the necessity or expediency of requisitioning a particular land. This argument amounts to reading the section, upside down and in fact to recasting the section altogether. If that were the true intention of the Governor of Bombay in promulgating this Ordinance, then the section would have said—" If any land is needed for a public purpose and if in the opinion of the Provincial Government it is necessary or expedient to requisition any particular land for that purpose, the Provincial Government may, by an order in writing, requisition such land." The section as enacted, however, did not say anything of the kind.

(iv) It is said that this section postulated a public purpose to exist and required the Provincial Government to form its opinion as to the necessity or expediency of requisitioning land for that public purpose. One can only arrive at the last mentioned proposition by interpreting the words " to do so " in the way suggested by me and once that interpretation is adopted, the existence of a public

purpose as well as the necessity or expediency of requisitioning land must both become the subject-matter of the opinion of the Provincial Government.

(v) If the existence of a public purpose had to be determined as an objective fact and if that determination were liable to be subjected to the scrutiny of the Court in legal proceedings, then such a procedure would have quite effectively frustrated the very object set forth in the second preamble by preventing the Provincial Government, by means of protracted legal proceedings, from taking immediate action for making provision for requisition of land and for the continuance of the requisition of land already subject to requisition. In this very case, the order of requisition which had been made in February, 1948, is still in abeyance.

(vi) The result of the interpretation suggested by the respondents would be to hold that the Provincial Government had to determine judicially the existence of a public purpose as an objective fact before it proceeded to form its opinion as to the necessity or expediency of requisitioning any particular land. It is difficult to appreciate how the Provincial Government would have proceeded to decide this issue. To whom would the Provincial Government give notice that it proposed to decide this issue of the existence or otherwise of a public purpose? Who would be interested to deny the existence of such a purpose at that stage? None, for no particular person's land was actually sought to be requisitioned at that stage. Indeed this issue could not arise until a person was actually threatened with a requisition order. An interpretation that leads to such an absurd and anomalous position cannot but be rejected.

(vii) If it is contended that the Provincial Government had to decide this issue as and when it sought to requisition any particular land belonging to a particular person, the result will be still more anomalous. In that case the Provincial Government would be called upon to decide the selfsame issue as to the existence of a public purpose as often and as many times as it would need any land, for the decision in one case will not bind the owner of a different land. There would have to be as many decisions as to the existence of a public purpose as there would be number of plots of land to be acquired. Can anything be more absurd than this?

(viii) If the decision on the existence of a public purpose had to be made along with or simultaneously with the formation of opinion as to the necessity or expediency for requisitioning any particular land then it must be conceded that the two matters were correlated to each other and then it will be absurd to suggest that the intention of the Ordinance was to keep the two component parts in separate water-tight compartments, one being required to be decided as an objective fact and the other being left to the subjective opinion of the Provincial Government. In the absence of specific provision in express language such an anomalous intention cannot be imputed to the legislative authority.

The objections stated above quite definitely lead me to the conclusion that the interpretation suggested by the respondents cannot be adopted and they also fortify my view that the section must be construed in the manner I have mentioned. So construed, it would read as follows :

"If in the opinion of the Provincial Government it is necessary or expedient to requisition any land for a public purpose, the Provincial Government may by an order in writing, requisition any land for a public purpose."

As soon as this construction is reached, there remains, on the authorities and on principle, no escape from the conclusion that what had been left to the subjective opinion of the Provincial Government was a composite matter, namely, the necessity or expediency for requisitioning land for a public purpose. The Provincial Government was authorised to form an opinion on the entire matter and every component part of it. In short the existence of a public purpose was left as much to the opinion of the Provincial Government as was the necessity or expediency for requisitioning any particular land. It seems clear to me that the legislative authority meant, not that there must be a public purpose as an objective fact to be determined judicially which determination was to be subject to the scrutiny of the Court but,

that the Provincial Government should be of opinion that a public purpose existed for the advancement of which it was necessary or expedient to requisition land. In my opinion the words "if in the opinion of the Provincial Government" governed both the purpose and the necessity or expediency of making an order of requisition. The formation of opinion on the entire matter was purely subjective, and the order of requisition was to be founded on this subjective opinion and as such was a purely administrative act. It will be useful, at this stage to refer to some of the judicial decisions which, as I apprehend them, fully support my above conclusions.

It is well established that if the Legislature simply confides the power of doing an act to a particular body if in the opinion of that body it is necessary or expedient to do it, then the act is purely an administrative, *i.e.*, an executive act as opposed to a judicial or quasi-judicial act, and, in the absence of proof of bad faith, the Court has no jurisdiction to interfere with it and certainly not by the high prerogative writ of *certiorari*. Usually this discretion is confided by the use of expressions like "If it appears to," "If in the opinion of" or "If so and so is satisfied." In *Mayor, etc., of Westminster* v. *London and North-Western Railway Company*[1], Lord Halsbury, L.C., observed :

"Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised."

To the like effect are the following observations of Batty, J., in *Balwant Ramchandra Natu* v. *The Secretary of State*[2] :

"No doubt when a power has been conferred in unambiguous language by Statute, the Courts cannot interfere with its exercise and substitute their own discretion for that of persons or bodies selected by the Legislature for the purpose."

Sometimes the Legislature may entrust a power to a specified authority to do an act for a certain purpose. Even in such a case, the Legislature may, nevertheless, by appropriate language, leave not only the determination of the necessity or expediency for doing the act but also the determination of the necessity or expediency for doing the act for that purpose as a composite matter to the opinion, satisfaction or discretion of that authority. In such a case what is a condition precedent for the doing of the act is not the actual existence of the particular purpose but the opinion of the specified authority that the purpose exists. In other words the authority is also made the sole judge of the existence of the purpose, for otherwise it cannot form its opinion as to the necessity or expediency of doing the act for that purpose.

In *Wijeyesekera* v. *Festing*[3] the Governor of Ceylon with the advice of his Executive Council made an order under the Acquisition of Land Ordinance, 1876, directing the Government agent to take order for the acquisition, under the provisions of the Ordinance, of part of the appellant's estate for a public purpose, namely, the making of a road. The whole point in the case was whether the decision of the Governor in Council was conclusive on the point that the land was wanted for a public purpose. The question turned on sections 4 and 6 of the Ordinance (No. 3 of 1876) relevant portions of which provided as follows :

"4. Whenever it shall appear to the Governor that land in any locality is likely to be needed for any public purpose, it shall be lawful for the Governor to direct the Surveyor-General or other officer generally or specially authorised by the Governor in this behalf, to examine such land and report whether the same is fitted for such purpose.

6. The Surveyor-General, or other officer so authorised as aforesaid, shall then make his report to the Governor whether the possession of the land is needed for the purposes for which it appeared likely to be needed as aforesaid. And upon receipt of such report it shall be lawful for the Governor, with the advice of the Executive Council, to direct the Government Agent to take order for the acquisition of the land."

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1. (1905) A.C. 426.
2. (1905) I.L.R. 29 Bom. 480, 503.
3. (1919) A.C. 646.

In delivering the judgment of the Board Lord Finlay approved of a previous decision of the Supreme Court of Ceylon and observed as follows :

"It appears to their Lordships that the decision of the Governor that the land is wanted for public purposes is final, and was intended to be final, and could not be questioned in any Court. The nature of the objection is such that it would be obviously unsuitable for the District Court, which is concerned with questions of compensation which would arise if the land is to be taken. But the question might also be raised in a preliminary way, as was suggested by Lord Wrenbury in the course of the argument. It might be raised by an application to the Court to stay the further proceedings on the ground that although the Governor in the Executive Council had made the order, it was not a case where the condition precedent of the Ordinance was really fulfilled, namely, that the land was wanted for public purpose.

In their Lordships' opinion no such proceeding would be competent in such a case, and the decision of the Governor in Council, making an order under the latter part of section 6 of the Ordinance, is final and conclusive."

His Lordship concluded—

"When you have an enactment of that kind it shows that it was intended that the decision of the Governor in Executive Council on the point should be binding."

The decision in *Point of Ayer Collieries, Ltd.* v. *Lloyd George*[1] which was a case of requisition of an undertaking turned on reg. 55 (4) of the Defence (General) Regulations—the relevant parts of which were as follows :

"If it appears to a competent authority that in the interests of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking, and that, for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person (hereinafter referred to as an "authorised controller") to exercise, with respect to the undertaking or any part thereof specified in the order, such functions of control on behalf of His Majesty as may be provided by the order . . . "

An order under the regulation having been made with respect to the appellant's undertaking, the appellant brought an action impugning it on the ground, *inter alia*, that there were no adequate grounds upon which the Minister could find, as he stated he had found, namely, that it was necessary to take control in the interests of the public safety, the defence of the realm, the efficient prosecution of the war or for maintaining supplies and services essential to the community. Singleton, J., having dismissed the action, the appellant went up to the appeal Court. If the reasonings and the conclusions of the judgments under appeal before us were sound and correct it could well have been held by the Court of Appeal in that case that the regulation postulated the existence of the interests of public safety, etc., which had to be judicially determined as an objective fact and that what had been left to the subjective opinion of the competent authority was only the necessity for taking control of the undertaking. This was, however, repelled and in dismissing the appeal Lord Greene, M. R., with whom Goddard and du Parcq, L.JJ., concurred observed as follows :

"If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation. All these matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain, and that is that those matters are not within the competence of this Court. It is the competent authority that is selected by Parliament to come to the decision, and if that decision is come to in good faith, this Court has no power to interfere, provided, of course that the action is one which is within the four corners of the authority delegated to the Minister."

There is no substantial difference in the language of reg. 55 (4) and that of the Bombay Ordinance now before us if it is properly construed and read in the way I have indicated above. Even if it were possible, on an over-meticulous analysis to detect any such difference, the position is put beyond

1. (1943) 2 All E.R. 546.

doubt in the decision of the English Court of Appeal in *Carltona Ltd.* v. *Commissioners of Works and others*[1]. The decision turned on reg. 51 (1) of the Defence (General) Regulations which was in the following terms :

"A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

There is no substantial difference at all between the language of this regulation and section 3 of the Bombay Ordinance as construed above. If the reasonings of Chagla, C.J. and Tendolkar, J., were correct, the words "so to do" in the above regulation would refer only to the act of taking of possession, for, according to them, the interests of the public safety, etc., do not describe the nature or character of that act but constitute the purpose for which the competent authority was to do the act of taking possession. On that line of reasoning the regulation could be equally said to postulate the existence of the interests of the public safety, etc., as conditions precedent to the exercise of the power and it could be said that the fulfilment of those conditions precedent had to be determined quasi-judicially so as to be subject to the scrutiny and interference of the Court. All this line of reasoning was rejected by Lord Greene, M. R., with the concurrence of Goddard and du Parcq, L.JJ., in the following words :

"The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not possibly have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith—and I may say that there is no such allegation here— is not open to this Court. It has been decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so, it would mean that the Courts would be made responsible for carrying on the executive Government of this Country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no Court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction."

Vedlapatla Suryanarayana v. *Province of Madras*[2] is a Full Bench decision of the Madras High Court. It discussed section 6 of the Land Acquisition Act and held that the decision of the Provincial Government that the land was required for a public purpose was final.

Robinson v. *Minister of Town and Country Planning*[3] is instructive. The provisions of the Town and Country Planning Act, 1944, were considered in that case. The relevant portions of section 1 of that Act were as follows :

"Where the Minister of Town and Country Planning (in this Act referred to as the Minister) is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land contiguous or adjacent thereto, should be laid out afresh and redeveloped as a whole, an order declaring all or any of the land in such a part of their area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister if an application in that behalf is made by the authority to him before the expiration of five years from such date as the Minister may by order appoint as being the date when the making of such applications has become practicable."

It will be noticed that the power to make the order was subject to the satisfaction of the Minister not only that it was requisite that lands should be laid out afresh but that it was requisite "for the purpose of dealing satisfactorily, etc.," which unquestionably was a question of fact and could be said to be subject to objective determination yet, it was held by the appeal Court, overruling an earlier decision of Henn Collins, J., in another case that the entire matter, namely, the necessity for laying out the lands afresh as well as the purpose of dealing was for the satisfaction of

1. (1943) 2 All E.R. 560.
2. (1945) 2 M.L.J. 237 : I.L.R. (1946) Mad. 153 (F.B.).
3. (1947) 1 All E.R. 851.

the Minister that he was the sole judge that no objective test was possible and that the decision of the Minister was an administrative act.

Franklin v. *Minister for Town and Country Planning*[1] was concerned with section 1 (1) of the New Towns Act 1946, the relevant portions of which ran as follows :

"If the Minister is satisfied after consulting with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a Corporation established under this Act, he may make an order designating that area as the site of the proposed new town."

Here what was left to the satisfaction of the Minister was not only whether it was expedient that any area should be developed as a new town but whether it was expedient in the national interest that any area should be so developed. If the present arguments were sound it could be held in that case that the section postulated the existence of national interest to be determined judicially as an objective fact and that it was a condition precedent to the making of the order. It was, however, held by the House of Lords that no judicial or quasi-judicial duty was imposed on the Minister in the discharge of his statutory duties, those duties being purely administrative.

The case of *Hubli Electricity Co., Ltd.* v. *Province of Bombay*[2] may also be referred to. Relevant portions of section 4, sub-section (1) of the Indian Electricity Act, 1910, provided :

"The Provincial Government may, if in its opinion the public interests require, revoke a licence in the following cases namely :—

(*a*) Where the licensee, in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act."

Could anything be more objective than the requirements of public interest or the wilful and unreasonably prolonged default? And yet in construing the section their Lordships of the Privy Council observed :

"Their Lordships are unable to see that there is anything in the language of the sub-section or in the subject-matter to which it relates on which to found the suggestion that the opinion of the Government is to be subject to objective tests. In terms the relevant matter is the opinion of the Government—not the grounds on which the opinion is based. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion. Further, the question on which the opinion of the Government is relevant is not whether a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default. On that point the opinion is the determining matter, and—if it is not for good cause displaced as a relevant opinion—it is conclusive."

The recent case of *A. C. Mohamed* v. *Sailendra Nath Mitra*[3] may also be referred to. It was concerned with an order of requisition of certain premises except the ground floor made under section 3 (1) of the West Bengal Requisition and Control (Temporary Provisions) Act, 1947, which runs as follows :

"Whenever it appears to the Provincial Government that any premises in any locality are needed or are likely to be needed for any public purpose, it may, by order in writing, requisition such premises: Provided that no premises exclusively used for the purpose of religous worship shall be requisitioned under this section."

I find no difference between the language of this section and that of section 3 of the Bombay Ordinance as construed by me. It is quite clear that what was left to the opinion of the Provincial Government was not the need of the premises simpliciter but the need of any premises for a public purpose as a composite matter. If the present arguments were sound, it could be held that the section postulated the existence of a public purpose and that what was left to the opinion of the Provincial Government was the need of the premises for that public purpose. It was, however, held by a Division Bench of the Calcutta High Court—and I think quite rightly—that it sufficed for the exercise of the power that the local Government was satisfied as to the existence of the condition precedent to the exercise of its powers.

1. (1947) 2 All E.R. 289 : (1948) A.C. 87.
2. (1919) 2 M.L.J. 30 : L.R. 76 I.A. 57 : 51 Bom. L.R. 551 (P.C.).
3. (1950) 54 C.W.N. 642.

To summarise: It is abundantly clear from the authorities cited above that questions of fact such as the existence of a public purpose or the interest of the public safety or the defence of the realm or the efficient prosecution of the war, or the maintenance of essential supplies and the like may well be and, indeed are often left to the subjective opinion or satisfaction of the executive authority. Merely because such a matter involves a question of fact it does not follow at all that it must always, and irrespective of the language of the particular enactment, be determined judicially as an objective fact. When the Legislature leaves it to an executive authority to form an opinion on or to be satisfied about such a matter as a condition for the exercise of any power conferred on it, and to act upon such opinion, what is condition precedent is, not the actual existence of the matter but, the subjective opinion or satisfaction of the executive authority that it exists. The cases referred to above clearly establish this much that when the Legislature leaves it to the opinion or satisfaction of the executive authority as to whether it is necessary or expedient to requisition any land for a public purpose the executive authority is constituted the sole judge of the composite matter, that is to say of the existence of the public purpose as well as the necessity or expediency for requisitioning the land for that public purpose, call it a condition precedent or an objective fact or what you will. On a proper construction of section 3 of the Bombay Ordinance (No. V of 1947) there can be no doubt that that section left it to the Provincial Government to form its own opinion on the entire matter, namely, whether it was necessary or expedient to requisition any land for a public purpose and to act upon that opinion. So construed, the formation of opinion on the whole matter and the act founded thereon was nothing but a purely administrative, (*i.e.*, executive) act. If the acts were done in good faith and within the four corners of the Ordinance, the Court cannot interfere with it in any proceeding and far less by the prerogative writs of *certiorari* or prohibition. If there be any hardship the appeal of the subject must be to the Legislature and not to the Court. The first and the major head of the arguments advanced on behalf of the respondents must, therefore, fail.

It will be convenient to dispose of at once two ancillary points. In the petition a bald suggestion was made, verified only as true to information and belief and unsupported by any legal evidence, that the Provincial Government had made the order *mala fide* and for a collateral purpose. The petitioner gave evidence in Court. There is nothing in the evidence which may support any plea of bad faith on the part of the Provincial Government or its officers. All that was said was that Mrs. C. Dayaram to whom the requisitioned premises had been allotted was the wife of an advocate from Karachi, and was a refugee and that the petitioner did not know whether her husband had also migrated from Karachi. At an adjourned hearing the question was put as to whether Mrs. Dayaram was concerned in any manner whatever with the administration of Government of Bombay or was a public servant. The purpose of the question was perhaps to establish that she was in a position to influence the Government officers. The petitioner in fairness replied that he was not aware if she were. In the evidence there is nothing from which it can be taken as proved that the Provincial Government and its officers had acted in bad faith. Secondly, it was suggested that the Provincial Government had not acted within the four corners of the Ordinance in that, on its own showing, there was no public purpose at all for which the order was made. Bhagwati, J., expressed the view that the requisitioning of a flat for a particular or individual refugee was not a public purpose, for there was no question of serving the general interests of the community. On appeal Chagla, C.J., disagreed with the above view. In his opinion the housing of refugee might certainly be a public purpose, for securing a house for an individual refugee might itself confer a benefit on the community as a whole. In this opinion the learned Chief Justice was manifestly right. But the learned Chief Justice went on to say that choosing one refugee as against another without any ostensible cause would not constitute a public purpose for which the flat in question could be requisitioned. This conclusion, with great respect to the learned Chief Justice, appears to be founded on a slight confusion

of ideas. It has to be remembered that this was not a solitary order of requisition made by the Government for the public purpose of housing refugees. The petitioner's Solicitors' letter dated 27th February, 1948, clearly stated that there were "similar orders" issued by the Government. The impugned order itself shows *ex facie* that the order was made generally for "public purpose housing." It was not in terms made for the benefit of any particular individual refugee. The allotment of the flat to Mrs. C. Dayaram was the next step and as such the allotment of the flat already requisitioned to a particular refugee cannot possibly vitiate the preceding order of requisition. To say that seeing that the allotment was made to her, the order of requisition must have been made in her interest is to act on suspicion which is not permissible. The flat had to be allotted to a refugee for purposes of his or her housing. The fact that the petitioner himself was a refugee has been stressed before us and it has been said that it was a novel way of solving the refugee problem by ousting one refugee and putting in another. There is no evidence as to the relative circumstances of the petitioner and Mrs. C. Dayaram. For all we know she may have been a more deserving person whose needs were more urgent than those of the petitioner. The point is that it lies heavily on the person who challenges the *bona fides* of a public authority or who contends that the authority had acted outside its powers to establish his case on cogent legal evidence. He cannot succeed by leaving the matter in the air and to the ingenuity of his counsel in creating an atmosphere of mere suspicion, which falls far short of legal proof.

I now pass on to the second head of argument which is based on the assumption that the existence of a public purpose had not been left to the subjective opinion of the Provincial Government but was an objective fact which was a condition precedent to the exercise of the power of requisition. What consequences follow from this assumption? The contention of the respondents is that the fulfilment of this condition as an objective fact had to be determined by the Provincial Government judicially and that being thus charged with a quasi-judicial function the Provincial Government become amenable to the high prerogative writ of *certiorari* in case it acted without jurisdiction or in excess of it or in violation of the principles of natural justice. The question, therefore arises as to what are the tests for ascertaining whether the act of a statutory body is a quasi-judicial act or an administrative act.

As to what is a quasi-judicial act there have been many judicial pronouncements. May, C.J. in *Queen* v. *Dublin Corporation*[1] described a quasi-judicial act as follows:

> "In this connection the term judicial does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. And if there be a body empowered by law to enquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

Lord Atkinson in *Frome United Breweries* v. *Bath Justices*[2] approved of this definition as one of the best definitions. The definition that now holds the field is that of Atkin, L.J., as he then was, in *Rex* v. *Electricity Commissioners*[3]. It runs as follows:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This definition was accepted as correct in *Rex* v. *London County Council*[4] and by many learned Judges in subsequent cases including the latest decision of the Privy Council in *Nakkuda Ali* v. *M. F. De S. Jayaratne*[5]. In *Banwarilal's case*[6] I had occasion to analyse the essential characteristics of a quasi-judicial act as opposed to an administrative act. I stand by what I said on this point on that occasion. As

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1. (1878) 2 Ir. R. 371.
2. (1926) A.C. 586.
3. (1924) 1 K.B. 171.
4. (1931) 2 K.B. 215.
5. (1950) 54 C.W.N. 883 (P.C.).
6. (1943) 48 C.W.N. 766 at pp. 779-801.

I pointed out there, the two kinds of acts have many common features. Thus a person entrusted to do an administrative act has often to determine questions of fact to enable him to exercise his power. He has to consider facts and circumstances and to weigh *pros* and *cons* in his mind before he makes up his mind to exercise his power just as a person exercising a judicial or quasi-judicial function has to do. Both have to act in good faith. A good and valid administrative or executive act binds the subject and affects his rights or imposes liability on him just as effectively as a quasi-judicial act does. The exercise of an administrative or executive act may well be and is frequently made dependent by the Legislature upon a condition or contingency which may involve a question of fact, but the question of fulfilment of which may, nevertheless, be left to the subjective opinion or satisfaction of the executive authority, as was done in the several Ordinances, regulations and enactments considered and construed in the several cases referred to above. The first two items of the definition given by Atkin, L.J., may be equally applicable to an administrative act. The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L.J.'s definition, namely, the duty to act judicially. As was said by Lord Hewart, C.J., in *R.* v. *Legislative Committee of the Church Assembly*[1] :

"In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects ; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

The above passage was quoted with approval by Lord Radcliffe in delivering the judgment of the Privy Council in *Nakkuda Ali's case*[2] (supra). Therefore, in considering whether a particular statutory authority is a quasi-judicial body or a mere administrative body it has to be ascertained whether the statutory authority has the duty to act judicially. When and under what circumstances then can a statutory body be said to be under a duty to act judicially ?

An examination of the decided cases shows that in many of them where the statutory bodies were held to be quasi-judicial bodies and their decisions were regarded as quasi-judicial acts there were some parties making a claim under the statute and some parties opposing such claim and the statutory authority was empowered to adjudicate upon the matters in issue between the parties and to grant or refuse the claim. Thus in *The Queen* v. *The Local Government Board*[3] the contesting parties were the County Council of Wexford on one side and Webster and Leary on the other side and Local Government Board was the statutory authority to decide whether the latter were entitled to higher salary. In *Rex* v. *Woodhouse*[4] the contest was between the applicants for renewal of licence of certain brewers and the Justices of Leeds were to decide whether the licence should or should not be renewed. Reference may also be made to the cases of *Rex* v. *Post Master General*[5], *Rex* v. *London County Council*[6] and *Rex* v. *Hendon District Council*[7]. Even in *Rex* v. *Boycott*[8] it may be said that the Statute there contemplated a contest between the Local Education Society and the boy who was alleged to be imbecile and whose father was entitled to notice under the regulations before a certificate was issued against the boy. It is not necessary to multiply instances. The point to note is that in each of these cases there was a *lis*—a proposition and an opposition—and the statutory authority was authorised to decide the question and in each of these cases the decision was regarded as a quasi-judicial decision. Indeed in some of the cases the necessity of a *lis* between two or more parties has been referred to or even insisted upon. Thus in *Errington and others* v. *Minister of Health*[9], Maugham, L.J., as he then was, said :

"In determining whether the position of the Minister is that which I have described as being quasi-judicial, I think, it is necessary to appreciate that under a clearance area scheme, to which objections are made by the owners of the property in the area, there is a true contest as between the

1. (1928) 1 K.B. 411 at p. 415.
2. (1950) 54 C.W.N. 883 (P.C.).
3. (1902) L.R. 2 Ir. 349.
4. (1906) 2 K.B. 501.
5. (1928) 1 K.B. 291.
6. (1931) 2 K.B. 215.
7. (1933) 2 K.B. 696.
8. (1939) 2 K.B. 651.
9. (1935) 1 K.B. 249 at 271.

owners of the property and the local authority; in other words, there are two sides as between whom the Minister has to come to a determination after consideration."

The following passage from the judgment of Greer, L.J., in that case quoted with approval by Swift, J., in *Frost and others* v. *Minister of Health*[1] takes the matter a little further in that line:

"In so far as the Minister deals with the matter of confirmation of a closing order in the absence of objection by the owners, it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such enquiries as he thinks necessary to enable him to make up his mind whether it was in the public interest that order should be made. But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. It seems to me that in deciding whether a closing order be made in spite of the objections which have been raised by the owners, it seems to me reasonable that the Minister should be regarded as exercising quasi-judicial functions."

Swift, J., in accepting above statement added:

"I accept that from the moment an objection is made the Minister is exercising quasi-judicial functions, but it seems to me to be clearly recognised by the Court of Appeal that up to the time of objection being made the Minister acts in an administrative, and not a judicial, capacity."

Under the Housing Act, 1930, the local authority submits a clearing order to the Minister. If no objection is raised by the owners of the property the Minister considers the matter and either confirms or modifies the order of the local authority. In the absence of objection the Minister, according to those two decisions, acts in an administrative capacity. Why? Because there is no *lis* in the sense of two opposing parties. There is only a proposal by the local authority. But if objection is raised by the owner, the Minister, according to these cases, in deciding the matter, acts judicially. Why? Because there is a *lis* between two contending parties, namely, the local authority and the owner which has to be decided by the Minister. It is true that in *Franklin* v. *Minister of Town and Country Planning*[2] (supra) the House of Lords held that under the Statute the Minister at no stage acted judicially, and, therefore, the actual decisions in these two cases cannot be sustained. But, nevertheless, I have quoted the above passages only to illustrate the reasons and the principle on which the act of a statutory body empowered to decide disputes between two contesting parties was held to be quasi-judicial. The Report of the Ministers' Powers Committee in defining the words 'judicial' and 'quasi-judicial' which definition was accepted by Scott, L.J., as correct in *Cooper* v. *Wilson*[3] stated:

"A true judicial decision pre-supposes an existing dispute between two or more parties and then involves four requisites . . . . . A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves . . . . ."

This definition of a quasi-judicial decision clearly suggests that there must be two or more contesting parties and an outside authority to decide those disputes. The following observations of my Lord the Chief Justice then sitting as a Single Judge in the Bombay High Court, in *Kaikhushroo Sorabjee* v. *The Commissioner of Police*[4] in which an order made under the Defence of India Rules was under consideration, are relevant on this point:

"It appears to me that unless the authority invested with the power to pass an order had to act judicially, *i.e.*, to weigh a question from two sides and decide on the matter, no question of quasi-judicial act can arise. The two sides cannot include himself as he is the deciding authority."

In *Franklin* v. *Minister of Town and Country Planning*[5], while it was before the Appeal Court, Lord Oaksey, L.J., said:

"In all the authorities which have been referred to as showing that at an enquiry there must be an examination of the case of both sides, there was what has been called a *lis*; that is to say, there were two parties contesting and the Minister as an outside authority, was deciding the case."

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1. (1935) 1 K.B. 286 at pp. 292-3.
2. (1947) 2 All E.R. 289: (1948) A.C. 87.
3. (1937) 2 K.B. 309, 340.
4. (1946) 48 Bom.L.R. 717.
5. (1947) 176 L.T. 312 at 316.

In the very recent case of *Patri Shaw* v. *R. N. Roy*[1] a Division Bench of the Calcutta High Court dissented from this very Bombay case[2] which is now before us and emphasised the necessity of a *lis* between two parties for making the decision of the authority a quasi-judicial act.

On the other hand there are many cases where the act of a statutory authority has been accepted as a quasi-judicial act although there were not two opposing parties over whose disputes the authority was to sit in judgment. In those cases it was the authority who made a proposal and another person objected to it and the authority itself was entrusted to hear the objection and give a decision on it. In short the authority which was the proposer was the judge in its own cause. The only ground on which the decision of such an authority, placed in such situation as I have just mentioned, was regarded as a quasi-judicial act was that the authority was empowered to affect the rights of or impose a liability on others and was required by the very law which constituted it to act judicially. To take a few illustrative cases, *The Queen* v. *Corporation of Dublin*[3] (supra) was the case before May, C.J., for quashing a borough rate by *certiorari*. Here the contest was between the Corporation on one side and the rate-payers on the other. It was the Corporation which, under the Act, was empowered, after consideration of facts and circumstances, to impose a borough rate, a liability of the rate-payers. The provisions of the relevant statutes are not set out in the report and it is difficult to say precisely what duties had been imposed on the Corporation before it could impose liability on rate-payers. I, therefore, pass on to the case of *Rex* v. *Electricity Commissioners* (supra) in which we find the celebrated definition of Atkin, L.J. It will be noticed that in this case also there were not two parties apart from the Commissioners. Indeed the Commissioners themselves proposed the scheme and the companies took objection to it and the Commissioners after holding the local enquiry and hearing the objections had to make the final order. It will also be noticed that the local enquiry was to be held by the Commissioners themselves. The only principle on which this decision rests is that the Commissioners had power to do something which affected the rights of others and that they were required by the statute itself to hold an enquiry, hear objections and evidence in support thereof and make their final decision after considering all facts and circumstances. Take the case of *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust*[4]. The contest was between the appellant as owner and the respondent Trust as the authority making an adverse declaration with respect to the appellant's building. By the very provisions of the statute the respondent Trust was made the judge in its own cause. It was, however, directed to entertain objections, hear evidence and then decide the issue. It is this last mentioned circumstance on which this decision rests. It is needless to multiply instances, for, I think, these cases sufficiently illustrate the position.

What are the principles to be deduced from the two lines of cases I have referred to? The principles, as I apprehend them, are:

(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

1. (1950) 54 C.W.N. 855.
2. (1949) 51 Bom.L.R. 342.
3. (1878) 2 Ir.R. 371.
4. (1937) 3 All E.R. 327 (P.C.).

In other words, while the presence of the two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially.

Mr. Seervai relied on two cases, namely, *Rex* v. *Hendon Rural District Council*[1] and *Rex* v. *London County Council*[2] as establishing that although the statute itself may not require an inquiry yet the decision of the authority may be a quasi-judicial act. In the second case although there were no express provisions for inquiry in the statute itself, the rules framed by the Theatre and Music Hall Committee had made elaborate provisions for notice, advertisement, opposition and hearing in public and liberty to examine and cross-examine witnesses. In the first case notice was actually given, objections were invited and the parties had appeared. In any case, in both the cases, as I have already pointed out, there was a *lis* between two contending parties apart from the deciding authority and the decision of the authority affected the rights of the parties and can, therefore, be well supported as a quasi-judicial act on the principle first enunciated.

The question I have now to consider is whether the act of the Provincial Government under the Bombay Ordinance satisfied either of the two tests. In the case before us there were not two parties so as to make up a *lis* in the usual sense. Here the Provincial Government had been authorised to requisition land for a public purpose and the respondents' father whose interests were prejudicially affected opposed the requisition. The case, therefore, did not satisfy the test of a quasi-judicial act based on the presence of two parties apart from the Provincial Government. Chagla, C. J., obviously felt the difficulty and tried to get over it by introducing the State as a party, as if, under the Government of India Act, 1935, the State was a legal entity apart from the Provincial Government. This introduction of a fiction is wholly unconvincing and cannot be supported. The Ordinance under review did not contemplate or permit such a fiction. The bald fact has to be faced that in this case there was an absence of two contending parties apart from the Provincial Government which was the deciding authority. This, as I have said, is, however, not decisive, for it has yet to be enquired whether the case satisfied the second test, that is to say, whether the Ordinance required the Provincial Government to act judicially.

Turning now to the provisions of the Ordinance, it is contended that it is implicit in section 3 that the existence of a public purpose must be determined judicially. The argument may be summed up thus: The existence of a public purpose as an objective fact was, under the main body of section 3, a condition precedent to the exercise of the power of requisition, just as the non-user of land for any of the purposes mentioned in the proviso to section 3 or the vacancy of the premises under section 4 were conditions precedent. This condition precedent being an objective fact, it had of necessity to be determined by the Provincial Government in a quasi-judicial manner. The first part of the argument wholly overlooks the difference in the language used in the main body of section 3 and that used in the proviso to that section and that used in section 4 of the Ordinance. The proviso to section 3 placed certain lands outside the ambit of the power conferred on the Provincial Government by the main body of that section. If the Provincial Government purported to exercise its power of requisition with respect to land which fell within the proviso on an erroneous belief that it did not, then the Provincial Government overstepped the limits of its powers and the order of requisition would not bind anybody and could be challenged by suit as wholly without judrisdiction. Likewise, under section 4 the Provincial Government's power of requisition had been confined in its range to vacant premises and if the Provincial Government purported to requisition premises as vacant premises which in fact were not vacant premises then also the Provincial Government entered the forbidden field and went beyond

1. (1933) 2 K.B. 696.

2. (1931) 2 K.B. 215.

its power and its decision would not bind any body and could be challenged by a suit. This would be the position in the two cases I have mentioned, because there was nothing in the Proviso to section 3 or in section 4 which could suggest that the question of the fulfilment of the condition precedent, namely, the non-user of the land for any of the purposes mentioned in the Proviso to section 3 or the vacancy of the premises under section 4, had in any manner been left to the subjective opinion of the Provincial Government. But, as I have already stated, the main body of section 3, on a correct construction of it, expressly left the question of the existence of the public purpose along with the question of the necessity or expediency of requisitioning land to the subjective opinion of the Provincial Government, and, therefore, its decision, if made in good faith, could not be questioned at all. The circumstance that the fulfilment of the condition precedent laid down in the Proviso to section 3 or in section 4 had not been left to the opinion of the Provincial Government could not affect the question of construction of the language used in the main body of section 3 or alter the nature or character of the act under that section. The first part of the argument overlooks this aspect of the matter. The second part of the argument proceeds on the assumption that an objective fact can never be left to the subjective opinion of a specified authority and must always be determined judicially. The cases already referred to in connection with the first head of arguments clearly show that the question of the existence of a public purpose or the interests of the State and the like may well be, and, indeed, often are, left to the subjective opinion or satisfaction of the specified authority and in such cases its decision, in the absence of bad faith, cannot be challenged in any proceeding. Even if the matter be not left to its subjective opinion, nevertheless, as already pointed out, an administrative authority has frequently to come to a decision in its own mind as to the objective facts such as the existence of a public purpose or the like as a step in the process of the exercise of its administrative powers. That decision, if erroneous, will not bind anybody and may be questioned in an action. See the observations of Palles, C.B., in *The Queen* v. *Local Government Board*[1]. The mere fact that the existence of a public purpose is a condition precedent to the exercise of the power of requisition will not necessarily make the decision as to its existence a quasi-judicial act. There is no warrant for saying that the fulfilment of the condition precedent to the exercise of an administrative power must necessarily and always be determined judicially by the authority invested with the power. The authority decides it for its own purpose and in case of dispute the final decision rests with the Court—a circumstance which also supports the view that the authority has no duty to decide it judicially. In my opinion, even on the assumption that the question of the existence of public purpose had not been left to the subjective opinion of the Provincial Government and that the question had to be determined by the Provincial Government, there was nothing in section 3 to suggest that such determination had to be made judicially at all. The observations of Lord Radcliffe in *Nakkuda Ali's case*[2] at p. 887 are also instructive and helpful on this point.

Mr. Seervai then draws our attention to sections 10 and 12 of the Ordinance on which he strongly relies in support of his contention. It should be borne in mind that Mr. Seervai has not contended that the order for requisition by itself was a quasi-judicial act. His contention has been that this power to make the order was subject to a condition precedent, namely, the existence of a public purpose which alone had to be established judicially as an objective fact. It will, therefore have to be seen whether the sections relied on have any bearing on the question of the determination of the existence in fact of a public purpose. The sections ran as follows :—

"10. *Power to obtain information.*—(1) The Provincial Government may, with a view to carrying out the purposes of this Ordinance, by order require any person to furnish to such authority as may be specified in the order such information in his possession relating to any land which is requisitioned or is continued under requisition or is intended to be requisitioned or continued under requisition.

1. (1902) I.R. 2 Ir. 349. 2. (1950) 54 C.W.N. 883 (P.C.).

(2) Every person required to furnish such information as is referred to in sub-section (1) shall be deemed to be legally bound to do so within the meaning of sections 176 and 177 of the Indian Penal Code (XLV of 1860).

12. *Power to enter and inspect land.*—Without prejudice to any powers otherwise conferred by this Ordinance any Officer or person empowered in this behalf by the Provincial Government by general or special order may enter and inspect any land for the purpose of determining whether, and, if so, in what manner, an order under this Ordinance should be made in relation to such land or with a view to securing compliance with any order made under this Ordinance."

In considering and construing the above sections it has to be borne in mind that a mere provision for an enquiry as a preliminary step to coming to a decision will not necessarily make the decision a quasi-judicial act, for the purpose of the enquiry may only be to enable the deciding authority to make up its mind to do what may be a purely administrative act. Take the case of *Robinson* v. *Minister of Town and Country Planning*[1] to which reference has already been made where the act of the Minister was held to be an administrative act. Lord Greene, M. R., said at p. 859 :

"As an example of the difference to be found in the subject-matter dealt with in different statutes I may point out that this case is different from a case where a Minister is given the duty of hearing an appeal from an order such as a closing order made by a local authority. This is not the case of an appeal. It is the case of an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public enquiry if there is one. To say that, in coming to his decision, he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the enquiry itself must be conducted on what may be described as quasi-judicial principles, but this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, *i.e.*, the making of the order. The enquiry is only a step in the process which leads to the result, and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the Courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or, if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not."

In *Franklin* v. *Minister of Town and Country Planning*[2] to which also reference has already been made, Lord Thankerton at p. 295-296 said :

"In my opinion no judicial or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty or bias is irrelevant, in the present case. The respondent's duties, under section 1 of the Act and Schedule 1 thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, the discharge of that duty. It is obvious that, before making the draft order, which must contain a definite proposal to designate the area concerned as the site of a new town, the respondent must have made elaborate inquiry into the matter, and have consulted any local authorities who appear to him to be concerned, and, obviously, other departments of the Government, such as the Ministry of Health, would naturally require to be consulted. It would seem, accordingly, that the respondent was required to satisfy himself that it was a sound scheme before he took the serious step of issuing a draft order. It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by some one other than the respondent, to whom that person reports, was for the further information of the respondent, in order to the final consideration of the soundness of the scheme of the designation; and it is important to note that the development of the site, after the order is made, is primarily the duty of the development corporation established under section 2 of the Act. I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report."

Keeping these weighty observations in view I now proceed to analyse the provisions of the two sections.

It will be noticed that the powers given to the Provincial Government under both the sections are only enabling and in terms are not compulsory. The Court below has construed the word "may" as "must" on the hypothesis that a right implies a corresponding duty and the Provincial Government is, therefore, under an obligation to exercise the power and consequently an enquiry is compulsory. I am unable to accept this line of reasoning. The authorities show that in construing a power the Court will read the word 'may' as 'must' when the exercise of the power will be in furtherance of the interest of a third person for securing which

1. (1947) 1 A.E.R. 851.

2. (1947) 2 A.E.R. 289 : (1948) A.C. 87.

the power was given. Enabling words are always potential and never in themselves significant of any obligation. They are read as compulsory where they are words to effectuate a legal right. See *Julius* v. *Lord Bishop of Oxford*[1]. Here the power was given to enable the Provincial Government to obtain information to carry out the purposes of the Ordinance. It was not given for the benefit of any other person including the owner of the land sought to be requisitioned. When a power is given to one person, here the Provincial Government, for his own benefit, couched in enabling words making its exercise optional, there is no principle or authority that I know of which enables the Court to make the exercise of the power compulsory by reading the word 'may' as 'must.' Assuming, however, that 'may' in these sections means 'must', what follows? It is true that the information could be obtained under section 10 with a view to carrying out the purposes of the Act but what was the nature of the information that might be gathered under the section? It was only information relating to the land requisitioned or to be requisitioned that could be obtained. Information relating to the land would certainly be useful in enabling the Provincial Government to consider the necessity or expediency of requisitioning that land. Such information would also be useful to the officer determining the question of compensation. But how could any information relating to any particular land have any bearing on the question of the existence of a public purpose which was the only matter under section 3, which, according to Mr. Seervai, had to be judicially determined by the Provincial Government? I fail to perceive any. As I have said, information relating to land certainly had a bearing on the question whether it was necessary or expedient to acquire that particular land which admittedly was a purely administrative act. Finally, section 10 enabled the Provincial Government to require 'any person' to furnish information relating to the land. The Ordinance did not think fit even to mention the owner or other persons interested in the land as a specific source of information. Assuming that the Provincial Government was obliged to make any enquiry, the owner of the land had no special right to be consulted apart from the general right of "any person." No provision was made for giving notice of the intended requisition by special notice or by advertisement or for enabling any aggrieved person to lodge any objection and nobody was designated as authority on whom was cast any duty to hear the objections. Further, it will be noticed that under the section the information was to be furnished to such authority as might be specified which means that the information was not to be communicated to the Provincial Government direct. Therefore, the information was nothing more than the information obtained for the Minister by somebody appointed by him to hold a public enquiry under the statutes which were considered in *Robinson* v. *Minister of Town and Country Planning*[2] and *Franklin* v. *Minister of Town and Country Planning*[3]. The circumstance that by sub-section (2) of that section a legal obligation, on pain of criminal penalty, was imposed on persons to furnish information so strongly relied on by Mr. Seervai appears to me to have no bearing on the character or scope of the inquiry envisaged by sub-section (1). The Provisions of section 12 also carried the matter no further. This section was also an enabling section. The inspection was in terms for the purpose of determining whether, and, if so, in what manner an order should be made. It can have no possible bearing on the question of the existence of a public purpose which is an independent question having no necessary relation to any particular land. Further, presumably, a number of premises might have to be requisitioned and, if the contention of the respondent were correct, there would have to be as many quasi-judicial determinations of the existence of the same public purpose as there might be the number of houses to be acquired—a proposition impracticable and absurd on the face of it. Finally, compare the provisions of sections 10 and 12 with those of section 6. The determination of the question of compensation and the apportionment thereof were certainly judicial or quasi-judicial acts. There

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1. (1880) 5 A.C. 214.
2. (1947) 1 A.E.R. 851.
3. (1947) 2 A.E.R. 289 : (1948) A.C. 87.

was a provision for appeal also. Section 16 provided for making rules for holding the inquiry under sub-sections (1) and (3) of section 6. The circumstance that the Ordinance provided for judicial or quasi-judicial inquiry for the purposes of section 6 but was silent as regards section 3 cannot be overlooked.

In my judgment, the Ordinance did not require the Provincial Government to act judicially at all in the matter of making a requisition order under section 3. The provisions for obtaining information and for getting inspection under sections 10 and 12 respectively cannot be read as provisions for a judicial or quasi-judicial inquiry, nor was such so called inquiry obligatory at all. Those sections served and were intended to serve the purpose of obtaining information which would enable the Provincial Government to exercise its administrative, *i.e.*, executive function of making an order for requisition. The conclusions I have arrived at are (i) that on a true construction of section 3 of the Ordinance the determination of the existence of a public purpose and the necessity or expediency for requisitioning any particular land for that purpose was a purely administrative act, for the entire composite matter was left to the opinion of the Provincial Government and its decision if made in good faith could not be questioned; (ii) that, apart from the question of construction and assuming that the matter had not been left to its opinion, the determination of the existence of a public purpose or the necessity or expediency for making the order could not be regarded as a quasi-judicial act, because (*a*) there was no *lis* in the sense of dispute between two contesting parties to be decided by the Provincial Government; and (*b*) the Provincial Government was not required by the Ordinance to hold any judicial inquiry or to act judicially and that the determination of the existence of a public purpose was only a step in the process of the exercise of the administrative power and, if erroneous the decision could at best be challenged by the action, but a *certiorari* would be a wholly inappropriate remedy. The second head of argument must, therefore, be rejected.

There is the last head of argument which requires consideration before I conclude. The argument is that the existence of a public purpose was a condition precedent to the exercise of the power and, therefore, the fulfilment of the condition precedent had to be determined judicially by the Provincial Government as an objective fact but the Provincial Government could not, by wrongly deciding the preliminary point, assume jurisdiction to exercise the power.

In *Bunbury* v. *Fuller*[1] Coleridge, J., laid down:

"Now, it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends and however its decisions may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon these preliminary questions, its decision must always be open to enquiry in the superior Court."

This was cited by Blackburn, J., in *Pease* v. *Chaytor*[2]. The same principle was also laid down by the Privy Council in *Colonial Bank of Australia* v. *Willan*[3]. The principle is quite plain but as Lord Esher, M.R., pointed out in *Reg.* v. *Commissioner of Income-tax*[4] "its application is often misleading." The learned Master of the Rolls classified the cases in two categories thus:

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them,

1. 9 Ex. 111 at p. 140.
2. 3 B. & S. 620.
3. (1874) L.R. 5 P.C. 417.
4. (1898) 21 Q.B.D. 313.

whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Mr. Seervai contends that the present case falls within the first class of cases and strongly relies on *Rex* v. *Woodhouse*[1] and *Rex* v. *Bradford*[2] as establishing that a *certiorari* lies to correct the error of the Provincial Government. There are, two answers to this argument. In the first place it is not disputed that the formation of opinion as to the necessity or expediency of requisitioning any land is a purely subjective matter and that the order of requisition founded on that opinion is an administrative act. What is contended is that the existence of a public purpose must be judicially determined by the Provincial Government before it could proceed to exercise its administrative powers. In short *qua* that issue only the Provincial Government was to act judicially. The consequence of this argument is that the decision of the Provincial Government on this issue was not a decision on a collateral matter but a decision on the issue itself which, according to the argument, had been left within the jurisdiction of the Provincial Government to decide. It must, therefore, follow that the case fell within the second class of cases mentioned by Lord Esher, M.R. The fact that there is no right of appeal from this decision, although the Ordinance provided for an appeal under section 6, is also significant. Before coming to the decision on this issue the Government had sent an Inspector to gather information under section 10 and the Respondents' father, the original applicant, furnished all necessary information and produced the original Deed of Assignment on which he founded his title and gave a written statement. The requirements of the Statute had been complied with and the petitioner had his say. The decision of the Provincial Government that a public purpose existed given in such circumstances became, in the absence of bad faith, binding and, in the absence of any right of appeal, was conclusive, however erroneous the decision might have been. The second answer to Mr. Seervai's contention is that assuming that the case fell within the first class of cases and the erroneous decision could be corrected, it might have been corrected by an action but certainly not by *certiorari*. The two cases relied on by Mr. Seervai, when properly understood, can have no application to the facts of the case before us. In *Rex* v. *Woodhouse*[1] the Court of Appeal accepted the position that the licensing Justices in granting or refusing to grant the licence had to perform a quasi-judicial act, for they had to decide the matter as between two contending parties, namely, the applicant for licence and the persons opposing the grant. There the Justices granted a provisional licence and referred the matter to Quarter Sessions. Three points were taken, namely, (i) that the Justices did not apply their mind to the issue and failed to decide the matter judicially but made the order in pursuance of a pre-existing agreement between them and the Corporation, (ii) that the Justices were biassed and (iii) that the power of the Justices being limited to granting licences to persons who had some specified qualifications, they could not, by wrongly deciding that the applicants had the necessary qualifications, assume jurisdiction to do the quasi-judicial act of granting the licence. This decision of the Court of Appeal was reversed by the House of Lords in *Lord Mayor, etc., of Leeds* v. *Ryder*[3] on the ground that the Justices had to act according to their own discretion and that they were not guilty of any bad faith in doing what they did. The point to note, however, is that the decision of the Court of Appeal proceeded on the footing that the justices were a quasi-judicial body and that by wrongly deciding a preliminary fact they assumed to discharge their quasi-judicial function of granting the licence and it was the quasi-judicial act of granting the licence that was brought up and quashed by *certiorari*. The case of *Rex* v. *Bradford*[2] also proceeded on the footing that in granting the licence to the District Council to take away stones, etc., the Justices were exercising a quasi-judicial function and they

1. (1906) 2 K.B. 501.
2. (1908) 1 K.B. 365.
3. (1907) A.C. 420.

assumed jurisdiction to exercise that quasi-judicial function by wrongly deciding the collateral fact that the land in question was not a park. The same remarks apply to *Rex (Greenaway)* v. *Justice of Armagh*[1]. All these cases in the appeal Court were cases where a quasi-judicial body purported to assume jurisdiction to discharge its quasi-judicial function by an erroneous decision of a collateral fact and, therefore, *certiorari* was granted to correct the error of jurisdiction by quashing the order itself which was a quasi-judicial act. In the case now before us the Provincial Government was functioning as an administrative body doing an administrative act, namely, forming its opinion as to the necessity or expediency of requisitioning land and making an order of requisition based on that opinion. If the existence of a public purpose was a collateral fact, then at best it was a case of an administrative body assuming jurisdiction to perform its administrative powers by erroneously deciding the collateral fact as to the existence of a public purpose. In such circumstances the two cases relied on by Mr. Seervai can have no possible application. Assuming that this case fell within the first class mentioned by Lord Esher, M.R., this erroneous assumption of jurisdiction to do an administrative act might have been corrected by an action but *certiorari* cannot possibly be the appropriate remedy. It is said that in deciding the collateral fact the Provincial Government was acting judicially and, therefore, *certiorari* might go. The argument will take the respondents nowhere, for assuming that the decision on the question of existence of a public purpose was a quasi-judicial act, that decision, at the most, might be quashed, but the administrative act, namely, the formation of opinion and the order based thereon would remain unaffected, for *certiorari* would not affect it. The passage I have quoted from the judgment of Lord Greene, M.R., in *Robinson* v. *Minister of Town and Country Planning*[2], clearly establishes that although the preliminary enquiry had to be done in a quasi-judicial manner, that fact could not alter the nature or character of the ultimate administrative act. That administrative act would remain an administrative act and could not be touched by *certiorari*. The third head of arguments advanced on behalf of the respondents must, therefore, also fail.

In my judgment the first of the two points raised by the learned Attorney-General on behalf of the appellant must prevail for reasons stated above. This is sufficient to dispose of this appeal, and the second point, namely, whether a writ of this nature can lie against the Provincial Government, does not arise. In view of the fact that the Government of India Act, 1935, has been repealed and the provisions of our Constitution on this point are different from those of the Government of India Act, the question has also become academic for future purposes and I express no opinion on it.

I, therefore, agree with my Lord the Chief Justice that this appeal should be allowed and the judgments and orders of the Courts below should be set aside and the petition should stand dismissed. I also agree to the order for costs made by my Lord the Chief Justice.

G.R./V.S. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

M. Pooran Singh .. *Appellant**

v.

Krishna Bai and others .. *Respondents.*

Contract—Term in a partition deed that any of the brothers wishing to sell his share should sell it to the others at its market value—Right of the other brothers—When arises.

A term in a partition deed that any of the brothers wishing to sell his share should sell it to the others at its market value, is nothing more than an undertaking to make an offer of sale upon the

1. (1924) 2 Ir. R. 55. 2. (1947) 1 All E.R. 851.

* C. C. C. A. No. 32 of 1948. 7th August, 1950.

arising of such a contingency. It is not an offer in itself. The right of pre-emption can arise only when the sale has been effected. So when though there is an agreement to sell the property to a stranger and the latter withdraws from the agreement, the other brothers can have no right to any specific performance of the undertaking contained in the deed; nor are they entitled to damages; because the sale of the third party has not in fact taken place and no right to pre-emption or damages has arisen.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 485 of 1946, dated 12th December, 1947.

T. K. Subramania Pillai for Appellant.

C. Santamurthi Naidu for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, the defendant, and one Dei Singh were three brothers who partitioned their house No. 36, Kutcheri Road, Mylapore, by a registered partition deed, under which they agreed that in the event of any one of the brothers wishing to sell his share of the house he should sell it to the other brothers at its market value. Dei Singh sold his property some years ago. Recently the defendant entered into negotiations with a stranger and agreed to sell his share of the house to him for Rs. 1,700. The negotiations went so far that the stranger deposited Rs. 100 as earnest money. Purporting to comply with the terms of the partition deed, the defendant then wrote to his brother, the plaintiff, and told him that he had entered into negotiations with the stranger to sell his property to him for Rs. 1,700 but that as he was under this obligation under the partition deed to offer it first to the plaintiff he expressed his willingness to sell it to him for the aforesaid sum of Rs. 1,700. To that the plaintiff replied that Rs. 1,700 was an inflated price, and that the real value of the share was Rs. 250 for which sum he was willing to purchase it. Later on, as would appear from the written statement, on account of the notice of the plaintiff and the possibility of future litigation, the stranger withdrew from the contract and received back the sum of Rs. 100 paid by him. The plaintiff then filed the suit out of which this appeal arises in the City Civil Court praying for a decree against the defendant directing him:

> "to sell the portion of the premises belonging to him . . . . for the sum of Rs. 250 or at such other sum as the Honourable Court may fix as the market value."

The learned Additional Judge of the City Civil Court decreed the suit and appointed a commissioner to ascertain the market value.

A term in the partition deed such as that I am called upon here to give effect to has been construed by Ramesam, J., in *Alagirisami* v. *Kathia Goundan*[1], following earlier decisions, as merely an undertaking to make an offer of sale upon the arising of a certain contingency. It was not an offer in itself. It is not denied that a right to pre-emption arises only when the sale has been effected; for unless the sale has taken place, one cannot be sure that that will be any breach of the undertaking contained in the partition deed. Even when an enforceable agreement to sell has been entered into with a stranger, something may happen as a result of which the contract is not given effect to and no sale takes place. That was the case here when the third party withdrew from his contract because of the fear that he might be involved in litigation. Under the partition deed, therefore, the plaintiff can have no right to any specific performance of the undertaking contained in the deed; nor is he entitled to damages; because the sale to the third party has not in fact taken place and no right to pre-emption or to damages has arisen.

The plaintiff could therefore have acquired a right to bring a suit of this nature, only if the correspondence between the parties indicated that the plaintiff had acquired some larger right arising out of the offer made by the defendant. It has been argued by the learned advocate for the plaintiff-respondent that there was an offer by the defendant in fulfilment of his obligation under the partition

1. A.I.R. 1931 Mad. 799.

deed to sell his portion of the house to the plaintiff at its market price, and that the plaintiff accepted that offer, the only difference outstanding between the parties was with regard to the actual market value, which could be ascertained, as the learned Additional Judge of the City Civil Court intended, by the appointment of a commissioner. The correspondence does not however show that there was an offer by the defendant which was accepted by the plaintiff. It is true that the defendant realised his obligation to sell to the plaintiff at the market value, but he at no time during the course of the correspondence offered to sell at the market value. He stated that the market value was Rs. 1,700 and he offered to sell the property for Rs. 1,700. There is nothing in the letters that the defendant or his advocate wrote that suggested that the defendant was willing to sell the property for a lesser sum, if in fact the market value was less than that mentioned by him. On his part, the plaintiff in his replies at no time expressed his willingness to purchase the house at the market price, whatever that might be. He asserted that the market value was Rs. 250, and offered to purchase his brother's portion of the house at that value. Nothing in the correspondence suggested that he was prepared to pay more than Rs. 250. It is therefore impossible in these circumstances to say that the plaintiff acquired some right which was higher than that afforded to him under the partition deed. In short, the plaintiff did not, either through the partition deed or as a result of the correspondence, obtain any right to the relief which he sought in his plaint.

The appeal must therefore be allowed, but as the appellant (defendant) put forward in the lower Court various contentions which were certainly not maintainable, such as that the relevant term of the partition deed was void as being a restriction on alienations, the appellant will be given his costs only in this Court. In the Court below, both parties will bear their own costs. The memorandum of objections is dismissed. No costs.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Krishna Pillai and others .. *Petitioners**

v.

Ranganatha Pillai .. *Respondent.*

Advocate—Reporting of no instructions—Effect on vakalat filed—Same vakalat, if can be used for filing application to set aside ex parte *decree passed in the suit.*

Where an advocate reports no instructions, it means he withdraws his vakalat.

Hence, the same vakalat filed in a suit cannot be used to file an application to set aside the *ex parte* decree passed in the suit on the advocate's withdrawal.

Manickam Pillai v. *Mahudum Bathummal*, (1924) 47 M.L.J. 398 : I.L.R. 47 Mad. 819 (F.B.).

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree and judgment of the District Judge, South Arcot, dated 14th October, 1947, in C. M. A. No. 15 of 1947, preferred against the order of the District Munsiff, Cuddalore, dated 22nd November, 1946, in I. A. No. 1188 of 1946, in O. S. No. 371 of 1945.

P. S. Ramachandran for Petitioners.

N. K. Mohanarangan Pillai and *M. V. Gopalaratnam* for Respondent.

The Court delivered the following

JUDGMENT.—Because his clients were not ready, their advocate, through another advocate, reported no instructions. The suit was then decreed *ex parte*. In an application to set aside the *ex parte* decree, the advocate tendered the same vakalat, which was held by the Court not to be a proper vakalat, as the advocate had withdrawn it when he reported no instructions in the suit. The application

*C. R. P. No. 628 of 1948. 17th August, 1950.

to set aside the *ex parte* decree was therefore dismissed. In appeal, the learned District Judge affirmed the order of the District Munsiff.

I have no doubt that the Courts below decided this matter correctly. When a vakil reports no instructions, it means that he withdraws his vakalat. If authority was necessary for that it is found very clearly in *Manickam* v. *Mahudum Bathummal*[1], when the learned Chief Justice in several parts of his judgment equates the reporting of no instructions to the withdrawal of the vakalat. The learned Counsel for the petitioner here relies on *Bachubai* v. *Ibrahim*[2], and *Jwala Devi* v. *Bhrigunath Sahai*[3]. In these cases, the only question that arose was whether, where the suit had been decreed *ex parte*, the same vakalat could be used in an application to set aside the *ex parte* decree. As the learned District Judge pointed out with regard to *Bachubai* v. *Ibrahim*[2], the learned Judges there were not considering a case in which the plaintiff had reported no instructions. If they had, there could have been no question of utilising the same vakalat for another proceeding; for even befor the suit itself was decreed the vakalat had ceased to have any value, because it had been withdrawn.

The petition is dismissed with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Patinhare Edora Tholon Chutha .. *Petitioner**

v.

Pannichikkool Kunhammad Kutty .. *Respondent.*

Malabar Tenancy Act (XIV of 1930), sections 28 and 32—Application to fix fair rent filed during pendency of suit for arrears of rent—Tenant if can claim to pay arrears only at rate decided subsequently as fair rent.

Reading sections 28 and 32 of the Malabar Tenancy Act together and especially in view of the expressions "as fixed" and "shall be liable to pay" in section 28, it is clear that until and unless the fair rent has been fixed by Court which fixation will relate back to the date of the application, the tenant cannot claim to take advantage of it for an anterior period. The tenant will be entitled to pay the fair rent only after the date on which it is fixed by the Court which fixation again will relate back only to the date of the application and cannot reduce the arrears of rent already accrued due by a subsequent declaration of fair rent. Accordingly, where a tenant against whom a suit for arrears of rent is pending files an application for fixing fair rent, he cannot claim that he would be liable to pay arrears only at the rate to be decided subsequently as fair rent.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Additional District Munsiff of Tellicherry, dated 30th November, 1948, in S. C. S. No. 151 of 1948.

C. S. Swaminathan for Petitioner.

A. Achuthan Nambiar for Respondent.

The Court delivered the following

JUDGMENT.—Exhibit B-1 was a marupat executed by the defendant on the 7th of January, 1918, by which it was agreed that 120 seers of paddy would be paid as rent. This state of things continued till 15th February, 1945, when the defendant, who was holding over under the old marupat, renewed the same agreeing to pay a rent of 190 seers of paddy and 2 bunches of bananas. The present suit is for arrears of rent for two years, namely, the Malayalam years 1122 and 1123. During the pendency of the suit the defendant filed an application for fixing the fair rent under sections 11 and 12 of the Malabar Tenancy Act. It was contended on behalf of the defendant that she will be liable to pay the arrears only at the rates decided as fair rent after the same is fixed under sections 11 and 12 of the Act. The learned District Munsiff held that this fixation cannot have retrospective effect and decreed the suit as prayed for.

The question depends upon the construction of sections 28 and 32 of the Malabar Tenancy Act. Section 28 lays down that

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1. (1924) 47 M.L.J. 398 : I.L.R. 47 Mad. 819 (F.B.).
2. (1922) I.L.R. 47 Bom. 11.
3. I.L.R. (1944) All. 592.

* C. R. P. No. 745 of 1949. 1st September, 1950.

"Every cultivating verumpattamdar shall be bound to pay his immediate landlord, fair rent as fixed under section 12, provided that in the case of a cultivating verumpattamdar's holding existing at the date on which this Act comes into force, the rent payable on such holding shall be deemed to be fair rent for a period of 12 years from such date; unless the rent fixed under section 12 has been taken into account for the purpose of calculating the renewal fee under Chapter IV and there has been a renewal in which case, such rent shall be payable by the cultivating verumpattamdar from the date of renewal."

What has happened is that the term fixed under the original marupat expired long prior to the coming into operation of the Malabar Tenancy Act and the tenant was holding over on the same terms as before under the provisions of the Transfer of Property Act, and was paying rent according to the old agreement. But in 1945 there was a fresh agreement by which 190 seers of paddy and 2 bunches of bananas were agreed to be paid. It is contended on behalf of the tenant that she will be liable to pay only the fair rent fixed in accordance with the O. P. filed during the pendency of the suit, because section 32 lays down that

"Notwithstanding any contract to the contrary, expressed or implied, whether entered into before or after the coming into force of this Act, no cultivating verumpattamdar shall be liable to pay to his landlord anything more or anything less than the fair rent and no tenant who is entitled to claim a renewal under this Act . . . . . "

From the wording of the first portion of section 32, Mr. C. S. Swaminathan contends that the moment an application for fixing the fair rent under section 11 has been filed by the tenant any claim regarding the arrears of rent shall be subject to the ultimate decision in the Original Petition for fixing the fair rent. What the learned counsel contends is that the word "shall be liable to pay to his landlord" should be understood as deciding that that shall be the fair rent even for past years during which rent accrued. The difficulty in agreeing with that construction is apparent from the wording of paragraph 1 of section 28, where it is stated that the cultivating verumpattamdar shall be bound to pay the fair rent as fixed under section 12 of the Act. The expression "as fixed" should connote only a subsequent date (*i.e.*), from the date of filing of the petition and not for any retrospective operation. Reading the two sections 28 and 32 together, and especially in view of the expressions "as fixed" and "shall be liable to pay", I am of opinion that until and unless the fair rent has been fixed by Court which fixation will relate back to the date of application, the tenant cannot claim to take advantage of for an anterior period. The tenant will be entitled to pay the fair rent only after the date on which it is fixed by the Court which fixation again will relate back only to the date of application and cannot reduce the arrears of rent already accrued due by a subsequent declaration of the fair rent. This is the view which has been taken by the learned District Munsif, and I am not satisfied that his view is illegal or opposed to the provisions of the Malabar Tenancy Act. The C.R.P. is therefore dismissed with costs.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

Karuppiah Nadar .. *Petitioner* *

v.

Veerabadran Chettiar and others .. *Respondents.*

Insolvency—Creditor's petition for adjudication—Debt mentioned as being due to petitioner which in fact was due to the firm of which petitioner was only a partner—Amendment to clarify nature of the debt made three months after act of insolvency—If could be allowed.

In a creditor's petition for adjudication of his debtors as insolvents a debt was shown as being due to him as per extracts of accounts appended. On an objection being raised that the debt was due not to the petitioner in his individual capacity, but that it was really a partnership debt due to the firm of which the petitioner was only one of the partners, an amendment of the petition was sought for by the petitioner to the effect that the petitioner may be described as the firm of *X* of which the petitioner is the managing partner; but it was more than months after the act of bankruptcy alleged. On a question whether the amendment could be allowed,

* C. R. P. No. 336 of 1949. 24th March, 1950.

Held, the test to be applied in such cases is to see whether the effect of the amendment sought for is to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded. The present case is one where really an identical debt continues to be the foundation of the petition for insolvency. The debt due to the firm is really due to the partners. The amendment is only to make it clear that the petition is on behalf of the firm with respect to the partnership debt and therefore it can be allowed.

Petition under section 75 (1), Provincial Insolvency Act, praying that the High Court will be pleased to revise the order of the District Court, Ramnad at Madura, dated 14th December, 1948, in C.M.A. No. 5 of 1948, preferred against the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 7th January, 1948, in I.A. No. 12 of 1947, in I.P. No. 4 of 1947.

T. Krishna Rao for Petitioner.

V. Ramaswami Aiyar and *T. L. Venkatarama Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This case raises a question which is said to be of one of first impression really because the learned counsel on both sides have not been able to find an exact case on the point. The question relates to the validity of a petition filed to adjudicate respondents 1 to 3 as insolvents. The petitioner, one Karuppiah Nadar, was carrying on business in partnership with another person. The firm's name appears to have been S. K. S. K. N. Karuppiah Nadar. Respondents 1 to 3 had business dealings with that firm and they were indebted to the firm to the extent of Rs. 5,347-6-2 as on 3rd May, 1947. Karuppiah Nadar filed this petition, I.P. No. 4 of 1947, wherein he stated in paragraph 3 that

"The respondents were carrying on business in partnership and the petitioner is doing commission business in cotton and in the course of business between the petitioning creditor and the respondents, the respondents became indebted to the petitioner in Rs. 5,347-6-2 as shown by the extract of accounts submitted."

The extract of accounts contains this heading: "*Peredu* of respondents in the cotton shop of Rajapalayam S. K. S. K. M. Karuppiah Nadar". The act of bankruptcy alleged was, among other things, the creation of a mortgage in favour of the fourth respondent, with a view to defeat and delay the creditors. Acts of suspension of business were also alleged. The respondents contended that the debt was due not to Karuppiah Nadar in his individual capacity but it was really a partnership debt due to the firm of which Karuppiah was only one of the partners. To meet this objection an amendment was sought for by the petitioner to the effect that the petitioner may be described as

"The firm S. K. S. K. M. Karuppiah Nadar of which Karuppiah Nadar is the managing partner".

If the amendment is to be allowed it is not disputed that the petition would be a proper petition. The trial Court allowed the amendment. The trial Court did not proceed to dispose of the petition on the merits because even before that stage, an appeal would appear to have been filed, (it is stated, under section 75 of the Act) to the appellate Court. The appellate Court disallowed the amendment on the ground that the application was made beyond the three months from the act of bankruptcy and the application in fact introdued a new debt and a new creditor which was not permissible. It, therefore, dismissed the petition. Against that the petitioning creditor has come up in revision.

It is contended for the petitioner that the original petition itself disclosed that the debt due to the partnership firm because the extract which was appended to the petition and which was referred to in the body of the petition as showing the amount due contains indications that it represents the result of transactions between the firm and the respondents. On a fair reading of petition it is argued that it must be taken that it was a partnership debt which was the foundation of the petition. It is submitted that the petitioner was stated to be Karuppiah Nadar without any indication that he was a partner or a managing partner of the firm and acting on behalf of the firm. The language of paragraph 3 is somewhat ambiguous. Standing

by itself, it would be ordinarily understood as containing an averment that the petitioner was exclusively entitled to the debt in question. But a reference to the extract which also forms part of paragraph 3 creates an ambiguity because, the extract, as pointed out shows that the debt was due to the partnership. Whatever may be the case, the amendment was sought in order to clarify the position. The real question, therefore, that arises for decision now is whether the amendment is permissible because it is the same debt which was the foundation for the insolvency petition, or not permissible, because it really introduces a new debt. Reference has been made to certain English decisions and to the decision of this Court in *Chockalingam Chettiar* v. *Muthiah Chettiar*[1]. The test that is laid down is described in the language of Wright, J., as follows :

> "Every debt sought to be added as ground of the petition after three months from the date of the Act of bankruptcy, is unavailable for that purpose ; but if within that period a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice."

The idea is put in slightly different language by Vaugham Williams, J. :

> "Is the effect of the amendment to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded ?"

In the present case it is true that a debt due to a partnership cannot be taken to be a debt due exclusively to any individual partner but nonetheless it is not correct to say that it is in no sense due to that partner. A firm under Indian law is merely a compendious expression for the persons who form the partners. The debt due to a firm is really due to the partners. Therefore, while it may be incorrect to describe a debt due to *A* because it is really a debt due to *A*, *B* and *C*, the partners of the firm, it would be incorrect to hold that a new debt is sought to be taken advantage of as foundation for the petitioning creditor's debt merely because the same debt due to the partnership and therefore due to also *A* is now sought to be described as a debt due to *A*, *B* and *C*, all the partners. This, in my opinion, is a case where really an identical debt in question continues to be the foundation of the petition for insolvency. Only the partners who ought to have been added in the first instance are now sought to be added or, where the rules permit, it is made clear that the petition is on behalf of the firm with respect to the partnership debt. Applying the principle laid down by Wright, J., I am of opinion that the amendment was properly allowed by the trial Court and the lower Court was wrong in upsetting that order. In the result, I allow the Civil Revision Petition, set aside the order of the appellate Court and restore that of the trial Court. The petitioner will get his costs in the Court below and in this Court. The petitioner will get his costs from respondents 1 to 3.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

S. Venkatakrishnan .. *Petitioner* *

Criminal Procedure Code (V of 1898), section 238 and Motor Vehicles Act (IV of 1939), sections 78, 112 and 116—Offence under section 116 of the Motor Vehicles Act made out—Conviction under sections 78 and 112 as mandatory provisions of section 131 of the Act not complied with—Conviction for minor offence on that ground—Legality.

The petitioner was prosecuted for an offence under section 116 of the Motor Vehicles Act. Though it was found that the offence was made out he was not convicted for that offence because the mandatory procedure prescribed by section 131 of the Act had not been complied with but was convicted under sections 78 and 112 of the Act as it was a minor offence to one under section 116 and which from the evidence could be said to have been made out. On the question as to the legality of such a conviction

Held, there is no provision of law under which a person can be convicted for a minor offence except under the provisions of section 238, Criminal Procedure Code, and this did not

1. (1938) 2 M.L.J. 390.

*Cr. R. C. No. 242 of 1950. 4th October, 1950.
(Cr. R. P. No. 227 of 1950).

in terms apply to the case. A person cannot be convicted of a minor offence on account of a legal bar to the prosecution of the major offence. As it is doubtful whether the petitioner could be so convicted, he should be given the benefit of doubt and his conviction set aside.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate's Court, Madras, dated 5th January, 1950, in M. V. No. 985 of 1949.

S. G. Rangaramanujam and *V. Somasundaram* for Petitioner.

S. Govind Swaminathan for the State Prosecutor.

The Court made the following

ORDER.—The petitioner in this case has been convicted under sections 78 and 112 of the Motor Vehicles Act. The petitioner was prosecuted for an offence under section 116 and the lower Court in effect finds that the offence under section 116 has been made out but did not convict him very rightly for that offence as the mandatory procedure prescribed by section 131 has not been complied with.

The lower Court, however, convicted the petitioner for an offence under sections 78 and 112, as this was a minor offence to one under section 116 and as from the evidence the minor offence could be said to have been made out.

The provision of law under which an accused charged with a major offence, can be convicted for a minor offence is section 238, Criminal Procedure Code. Mr. Govind Swaminathan, the State Prosecutor, very rightly drew my attention to the wording of the section 238. According to the section, when a person charged with an offence consisting of several particulars, a combination of some of which constitutes a minor offence and such combination is proved and the remaining particulars *are not proved*, then he can be convicted of the minor offence, though not charged with it.

Under clause 2, when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, though he may not be charged with.

Now in this case, the accused was charged with a major offence and all the particulars of that offence have been proved. There is no question, that some only of the particulars are proved which reduce it to a minor offence. The question in such cases is whether he can be convicted of the minor offence on account of a legal bar to the prosecution of a major offence. There is no provision of law under which a person can be convicted for a minor offence except under the provisions of section 238 of the Criminal Procedure Code and this does not in terms apply to this case. It is doubtful, therefore, whether the petitioner in the circumstances can be convicted for the minor offence. The question is not free from difficulty. The benefit of doubt must be given to the petitioner. His conviction and sentence are set aside and he is acquitted. The fine, if paid, will be refunded.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

Pallikkondi Matha .. *Appellant* *

v.

Kaniyarakkal Natenite Valappil Mayan Kunhi and another .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946)—Scope—Mortgage decree made up of admitted mortgage amount and some rent amounts—If falls within the mischief of the Act.

The properties usufructuarily mortgaged were got on lease back by the purchaser of the equity of redemption. After the mortgagee obtained a decree on his mortgage, the lessee purchaser of the equity of redemption got the decree scaled down and an amended decree was passed for the composite sum made up of the mortgage amount and the arrears of rent for the period of the lease. When it was sought to be executed it was contended by the lessee that as the decree was also for arrears of rent which involved his eviction from the holding, it was liable to be stayed under the Madras Tenants and Ryots Protection Act.

* A. A. A. O. No. 10 of 1949. 21st September, 1950.

Held, the amended decree when passed for the mortgage amount and arrears of rent, became a composite decree and so fell within the mischief of the Act and compelled the Court to stay execution proceedings.

Appeal against the order of the Court of the District Judge of North Malabar, dated 30th July, 1948, in A.S. No. 655 of 1947 preferred against the order of the District Munsif Court, Cannanore, in R.E.P. No. 222 of 1947 in O.S. No. 182 of 1936.

N. R. Sesha Aiyar for Appellant.

A. Atchuthan Nambiar for Respondents.

The Court delivered the following

JUDGMENT.—The Civil Miscellaneous Second Appeal raises an interesting question of law. The first respondent, Mayan Kunhi, usufructuarily mortgaged certain properties to the decree-holder, Matha. The second respondent Kumaran, bought the equity of redemption from the first respondent, and also got a lease back of the property from the usufructuary mortgagee, Matha. Finally Matha filed a suit, O.S. No. 182 of 1936, and got a preliminary decree on 17th April, 1936. There was an application by Kumaran for scaling down that decree under the Madras Agriculturists' Relief Act. By consent of all the parties, the decree amount was scaled down, on 4th July, 1947, in I.A. No. 3264 of 1946. The mortgage amount was admitted to be Rs. 400, and the arrears of rent to be Rs. 8 for the year 1933, Rs. 64 for 1934-35, and Rs. 21-5-5 for the subsequent period till 11th July, 1935. The amended decree was passed for the composite amount arrived at thus. When it was sought to be executed by Matha, Kumaran contended that the decree was also for arrears of rent and involved his eviction from the holding, and therefore was liable to be stayed under the Act XVII of 1946. The District Munsif of Cannanore upheld that contention, and dismissed Matha's petition, R.E.P. No. 222 of 1947, without costs.

Matha took the matter in appeal to the District Judge, North Malabar. The District Judge, by his judgment, dated 30th July, 1948, dismissing A.S. No. 655 of 1947, held that, though the mortgage decree consisted of the admitted mortgage amount of Rs. 400, and some rent amounts, it became a composite decree by adding up all these amounts including the lease amounts, and so fell within the mischief of Madras Act XVII of 1946, and compelled the Court to stay such an execution proceeding.

Though this is a hard case for the decree-holder, the reasoning of the lower appellate Court cannot be said to be wrong. The learned counsel for Kumaran urged before me that to divide the mortgage amount in this composite decree from the lease amount would be in effect to substitute two decrees for one, and that, in the absence of specific provisions, like section 14 of the Madras Agriculturists Relief Act, enabling a Court to divide a decree into two parts, the Court would not have the said power, and the decree, being one and indivisible will fall within the mischief of Act XVII of 1946 and the stay given there. I agree.

So the only modification I make in the lower appellate Court's order is to delete the provision directing the decree-holder to pay Kumaran's costs. It is the act of Kumaran himself, by naming the mortgage amount separately payable to the decree-holder, that added to the confusion. I accordingly delete the order of the lower Court making Matha give Kumaran's costs, and confirm it in all other respects. This Civil Miscellaneous Second Appeal also is dismissed otherwise. The parties are directed to bear their own costs. No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Boya Chinna Lingappa .. *Appellant.**

Criminal Procedure Code (V of 1898), section 162—Statements under—Not made available to the accused for cross-examination—Legality of the trial.

Where statements under section 162, Criminal Procedure Code, were not made available to the accused for purposes of cross-examination,

Held, in such cases an irresistible inference arises that prejudice has been caused to the accused. Denial of these statements to the accused has resulted in the exclusion of evidence which could be used by him under section 145, Evidence Act, and in such circumstances the accused cannot be said to have had a fair trial and his conviction and sentence have to be set aside.

Appeal against the order of the Court of Session, Anantapur Division, in C.C. No. 18 of 1949.

K. Venkatarathnam, *O. Chinnappa Reddi* and *P. Ramakrishna* for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court delivered the following

JUDGMENT.—The appellant in this case was the first accused in Sessions Case No. 18 of 1949 on the file of the Court of Session, Anantapur. He and another were tried for an offence under section 307, Indian Penal Code. The second accused was acquitted, but the appellant alone was convicted and sentenced to rigorous imprisonment for two years and to pay a fine of Rs. 100.

This appeal has to be allowed on a question of law. The occurrence is said to have taken place at about 11 P.M. on the 1st February, 1949. Information was given at about 1 A.M. on 2nd February, 1949. It was recorded by P.W. 7, who was the station writer of the police station, where the information was given. He says in his evidence that he investigated into the case and recorded statements of witnesses. He examined P.W. 1 and he also examined P.Ws. 3 to 6 and recorded their statements. These statements constitute statements under section 162, Criminal Procedure Code. The learned Sessions Judge finds in paragraph 6 of his judgment that these statements were not made available to the accused for cross-examination ; but he rests content with remarking that " the police in this case did not play the game well ". In my opinion the objection goes to the root of the case. It has been pointed out by the Privy Council in *Pulukuri Kotayya* v. *King-Emperor*[1] as follows :

" The right given to an accused person by this section (referring to section 162) is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break-down of the whole of his evidence ; and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to section 162 as matter of gravity. *Baliram* v. *King-Emperor*[2], where the record of statements made by witnesses had been destroyed and *Emperor* v. *Bansidar and others*[3], where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of section 162 have led to the convictions being quashed. Their Lordships would, however, observe that where, as in those two cases, the statements were never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused."

In this case the statements were not made available to the accused, and as pointed out by the Privy Council, an irresistible inference arises that prejudice has been caused to the accused. Denial of these statements to the accused has resulted in the exclusion of evidence which could be used by him under section 145 of the Evidence Act. In the circumstances the accused cannot be said to have had a fair trial.

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* Cr. A. No. 836 of 1949. 28th September, 1950.

1. (1947) 1 M.L.J. 219 at 222 : L.R. 74 I.A. 65 : I.L.R. (1948) Mad. 1 (P.C.).
2. I.L.R. (1945) Nag. 151.
3. (1930) I.L.R. 53 All. 458.

I therefore set aside the conviction and sentence and acquit the appellant. The fine, if paid, will be refunded.

I must say that this is not the only case in which I have come across such conduct on the part of the police in the District of Anantapur. The police in this district seem to adopt a peculiar technique of saying that they embody the statements in what is called a special report and refuse to give copies of such statements to the accused. This is contrary to the provisions of section 162, Criminal Procedure Code, and this often results in conviction being quashed. I would like to invite the attention of the Inspector-General of Police to the conduct of the police in this case and in this district, so that such irregularities may not occur again in future.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kadalundi Pulikkalakath Saidalayi Thangal .. *Appellant**

v.

Thrikkannur Pulathottathil Mohideen and others .. *Respondents.*

Malabar Tenancy Act (*XIV of* 1930), *sections* 21 (1) *and* 43 (1) (a)—"*Eviction*" *in section* 21 (1) *if confined to eviction obtained by suit under section* 20—*Starting point of limitation under section* 43 (1) (a).

No doubt section 21 (1) of the Malabar Tenancy Act following closely upon section 20 which relates to a suit for eviction *prima facie* suggests that the eviction referred to in section 21 (1) is one obtained by means of a suit as mentioned in section 20 (1). Section 21 (1) which is a substantive enactment in itself is not controlled in the wider meaning of "eviction" which it *prima facie* carries with it by anything in section 20 with which it occurs in juxtaposition in the statute, with which it no doubt has to be read in order that the statute may be read and construed as a whole, but in which is to be found nothing repugnant to the wider meaning. There is no reason why "eviction" in section 21 (1) should not be understood as covering eviction otherwise than by suit as the wider connotation is warranted by the definition of eviction in section 3 (*e*), namely, that it means recovery of possession of land from a tenant *simpliciter* and no matter how. Accordingly section 21 (1) would apply to cases where eviction is obtained by private treaty between the landlord and the tenant.

As the transfer contemplated by section 43 (1) (*a*) of the Malabar Tenancy Act is clearly the transfer referred to in section 21 (1) as "on any kind of lease or mortgage with possession or on kanom, kuzhikanom or verumpattam," where a transfer is evidenced by a registered mortgage and a registered panaya kychit by the transferee, it is the date when actual possession is transferred to the transferee that will be the date of transfer for purposes of section 43 (1) (*a*).

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Kozhikode, dated 16th August, 1946, in A.S. No. 212 of 1946, preferred against the decree of the Court of the District Munsif, Parappanangadi in O.S. No. 710 of 1944.

B. Pocker for Appellant.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit under section 21 of the Malabar Tenancy Act (hereinafter to be referred to as the Act) for restoration of possession of land which the plaintiff having held it on a kanom under the first defendant surrendered to him after expiry of the term in response to a demand by the first defendant that he required it for his own cultivation. The plaintiff's case is that he did not *bona fide* so require it because the first defendant having thus obtained possession on 16th March, 1943, made a transfer of the property to the second defendant on 28th March, 1943, barely 12 days afterwards. The answer to the action so far as material to the disposal of this second appeal was twofold : (1) that there was no eviction of the plaintiff in a suit under section 20 of the Act for any right of suit for restoration under section 21 to arise or accrue ; and (2) that the suit laid on 9th October, 1944, more than one year from the date of the transfer is time barred under section 43 (1) (*a*) of the Act. The Courts below have concurrently negatived the first line of defence. As to the second, the lower

* S. A. No. 1610 of 1947. 5th September, 1950.

appellate Court has upheld it differing from the trial Court and has consequently dismissed the suit as time barred. Mr. Pocker assails the judgment of the lower appellate Court on the point of limitation, while Mr. Ramakrishna Aiyar besides maintaining it as correct, attacks the view of the Courts below on the first line of defence as erroneous.

The ground of difference between the Courts below on the question of limitation lies in this: that whereas the trial Court holds that the date of the second defendant getting into possession which was one year after the surrender is the *terminus a quo* the lower appellate Court holds the date of the transfer to the second defendant to be the starting point of limitation. In my judgment, the transfer contemplated by section 43 (1) (*a*) of the Act is clearly the transfer referred to in section 21 (1) as " on any kind of lease or mortgage with possession or on kanom, kuzhikanom or verumpattam ". In the present case the transfer to the second defendant is what is evidenced by Exhibits D-3 and D-1 executed on one and the same date, the registered mortgage by the first defendant to the second and the registered panaya kychit by the second defendant to the first, respectively. If possession under the transfer passed to the second defendant only one year thereafter as held by the learned District Munsif in the trial Court the suit would be in time. That question has not been considered by the learned Subordinate Judge on appeal in the erroneous view that he took that it is immaterial, what is material according to him being only the date of the transfer. This case must therefore go back to the lower appellate Court for a fresh determination of the question subject to my decision on the first line of defence to the suit repelled by the Courts below but sought to be supported by Mr. Ramakrishna Aiyar before me.

The view of the Courts below as to this is that in terms of section 21 (1) of the Act the present is a case in which eviction as defined by section 3 (*e*), *i.e.*, recovery of possession of land from a tenant, was obtained by the first defendant on the ground specified in clause (5) of section 20, no matter that he obtained it by merely making a private demand and without having recourse to a suit under section 20. No doubt section 21 (1) following, and it does, closely upon section 20 which relates to a suit for eviction *prima facie* suggests that the eviction referred to in section 21 (1) is one obtained by means of a suit as mentioned in section 20 (1). I am not however satisfied on the careful thought bestowed by me since reservation of judgment that the view of the Courts below is erroneous. It seems to me that while juxtaposition of sections in a statute may well afford sometimes a helpful clue to their interpretation, the language of each section by itself is the more material matter on a question of its interpretation. " Eviction " in the marginal note to section 20 means, as the section itself shows, eviction by means of a suit. That however is no reason why eviction in section 21 (1) should not be understood as covering eviction otherwise than by suit, if the wider connotation is, as I hold, warranted by the definition of " eviction " in section 3 (*e*), namely, that it means recovery of possession of land from a tenant, *simpliciter* and no matter how. The definition does not of course govern where there is something repugnant to in the subject or context. In my opinion, there is nothing however in the subject or context of section 21 (1) which is repugnant to the application of the definition to the word " eviction " occurring there. " In any case " is the expression with which the section begins, not "in the case of any suit". "On the ground specified" in clause (5) of section 20 and not "under clause (5) of section 20" are again the words which we have in the section. Far from there being anything in the subject or context of section 21 (1) to preclude the importation thereinto of the general definition of " eviction " in section 3 (*e*) it seems to me that there is in the language of section 21 (1) as chosen by the Legislature an intention revealed not to restrict the beneficent operation of this section only to cases of eviction obtained by means of suits as provided for in the immediately preceding section.

It is true, as I had occasion to observe in *Ramayya* v. *Venkata Subba Rao*[1], that the equity of the statute, as it is sometimes called, cannot override its plain language;

1. (1949) 2 M.L.J. 639.

nor is any benevolent interpretation of a statute permissible which extends the spirit of a section of the statute beyond its plain letter and unequivocal tenor. It is equally clear however to my mind that where the language of a section is sufficiently wide to indicate a beneficial operation wider than what another section may suggest, the Court ought not to whittle down or curtail such beneficial operation which is in accord with the general design of the statute by reference to the narrower scope and ambit of that other section. It is suggested by Mr. Ramakrishna Aiyar that a distinction ought to be made on principle between cases where eviction is obtained by means of a suit under section 20 of the Act and cases where eviction is obtained by private treaty between the landlord and the tenant. The principle according to the learned counsel, is that in the former case there is unimpeachable record in a judicial proceeding that the landlord did require the premises for his own cultivation but not *bona fide* as his later conduct might show, while in the latter case proof of such requirement by the landlord and the lack of *bona fides* about it as well as a decision by the Court on such proof would be a matter more difficult in *rerum natura*, especially when the question happens to arise after a long lapse of time, as it may well do, in view of the provision of so long a period as six years which the statute contains for any subsequent transfer by the landlord as giving rise to the right on the part of the tenant to be restored to possession on the ground of such transfer. I am not prepared to say that this difference, really affects the principle applicable to the situation with which I am called upon to deal, which is one of proper construction of the statute on its language.

"Eviction" according to the Concise Oxford Dictionary is derived from *vincere*, to conquer, and means expulsion, especially of a tenant from land, or more generally recovery of property from a person by legal process. As pointed out in Ramanatha Aiyar's Law Lexicon of British India the word is derived from *evinco*, to overcome, and according to Tomlin's Law Dictionary quoted by the author means, a recovery of land, etc., by form of law. The author further observes :

> "In its original and technical meaning it is an expulsion by the assertion of a paramount title and by process of law ; a recovery of land, etc., by form of law ; a lawful dispossession by judgment of law ; an ouster. Act of the landlord with the intention and having the effect of depriving the tenant of the enjoyment of the demised premises ; the term is now popularly applied to every class of expulsion."

The definition of the word "eviction" in section 3 (*e*) of the Act, it will be seen, is not restricted to cases of expulsion in the sense of ejection by force which is the ordinary meaning of the word as given in the Dictionaries, for instance, the Concise Oxford Dictionary. Much less is it restricted to dispossession by judgment in a suit. It means purely and simply recovery of possession according to the statutory definition—no matter how the recovery comes about. As indicated by the very opening words of section 3 and as also observed in Halsbury's Laws of England, 2nd edition, volume 31, page 477 in paragraph 591 :

> "If a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning.."

I am unable to see how the definition of "eviction" in the interpretation section does not fit the context of section 21 unless it be that the very juxtaposition of that section with section 20 is to entail a different result. As already indicated by me, such a result does not necessarily follow from the juxtaposition.

Another rule of interpretation of statutes applicable to the matter on hand is thus stated in Halsbury's Laws of England, 2nd edn., vol. 31, at page 464 in paragraph 566 and again at page 483 in paragraph 603 :

> "Notwithstanding that every section of a statute is a substantive enactment in itself, the statute must be read and construed as a whole, though one section may bear a wider, another a more limited meaning."

Applying the rule thus stated to the case on hand I am of opinion that section 21 (1) of the Act which is a substantive enactment in itself is not controlled in the wider meaning of "eviction" which it *prima facie* carries with it by anything in section 20 with which it occurs in juxtaposition in the statute, with which it no doubt has to

be read in order that the statute may be read and construed as a whole, but in which is to be found nothing repugnant, to that wider meaning.

This being my view of this aspect of the matter I must remit the case to the Court of First Instance, as agreed upon by both sides before me for a disposal of the suit, with reference to the question of limitation after giving the parties an opportunity for such fresh evidence as they may have on the question. Appellant to have refund of court-fee as well as costs of this appeal. All other costs to abide.

No leave.

V.S. *Case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

S. K. Murugesa Mudaly .. *Appellant**

v.

Baruda Arunagiri Mudaly and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 91 and Order 1, rule 8—Suit by plaintiff for declaration of a right of way across a public street—No special damage proved—Sanction of Advocate-General—Whether necessary—Maintainability of suit.

In a suit by the plaintiff for a declaration of his right of way across a public street and for a direction to the defendant to remove certain obstructions and for a permanent injunction restraining defendant from obstructing plaintiff from using the public street as such, the contention of the defendants was that in such a suit the consent of the Advocate-General under section 91, Civil Procedure Code, in the absence of proof of special damage to plaintiff was necessary and that as no such sanction was btained the suit itself was not maintainable.

Held, that once it is appreciated that the infringement of the rights of the residents of the village in respect of a public street does not constitute a public nuisance in the sense of a nuisance caused to the public in general, such infringement can well be sued upon by any member of the public who suffers from the wrong complained of. In this view the case cannot be considered as one of public nuisance within section 91, Civil Procedure Code, and the sanction of the Advocate-General is not required. Nor is it necessary to compel a person that suffers from such a wrong to have recourse to Order 1, rule 8, Civil Procedure Code, which is after all an enabling section.

Appeal against the decree of the Court of the Subordinate Judge, Chittoor in A.S. No. 3 of 1946, preferred against the decree of the Court of the District Munsif of Sholinghur in O.S. No. 152 of 1944.

S. Ramachandra Aiyar for Appellant.

K. Srinivasan for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for a declaration of the plaintiff's right of way across a public street, for a direction to the defendants to remove the obstructions put up by them on the street, and for a permanent injunction to restrain the defendants from obstructing the plaintiff in using the public street as such. The only answer to the suit which requires consideration in this second appeal is that it was not maintainable without the consent of the Advocate-General in the absence of any special damage sustained by the plaintiff. The defence was rejected by the District Munsif of Sholinghur and the suit decreed on his finding that the plaintiff had suffered special damage. This finding was reversed on appeal by the learned Subordinate Judge of Chittoor who accordingly dismissed the suit. The plaintiff appeals.

The plaintiff and certain others are residents of the Big Street in Narasingapuram, Arkonam taluk. The backyards of their houses reach up to the Othavadai street of the same place marked A B C D in the plan attached to the plaint. Some owners have doorways leading to Othavadai street from their backyards and some

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* S. A. No. 866 of 1947. 24th March, 1950.

others have not. Likewise, some of them have pits in that street for their backyard drainage water. The defendants who are owners of houses situate to the south of and facing Othavadai street happened to have constructed mud walls and put up fences and caused obstruction to the plaintiff and others owning houses with their backyards reaching up to Othavadai street in the matter of their taking cattle, manure, hay, etc., from their backyards to their fields. The plaintiff on these allegations filed the suit for the reliefs mentioned above without obtaining the sanction of the Advocate-General or framing a suit as one in a representative capacity under Order 1, rule 8, Civil Procedure Code. The learned District Munsif took the view that the action complained of against the defendants caused special damage to the plaintiff for the reasons which he gives in paragraph 8 of his judgment. Says the learned District Munsif:

". . . . . I am satisfied that the plaintiff has been using this street to take hay and manure from his backyard and that he has also used the same to take his cart, and for other purposes spoken to by him and his witnesses. There is little doubt that similarly other persons in the plaintiff's row have used the suit street and plaintiff has undoubtedly suffered by the obstruction caused by the defendants in as much as he is prevented from using the suit street to go from his backyard towards east to his lands. To take manure from his backyard to the land to the east of the suit street, plaintiff must take a detour, which certainly would justify him in saying that he has suffered special damage. The defendants' case is that the plaintiff can still use his backyard through Ediga street, but it depends upon how far 1st defendant is going to remain without enclosing that portion of the street into his backyard and it must put the plaintiff to a lot of inconvenience. I have no hesitation in coming to the conclusion that by defendants' action, plaintiff has suffered something that is special to him and not shared by others or common to all. It is well known that in the villages, if their backyards abut a street, the owners use their Backyards freely only from that street, and it is a very valuable right which is curtailed by the defendants' action. Further if the plaintiff wants to construct a small building in the backyard with frontage along the suit street, he cannot do so and it would be very serious loss to him. I therefore hold that the plaintiff has proved special damage."

In the result, the learned District Munsif decreed the suit as above stated.

On appeal taken by the defendants to the Subordinate Judge of Chittoor, it was held by him that on the facts found by the learned District Munsif the plaintiff must be taken to have suffered no more or further damage than the other residents of the same row in the locality and that therefore he had failed to prove special damage to entitle him to institute the suit otherwise than in a representative capacity under Order 1, rule 8, Civil Procedure Code, or with the sanction of the Advocate-General under section 91, Civil Procedure Code. The learned Subordinate Judge has observed that

"It is true that the defendants have highhandedly converted gramanatham public street into their backyards,"

but has dismissed the suit in the view that he has taken of its unmaintainability.

It is urged for the plaintiff in this appeal that he sustained a special damage by the action of the defendants because in his capacity as agriculturist the amenities that he had all along enjoyed over the street for carrying his manure, fuel, hay, etc., to his fields stood hampered by such action. It is said that the damage is nonetheless special, because other persons who also pursue the calling of agriculture may suffer the same inconvenience as the plaintiff as the result of the defendants' action. I accept this contention as well-founded and hold that although not instituted with the leave of the Court under Order 1, rule 8, Civil Procedure Code, or with the consent of the Advocate-General under section 91, Civil Procedure Code, the present suit is maintainable.

My attention has been drawn in the course of the argument to the ruling of this Court in *Suramma* v. *Narayanamurthi*[1], which holds that,

"It is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under section 91, Civil Procedure Code and even without proof of special damage."

In that case, however, the suit was one instituted under Order 1, rule 8, Civil Procedure Code and while it is true that the learned Judge who decided that case points out that very often Courts have to deal with the infringement of the rights

1. (1949) 1 M.L.J. 56.

of the residents of a village or a section of the community in pathways, wells and banks of rivers and so on, and that the infringement of such rights cannot be deemed to constitute a public nuisance within the meaning of section 91, Civil Procedure Code, or section 268, Indian Penal Code, his conclusion is that a member of such a class can file a representative suit under Order 1, rule 8, Civil Procedure Code, for relief in respect of infringement of such rights. That is not the kind of suit which we have here and the ruling in question may not consequently appear to assist the appellant before me.

It will be seen however on a careful scrutiny of that decision that in holding as it does that it is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under section 91, Civil Procedure Code and even without proof of special damage, it founds itself upon a prior decision—that of Wadsworth, J., to the same effect reported in *Munuswami* v. *Kuppuswami*[1]. The case before Wadsworth, J., was not itself a case of a suit instituted under Order 1, rule 8, Civil Procedure Code, but only in the individual capacity of the plaintiff who was entitled to maintain the suit. After all, the provision of Order 1, rule 8 is only an enabling provision, and there is no reason why merely because the plaintiff happens to share the same inconvenience by the obstruction to the highway as other people do he should be debarred of his right to seek relief, when once in view of the Privy Council decision in *Manzur Hasan* v. *Mahammad Zaman*[2], it is realised that the distinction between indictment and action in regard to what is done on a highway which is a distinction peculiar to English law ought not to be applied to India. I am of opinion therefore that even if the damage suffered by the plaintiff in the present case is one which is shared by other residents of the same locality he is still entitled to maintain the present suit. I am also of opinion that the ruling in *Suramma* v. *Narayanamurthi*[3], governs the present case in so far as it lays down that even if proof of special damage is otherwise necessary in a case of this kind, it becomes unnecessary because the wrong complained of in the present case does not constitute a public nuisance. As pointed out in that decision, once it is appreciated that infringement of the rights of the residents of a village in respect of a public street does not constitute a public nuisance in the sense of a nuisance caused to the public in general, such infringement can well be sued upon by any member of the public who suffers from the wrong complained of. The case cannot, in that view, be regarded as one of public nuisance within section 91, Civil Procedure Code, and the sanction of the Advocate-General accordingly is not required. Nor is it necessary to compel a person that suffers from such wrong to have recourse to the procedure prescribed by Order 1, rule 8 which, as already stated, is after all only an enabling and not a compulsory provision.

It has also been argued before me for the appellant that this case may well be regarded as one of trespass by the defendants in the sense of their obstruction to his right of passage over the public street which would fall within the rulings in *Velan Pakkiri Taragan* v. *Subbayyan Samban*[4], and *Manzur Hasan* v. *Mahammad Zaman*[2] or as one of the infringement of a village customary right such as the Privy Council has recently dealt with in *Lakshmi Dhar Misra* v. *Rangalal*[5]. It is unnecessary for me to consider these contentions in the view that I have taken that there has been, as rightly found by the learned District Munsif, such damage caused to the plaintiff as is sufficient to support his present suit, and that even in the absence of any such special damage the present suit is maintainable.

This second appeal is accordingly allowed with costs here and in the Courts below. No leave.

K.C. —————— *Appeal allowed.*

1. (1939) 1 M.L.J. 392 : I.L.R. (1939) Mad. 870.
2. (1924) 48 M.L.J. 23 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).
3. (1949) 1 M.L.J. 56.
4. (1918) 36 M.L.J. 79 : I.L.R. 42 Mad. 271 (F.B.).
5. (1950) 1 M.L.J. 100 : L.R. 76 I.A. 271 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

D. S. Duraiswamy Naidu .. *Appellant**

v.

A. M. Muhammad Abbas Sahib .. *Respondent.*

Transfer of Property Act (IV of 1882), section 55 (4) (b)—Sale of property—Vendor remaining in possession after date of sale—Interest on balance of purchase money—Crucial date.

In the case of a sale of immoveable property completed and registered on 1st October, 1945, actual possession was delivered by the vendor only on 8th November, 1946, and the vendor sued for the balance of the money with interest from the date of sale. On the question of the plaintiff's right to such interest,

Held, that under section 55 (4) (*b*) of the Transfer of Property Act as amended by Amending Act X of 1929, the vendor has no absolute right to interest on the purchase money irrespective of equities, and interest on the purchase money cannot be claimed so long as the vendor remains in possession of property sold.

Muthu Chetty v. *Sinna Velliam Chetty*, (1911) 21 M.L.J. 236 : I.L.R. 35 Mad. 625 at 627, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul, in O. S. No. 46 of 1945.

N. Gopala Menon for Appellant.

V. C. Veeraraghavan for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is a plaintiff's appeal against the decree and judgment of the Subordinate Judge of Dindigul in O. S. No. 46 of 1945 in so far as the decree was against him. The plaintiff sold to the defendant a house in Dindigul. The sale deed is dated 22nd August, 1945, and was got compulsorily registered on 1st October, 1945. The suit was filed for recovery of a sum of Rs. 15,500 being the balance of the unpaid purchase money due to the plaintiff under that sale deed with interest thereon. The defendant contended that the plaintiff made default and that, in any view, the plaintiff would not be entitled to interest for the period before the defendant was put in possession of the property sold to him. The learned Subordinate Judge, on a consideration of the evidence, held that there was no default on the part of the plaintiff in respect of the delivery of possession and therefore the suit for recovery of the balance of the purchase money was maintainable ; but he gave interest to the plaintiff only from 8th November, 1946, when the defendant was put in actual possession. The plaintiff contends that the said order was wrong and that he would be entitled to interest from the date of the sale, or at any rate, from the date when the defendant refused to take possession.

It is clear from the evidence that the plaintiff handed over the key of the house to the defendant only on 8th November, 1946, during the pendency of the suit. But the plaintiff's case is that he was ready and willing to put the defendant in possession from the date of the sale deed itself and that indeed, he had kept the house vacant and permitted a retired sub-inspector and his family to live in the suit house as care-takers. But it is also clear from the evidence that P. W. 1 himself kept in an upstair room of this house, under lock and key, his box, his bedding and a gun which he removed only on 23rd November, 1946, *i.e.*, a fortnight after the key was so handed over to the defendant. In this state of the evidence, we must hold that the plaintiff continued to be in possession of the suit building till 8th November, 1946. We have no doubt that the idea of the sub-inspector being a care-taker is an after-thought and that it is only an ingenious attempt to get over the fact that the plaintiff continued to be in possession of the building.

The question of interest on the unpaid purchase money is governed by section 55 (4) (*b*) of the Transfer of Property Act. It reads :

* Appeal No. 203 of 1947. 7th September, 1950.

"The seller is entitled,

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee with notice of the non-payment, for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered."

The words are clear and unambiguous, and do not lend scope for any argument. The plaintiff would be entitled only to interest from the date on which possession has been delivered. In this case, as possession was delivered only on 8th November, 1946, the plaintiff would be entitled to interest only from that date. The words "from the date on which possession has been delivered" after the words "interest on such amount or part" have been added by the Amending Act XX of 1929. Even on the section as it stood before the Amendment, this Court held in *Muthu Chetty* v. *Sinna Velliam Chetti*[1], that section 55 (4) of the Transfer of Property Act does not give the vendor an absolute title to interest in all cases irrespective of equities, and that interest on the purchase money cannot be claimed so long as the vendor remains in possession of the property sold. The reason of the rule is stated at page 627 as follows :—

"As observed in Fry on Specific Performance, page 591, 4th edition, it is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase money. The estate and the purchase money are things mutually exclusive."

The Amending Act accepted this principle and embodied it is in the section.

The judgment of the learned Subordinate Judge is correct and the appeal is dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Eravadu and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), sections 380, 438 and 439 and Criminal Rules of Practice, rule 263—Acquittal by Joint Magistrate—Legality—Procedure for setting aside order—Revisional powers of High Court in such cases.

A Joint Magistrate has no power to acquit under section 380 of the Criminal Procedure Code. If he acquits, the District Magistrate if he thinks the order is wrong can only ask the Government to appeal and cannot report the case to the High Court under section 438, Criminal Procedure Code. Further, the High Court will not interfere in revision with such an acquittal as section 439, clause (5) of the Code, provides that where an appeal lies and no appeal is brought proceedings by way of revision shall not be entertained at the instance of the party who could have appealed.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the District Magistrate, Chittoor, in his letter dated 8th March, 1950, in Criminal R. P. No. 7 of 1950 (C. C. No. 123 of 1949, Joint Magistrate Court, Chandragiri and C. C. No. 837 of 1949, Stationary Sub-Magistrate, Kalahasti).

Petitioners not represented.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—There is no doubt that under section 380, Criminal Procedure Code, the Joint Magistrate has no power to acquit. Vide *Public Prosecutor* v. *Gurappa Naidu*[2], *Piramangaya Pandara and others* v. *Emperor*[3], In re *Mogila Doraiswami Naidu and another*[4].

Even so under rule 263 of the Criminal Rules of Practice, the District Magistrate if he is of opinion that the order of acquittal is wrong must request the Govern-

* Cr. R. C. No. 481 of 1950. (Case Referred No. 22 of 1950.) 6th September, 1950.

1. (1911) 21 M.L.J. 236 : I.L.R. 35 Mad. 625.
2. (1933) 65 M.L.J. 405 : I.L.R. 57 Mad. 85.
3. (1943) 1 M.L.J. 126.
4. (1945) 1 M.L.J. 178 : I.L.R. (1945) Mad. 891.

ment to prefer an appeal under section 417, Criminal Procedure Code, and not report the case to this Court for orders under section 438, Criminal Procedure Code. Further under section 439, clause (5), Criminal Procedure Code, where an appeal lies and no appeal is brought proceedings by way of revision shall not be entertained at the instance of the party who could have appealed. In this case the District Magistrate could certainly have requested the Government to file an appeal but he did not do so. So under section 439, clause (5), Criminal Procedure Code, this reference is not competent. On going through the records, I am satisfied that the evidence is not such as to warrant a conviction of the accused. In this case I do not wish to interfere with the acquittal.

The reference is therefore not accepted.

V. P. S. ——— *Reference not accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

P. S. Subbarama Iyer and others .. *Petitioners.* *

Madras General Sales Tax Act (IX of 1939), section 15 (a)—"Fails to submit a return"—Interpretation.

The words 'fails to submit a return' in section 15 (*a*) of the Madras General Sales Tax Act cannot be interpreted to mean 'fails without reasonable cause.' A court will cut down or even contradict the language of a statute only if the natural meaning would lead to strangely anomalous results.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Tinnevelly division, dated 27th March, 1947, in C. A. No. 128 of 1946, preferred against the Court of the Sub-Divisional Magistrate, Tuticorin, in S. C. No. 12 of 1946.

M. Subbaroya Aiyar for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a Revision Petition against the conviction of the petitioners under section 15 (*a*) of the General Sales Tax Act.

The petitioners are dealers in salt which is exempted from sales tax. The salt was sold packed in gunnies. Though the turnover of the business was over Rs. 10,000 the petitioners did not submit a return as salt was exempted from tax as they *bona fide* believed that they were not dealing in gunnies. The petitioners no doubt charged the purchasers for gunnies also. The present prosecution is for failure to submit the return.

The petitioners paid the tax and filed a suit for the refund of the same on the ground that they were not liable to pay the tax on gunnies. The lower Court dismissed the suit and an appeal was filed and it was dismissed by this Court, vide *Varasuki and Co.* v. *The Province of Madras*[1]. It apperas from the judgment of the High Court that the Government have, subsequent to this prosecution, exempted gunnies in which salt was packed, from payment of sales tax.

The only point taken in revision is that under section 15 (*a*) the words "fails to submit a return" must be read as "fails without reasonable cause". It is conceded by the petitioners' advocate that giving the words the natural meaning, the section does not admit of such an interpretation. But it is contended that considering the scheme and the purpose of the Act, this is the view that must be taken of the section. In support of his argument, Mr. M. Subbaraya Aiyar relies on *Astor* v. *Perry : Duncan* v. *Adamson*[2]. In the above decision Lord Macmillan observes as follows :

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* Cr. R. C. No. 722 of 1947. (Cr. R. P. No. 616 of 1947.) 6th October, 1950.

1. (1950) 2 M.L.J. 449.
2. (1935) A.C. 398 at 417.

"'I think,' said Lord Herschell[1], 'that giving to the language of the enactment its natural meaning the facts stated do apparently bring this case within it'. But he went on to point out that where, as here again, the words of a statute according to their natural meaning lead to 'strangely anomalous' results, it is legitimate to examine their statutory context in order to see whether they ought to be construed as they would be if read alone. 'Courts of Law,' says Lord Loreburn, L.C., 'have cut down or even contradicted the language of the Legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown. A notable instance is the case of *Colquhoun* v. *Brooks*[1], decided nearly thirty years ago, and always followed.'"

I entirely agree that if the natural meaning could lead to "strangely anomalous" results, then the Court could cut down or even contradict the language. But in this case I am not satisfied how giving the natural meaning to the words would lead to strangely anomalous results. I am not prepared therefore to read the section with the words "without reasonable cause".

No other point is raised in this case and the petition is dismissed.

V. P. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Katragedda Rajagopal Rao .. *Appellant.**

Press and Registration of Books Act (XXV of 1867)—Publisher and printer undergoing imprisonment—Article published during such imprisonment—Liability for it.

Though a declaration under the Press and Registration of Books Act makes a printer and publisher *prima facie* liable as such printer and publisher for anything written in a journal of which he became the printer and publisher, still he may rebut such a presumption. Where in respect of an article falling under section 124-A, Indian Penal Code, the printer and publisher (accused) is able to prove that at the time of the appearance of the said objectionable article in his Journal he was actually undergoing imprisonment, he could not be deemed to have had any control of the press or held liable for the publication of the said article.

Appeal against the judgment of the Court of the Additional District Magistrate, Krishna, dated 14th September, 1950, in C.C. No. 2 of 1948.

Messrs. Row and Reddi for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court delivered the following

JUDGMENT.—This is an appeal by the accused who has been convicted by the Additional District Magistrate, Krishna, for an offence under section 124-A, Indian Penal Code, and sentenced to rigorous imprisonment for one year.

The appellant was the editor, printer and publisher of a Telugu daily newspaper called "Prajasakthi" printed at the Prajasakthi Press, Vijayawada. Under section 4 of Act XXV of 1867, the accused made the declaration before the District Magistrate as the manager of the press known as Prajasakthi Press, Vijayawada. Exhibit P-2, dated 29th March, 1943, is the declaration. He continued to be the printer and publisher till he was arrested on 31st January, 1948. He has since been in jail and even now is in jail. The article in question is said to have been published in the issue of the paper, dated 9th April, 1948, under the caption "Capitalist Congress Government started country wide military raids on people forces." There is no doubt that what is contained in the article will fall within the scope of section 124-A.

But the question is whether the accused who was in jail at the time of the publication of the article can still be convicted of the offence under section 124-A merely because he did not write to the District Magistrate that he ceased to be the publisher and printer of the paper after his arrest on 31st January, 1948. It has been held in *Ramaswami* v. *Lokamada*[2], that though a declaration was *prima facie* proof of publication by the editor, the presumption raised can be rebutted. It was held

* Cr. A. No. 709 of 1949. 10th October, 1950.

1. (1889) 14 A.C. 493 at 503. 2. (1886) I.L.R. 9 Mad. 387.

that it would be a safe answer to the charge if the accused showed that he entrusted in good faith the temporary management of his paper to a competent person in his absence and the libel was published without his knowledge. In *Harisarvothama Rao* v. *King-Emperor*[1], it was held that a person making a statutory declaration under Act XXV of 1867 that he is the printer and publisher of the newspaper is presumably liable as such printer and publisher but he may rebut such a presumption. At page 344 the learned judges say :

"It would be open to the proprietor to rebut it and prove that the publication was, in fact, not authorised by him. Act XXV of 1867 has nothing to do with the liability of the proprietor of the newspaper. It establishes the *prima facie* liability as publisher of the person who is declared the printer and publisher. In his case, the prosecution need not give any evidence that he is, in fact, the publisher. It is enough to produce the declaration . . . . . The proprietor's liability for the publication of the matter must be established to the satisfaction of the Court by direct proof or as a matter of reasonable inference from all the facts of the case."

It is clear therefore from the observations in the decisions cited above that though the declaration may be *prima facie* evidence that he was the printer and publisher of the article, it is open to the accused to prove that he is not in fact the publisher and at the time it was published he could have had no hand in it. It is conceded by the Public Prosecutor that the accused was arrested on 31st January, 1948, and on the day of the publication of the article, *i.e.*, 9th April, 1948, he had no control over the press. There is no evidence suggesting that he had any such control. He cannot therefore he held liable for the publication of the article on 9th April, 1948, when he was inside jail. The conviction and sentence are therefore set aside and the appellant is acquitted of the offence.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

The Little's Oriental Balm and Pharmaceuticals, Ltd., Madras and another .. *Respondents.*

Income-tax Act (XI of 1922), sections 4-A (c) (b) and 42 (3)—Profits made on sales in British India of products manufactured in Mysore State—Income on sales in British India exceeding fifty percent. of the total profits of an assessee—Liability to income-tax—Basis—Apportionment of income for operation of manufacture and sale—If permissible.

In section 4-A of the Indian Income-tax Act two alternative tests of residence in the case of companies are provided. Either the Control and management of the company's affairs should be situated wholly in British India in a particular y ear or its income arising in British India in that year should exceed its income arising without British India. There need be no connection between the company and British India except the derivation from British India of the major part of the income during the previous year and the company in that event, would be taxable on all its profits and gains including income arising without British India. The principle of apportionment in section 42 (3) of the Act cannot be applied when ascertaining the amount of income arising in British India for the purpose of section 4-A (*c*) (*b*) of the Act. It is not possible to ignore the difference between section 42 (3) as it stood before the amendment of 1939 and section 42 (3) as it stands after the amendment and hold that profits arising from sales effected in British India must always be put in the category of profits which are "deemed to have arisen or accrued in British India."

Where the business of the assessee was to manufacture ointment and medicinal tablets only for sale, the "income" from that business arises only if their products are sold and at the place where and at the time when they are sold. In the present cases, the profits of the assessees arose in British India where the bulk of the goods manufactured by them in Mysore was sold, the true measure of such profits being the price realised by the sales of their product in British India through their agents and depots less the cost of production, manufacture, transport and distribution of the goods whether incurred in Mysore or in British India. The circumstances that the goods were manufactured in Mysore can make no difference to the place where the income of the business arises. There is nothing in sections 4 and 4-A (*c*) (*b*) to suggest that the profits derived from a continuous process of manufacture and sale of goods should be cut up into different parts and allocated proportionately to the several places where the several stages of production and manufacture and sale take place.

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1. (1909) I.L.R. 32 Mad. 338.

* Case Referred Nos. 57 and 59 of 1946. 14th December, 1949.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in 66 R.A. 50 and 49, Madras, of 1945-46 on its file.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—R.C. No. 57 of 1946.—The following question was referred to us by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act:

"Whether in the circumstances of this case, the profits made on the sales which took place in British India were 'income arising in British India' within the meaning of section 4-A (*c*) (*b*) of the Income-tax Act?"

The assessee in this case is the Little's Oriental Balm and Pharmaceuticals, Ltd., Madras, which is a public limited company registered in Madras carrying on the business of manufacture and sale of medicines. Messrs. Oakley Bowden & Co. (Madras), Ltd., a private limited company, are its managing agents. The managing Agency agreement conferred upon the managing agents very wide powers subject only to the control of the Board of the principal company. The control, however, is very general and is confined only to safeguarding the interests of its shareholders.

Until the war scare of 1942, the company (in this judgment referred to as the assessee) was a resident of Madras and was assessed as such. On the 22nd April, 1942, the office of the Managing Agents and the factory of the company was shifted to Mysore, but was brought back in May, 1943. "The previous year" of the company ended on 31st December, 1942, the assessment year being 1943-44. From the 22nd April, 1942 to 31st December, 1942, the factory of the company and the office of the Managing Agents were undoubtedly in Mysore. The Appellate Tribunal found that out of the total sales of Rs. 2,42,917 during the accounting year, sales of the amount of Rs. 46,559 were made in Mysore outside British India, but the balance of Rs. 1,96,358 represented the sales in British India. The Appellate Assistant Commissioner held that 80 per cent. of the profits made by the company had accrued and arisen in British India and therefore the company was a resident in British India during the accounting period within the meaning of section 4-A (*c*) (*b*) of the Income-tax Act.

The Appellate Tribunal differed from this conclusion. The Tribunal held that profits from the sales in British India did not arise or accrue in British India, but should be deemed to be profits which had arisen or accrued in British India. As under section 4-A (*c*) (*b*) the test for determining the residence of a company is the *actual* accrual of the profits in British India and not profits *deemed* to have arisen in British India, the company, in their opinion, was not resident in British India. The Tribunal arrived at this conclusion from the language of section 42 (3) of the Act, as it stood before the amendment of section in 1939. Section 42 (3) as it stood before 1939 was as follows:—

"Where any profits or gains have accrued or arisen to any person directly or indirectly from the sale in British India by him or any agency or branch on his behalf from any place outside British India, the profits or gains shall be deemed to have accrued and arisen and to have been received in British India."

This section no doubt admits the argument that the profits and gains accrued or arising to a non-resident from the sales in British India shall be deemed to have accrued and to have been received in British India. But this language was altered in 1939 and the altered section 42 (3) is as follows:

"In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India."

It would be seen, that the language of the section has been radically altered in 1939 and this section it is that governs the assessment in the present case.

The fact that the sales in British India amounted to Rs. 1,96,358 during the accounting year was not disputed before us and the arguments in the case proceeded on the basis that the figures are correct and that the sales, in fact, took place in British India. It was not contended—and indeed it could not be contended—that in view of the language of section 4-A (*c*) (*a*) that the control and management of the affairs of the company was situated wholly in British India in the accounting year and this clause was not relied on to establish that the company is resident in British India.

The sole question for determination, therefore, is whether on the facts the income that arose in British India in the accounting year exceeded the income of the company that arose without British India in the year.

Mr. M. Subbaraya Aiyar, the learned advocate for the assessee, argued the case from two aspects. The first position he maintained was that notwithstanding the alteration of the language of section 42 (3) in 1939, the profits that accrued from the sales in British India during the year must be treated as "deemed profits" and not profits, which had actually arisen in British India. There is no authority, however, to support this construction of the section. Merely because under the law as it stood before 1939 the profits that arose in British India were treated as deemed profits under section 42 (3), as it then stood, is no reason to construe the present section 42 (3) in the same manner notwithstanding its clear and unambiguous language. We are not concerned with the policy or the scheme behind the alteration of the section. We are bound to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation. We cannot import the language of the repealed section into the present section and infer by that process, as did the Appellate Tribunal, that even under the present section, the income that actually arose in British India must be treated as "deemed income". Even the Tribunal does not dispute that the proper construction of section 4-A (*c*) (*b*) is that the income must arise within British India in the year of account. The method of reasoning adopted by them was to treat the income that actually accrued and arose in British India as "deemed income" and from that to argue that section 4-A (*c*) (*b*) has no application to the present case, as the income is "deemed income" and not income that actually arose in British India.

Section 42 (1) defines for the purpose of the Act what constitutes income, profits or gains "deemed to have accrued or arisen within British India". In the case of a non-resident, if income, profits or gains accrue or arise outside British India by reason of business connection in British India, or by other nexus indicated in that clause, such income, profits and gains are deemed to have accrued or arisen in British India. In such a case under section 42 (3) of the Act if the business comprised operations carried out within and without British India, the profits and gains of the business, which are deemed to have accrued under the section are apportionable between the operations carried out in British India and outside British India and the assessment would be confined to such of the profits and gains as are attributable to operations carried in British India.

This Court had occasion to construe this section in *Burugu Nagayya* v. *Commissioner of Income-tax*[1] and interpreted the section as not applicable to cases where the profits and gains had actually arisen in British India in view of the clear language of the section that it applies only to profits deemed to arise, or accrue in British India. The same view was also adopted by the Allahabad High Court in the case of *Hira Mills, Ltd., Cawnpur* v. *The Income-tax Officer, Cawnpur*[2]. Apart from authority, on a plain reading of the sections that is also the conclusion which I have reached. The argument, therefore, that profits in the present case arising out of sales in British India must be treated as "deemed profits", to use a compendious

1. (1949) 1 M.L.J. 623 : 1949 I.T.R. 194. 2. (1946) I.T.R. 417.

expression must be rejected and the decision of the Appellate Tribunal which rested solely on this view is clearly erroneous.

The second line of argument adopted by Mr. Subbaraya Aiyar the learned advocate for the assessee was that the income, profits and gains referred to in section 4 (1) of the Act must be restricted to merchanting profits and that the manufacturing profits must be excluded, as in the present case the manufacturing processes of the medicines were carried out in the factory at Mysore and the goods were sold in British India. In other words, apart from cases falling under section 42 (3), the contention of the learned advocate in substance amounts to saying that the same principle must also be applied and adopted in the case of profits arising in British India by reason of sale of goods in British India manufactured outside India. This contention, as would be seen, is quite apart and independent of the applicability of section 42 (3) of the Act. The question for consideration, therefore, is whether in the case of a non-resident carrying on manufacturing business outside British India when the sales are effected in British India, there is any warrant for apportioning and separating the profits attributable to the manufacturing processes from the entirety of the profits.

Profits and gains ordinarily connote the difference between the gross cost to the seller of the goods at the moment and at the point of sale and the net price, which he receives (see *Hira Mills case*[1]). In assessing the profits at the place of sale, the assessee would be entitled to a deduction from the sale proceeds, the cost of manufacture and export and other incidental charges which are permissible deductions and the balance alone represents the profits. The fact that the manufacture of the goods was outside British India and in the State of Mysore makes no difference in the interpretation of the expression " profits and gains ". It may be, as pointed out in *Hira Mills case*[1], that it gives rise to double taxation, but that is not a matter with which we are concerned in interpreting the section.

The non-resident is chargeable to income-tax under the Act in respect of income, profits and gains from whatever source derived, which he receives or is deemed to have received in British India in the year of account, or which accrue or arise or deemed to accrue or arise to him in British India in that year.

The expression " deemed to have received or accrued in British India " is explained in section 42, which has really to be read with section 4 on which it is a commentary. Section 4 is the charging section and section 42 gives the definition of the expression " deemed to accrue and arise " or " deemed to have been received in British India " in section 4. As already observed the profits in the present case are actual profits and not deemed profits. Is it permissible to exclude manufacturing profits out of profits which accrued, as a result of the sum total of the business operations ?

The definition of " business " in section 2 (4) includes no doubt manufacture. The operations of a business cannot be split up for the purpose of assessment under the Act and to make each part a definite and separate business merely because the definition is an inclusive one. By so splitting, the result is a conglomeration of several businesses by an artificial process of splitting up of what was merely one business into its component operations. So long as a business is one and entire, it must be treated as a single unit and the result of its operations, which end in profits, must be ascertained. A manufacturing process, itself may consist of several operations carried on in different places and may be situated at different places where such processes are carried on. For the purpose of the imposition of the income-tax, the place of the source, however, is not at all material as it is now finally decided by the Privy Council in *Chunilal Mehta's case*[2]. Probably the various places at which the processes are carried may be legitimately considered as places where the income is *earned* in part as they are all links in a chain of profit making operations, but the cumulative effect of all such operations is to produce profits and the profits accrue and arise only at one place, namely, the place of the sale

1. (1946) I.T.R. 417 at 424. Bom. 752 (P. C.).
2. (1938) L.R. 65 I.A. 332 : I.L.R. (1938)

in the case of goods. The income producing transactions may be several in a business and the profits of each such transaction may be produced and may accrue or arise at different places; but the transaction itself cannot be split up into its component parts and the situation of each of such part cannot be taken as the place of accrual of profits. For example, the place of formation of contract in the case of purchase of goods may be at one place and the sale may be at a different place, the profits of the business of purchase and sale ordinarily arise and accrue at the place of sale (*See Chunilal Mehta's case*[1]). From this it follows that there is no warrant under the provisions of the Act to separate and apportion the manufacturing profits as contended by the learned advocate for the assessee.

It now remains to examine whether there is any authority in support of such a contention. The decision in *Hira Mills case*[2] is definitely against such a contention. A similar contention was also raised in *In re : Port Said Salt Association, Ltd.*[3] The assessee in that case was a manufacturer of salt with the headquarters in Egypt. He exported salt for sale to the various parts of the world including India. The assessees were made liable to pay Indian income-tax under section 42 of the Act as it then stood, which did not contain a power to apportion as under the present section 42 (3). The assessee claimed that he was entitled in computing the profits and gains of his business in British India to make a deduction representing the proportion of profits earned by manufacture of salt in the country of origin. This contention was repelled and Rankin, C.J., observed in the course of the judgment that profit

> "though it may be anticipated by valuation or otherwise, is not realised before price and when the article is sold, the whole profit is realised for the first time."

It was also pointed out that the profits earned by the manufacture was not a permissible deduction under section 10 of the Act and, therefore, on that ground also the assessee was not entitled to the deduction claimed. No doubt in that case it was claimed as a deduction but the essence of the matter and the substance of the contention was an apportionment of the profits between manufacturing profits and the merchanting profits.

Of the several decisions cited before us some of the decisions turned upon the interpretation of section 42 of the Act and the decisions of the foreign Courts turned upon the language of the particular statute which had to be construed. Of the decisions in India reference may be made to the decision of this Court in *Commissioner of Income-tax Madras* v. *Mathias*[4] (High Court). The decision on appeal to the Privy Council in the same case is *Commissioner of Income-tax, Madras* v. *Mathias*[5] which was concerned with agricultural income or produce of land. The remarks of the learned Judges in that case were confined to income from agricultural land and this is made clear in the judgment itself by the observations of the learned Judge, Varadachariar, J., who delivered the judgment of the Court occurring in more than one place. The proviso to section 4 (2) of the Act which was construed in that case contained the words :

> "Nothing in the sub-section shall apply to income from agriculture arising or accruing in a State in India from land for which any annual payment in money, or in kind is made to the State."

The question which arose for consideration in that case was whether in the case of coffee grown and harvested in Mysore but brought to Mangalore where it was dried and cured and was sold, the income received from such sale was within the exemption. The Commissioner of Income-tax treated it as an income which accrued and arose in British India and hence not exempted under the proviso. The High Court did not accept this view. The following observations are enough to show that the learned Judge was not dealing with *profits* and *gains* but was only considering *income* from agricultural land. In the first place at page 28 it is observed :

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1. (1938) L.R. 65 I.A. 332 : I.L.R. (1938) Bom. 752 (P.C.).
2. (1946) I.T.R. 417.
3. (1932) I.L.R. 59 Cal. 1226.
4. (1937) 2 M.L.J. 310 : I.L.R. (1938) Mad. 25 (F.B.).
5. (1939) 1 M.L.J. 45 : L.R. 66 I.A. 23 : I.L.R. (1939) Mad. 178 (P.C.).
6. (1900) A.C. 588.

"Whatever may be said as to 'profits' or 'gains', the view that '*income* from agriculture can be said to arise and accrue only when and where the produce is sold and converted into money' seems to us, with all respect, difficult to reconcile with the reasoning, in *Commissioner of Taxation* v. *Kirk*[1]."

Secondly at page 29 it is remarked :

"In *Commissioner of Income-tax, Bihar* v. *Maharajadiraj of Darbanga*[2], the Privy Council observed 'that a receipt in kind may be taxable income'; they only add that what is received in kind should be money's worth. It was admitted before us by Mr. Patanjali Sastri, that in respect of the produce of land in British India, the Indian Income-tax Act recognises the receipt of income or rent *in kind* as receipt or accrual of income; it is difficult to see why, as a matter of language, the expressions 'receipt' or 'accrual' of income should not have the same significance when used in connection with the receipt of produce from lands outside British India."

The decisions in *In re : Port Said Salt Association Ltd.*[3] and *Jiwandas* v. *Income-tax Commissioner, Lahore*[4], were not dissented from and were distinguished on the ground that in the former case no portion of the income could escape taxation, unless there was a convention to limit the claim of one State against the Nationals of the other and that the second proviso to section 4 (2) was the result of such a convention and that the decision in *Jiwandas* v. *Income-tax Commissioner, Lahore*[4] was not concerned with the receipt of produce of land in a Native State. According to the view of the learned Judge, the income from agricultural land is received at the place where it was produced and therefore it is income, which accrued and arose in the Native State of Mysore, which attracted the exemption under the proviso. This decision, therefore, though it was reversed in appeal in *Mathias case*[5], by the Privy Council is no authority for holding that the manufacturing profits, which arose or accrued in a Native State should be separated, as not forming part of the income received in British India. The Privy Council rested their decision on the fact that the entire income was received in British India and therefore section 4 (1) applied to the case. There were however two passages in the judgment of the Judicial Committee which are seemingly irreconcilable and which are relied on by both sides. On behalf of the Crown, reliance was placed upon the passage at page 186 in which it was observed :

"The business operations cannot be arbitrarily cut into two portions, but must be regarded as a whole."

From this it is argued that there is no warrant under any of the provisions of the Act save in the case provided by section 42 (3) of the Act to apportion the profits by cutting up the business operations and separating the profits attributable to operations outside British India from the profits attributable to operations in British India. On the other hand, counsel for the assessee relied upon the passage, which occurs a little below on the same page which states :

"On the other hand, upon the question whether the profits and gains accrued or arose in British India, it may be that the fact that the coffee was grown in Mysore is by no means to be disregarded notwithstanding that it was sold in British India, especially if it be proved that it was sold without further process of a manufacturing character. For the moment it is enough to say that it may be so without examining the matter and without prejudice to either view."

The principle of cutting up profits is one thing and the decision of the question where and to what extent profits accrue or arise is a different question. Confining to the language of section 4 (1) it is impossible to cut up the business operations and the consequent profits in the manner contended by the learned advocate for the assessee in the absence of a specific provision to that effect. As has been already pointed out it has been ruled by this Court and also in *Hira Mills case*[6], that section 42 (3) has application to profits, which are deemed to have accrued in British India, which implies that in the case of profits, which actually accrued in British India, the Legislature has not applied the principle of apportionment contained in section 42 (3) of the Act. It may be from the point of view of the Native State, the State would be entitled to impose tax upon profits attributable to the manufacturing processes carried on within its jurisdiction if the law obtaining there permits it and might result in double taxation. But, that is no reason to construe the

1. (1900) A.C. 588.
2. (1933) 64 M.L.J. 612 : L.R. 60 I.A. 146 : I.L.R. 12 Pat. 318.
3. (1932) I.L.R. 59 Cal. 1226.
4. (1929) I.L.R. 10 Lah. 657 (F.B.).
5. (1939) 1 M.L.J. 45 : L.R. 66 I.A. 23 : I.L.R. 1939 Mad. 178 (P.C.).
6. (1946) I.T.R. 417.

plain language of section 4 (1) in a manner, which permits the apportionment of profits as claimed by the assessee. This aspect of the matter was considered in the *Hiralal Mills case*[1], where it was observed that:

"The circumstance that the assessee produced the goods in an Indian State can make no difference to the meaning of the words 'profits' or 'gains' and if the true construction of the Act gives rise in this, as in other cases, to double taxation that is not a matter by which we can be influenced in considering the Indian Income-tax Act."

The Bench of the Bombay High Court consisting of Chagla, C.J. and Tendolkar, J., in *Ahmedbhai Umarbhai and Co.* v. *Excess Profits Tax Officer*[2] had to construe the third proviso to section 5 of the Excess Profits Tax Act, which provided that:

"Where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business."

The facts in that case were: the assessee was the owner of three Mills in Bombay and one in Raichur in Hyderabad state. The business he carried on consisted of purchasing ground nuts and converting them and extracting oil in the mills. The oil extracted was sold. The case was confined to the oil extracted in the mill at Raichur, some of which was sold in British India. The assessee was a resident in British India and he claimed that the profits of part of his business, which accrued in Raichur and were referable to the manufacturing process at Raichur should be excluded from taxation. The argument advanced by the Advocate-General on behalf of the Excess Profits Tax Officer was that the business of the assessee was one comprehensive, and integrated business and that the profits accrued and arose only when oil was sold at the place where it was sold and at the time when it was sold and that till the sale was effected, no profits could have accrued in respect of the assessee's business. Therefore, the profits attributable to the manufacture of the oil at Raichur could not be separated. It was held that the business of manufacturing the oil at Raichur was "part of a business" within the meaning of the proviso and therefore it should be treated as a separate business. There are, however, some observations in the judgment of both the learned Judges, which have been relied on on behalf of the respondent. The larger question considered was whether the manufacture of oil, which was part of the business of the assessee in that case, could have produced profits. No doubt, until the oil was sold, no profits were made, but that according to the learned Judges was only to fix the time when the profits were made. From that fact, however, it did not follow that the profits were made merely by the act of sale.

"The act of sale" said Tendolkar, J., at page 203 "is the culminating process of the whole business; and it would be undoubtedly laying an undue emphasis on this final act or process to say that all the profits were attributable to that operation only. Part of the process which enabled the assessees to sell the oil was the manufacture of the oil and to my mind a portion of the profits must necessarily be attributable to the manufacture of the oil when profits are made. It is not necessary that they should be so attributable at the time that the goods are manufactured, because it may well happen that the business makes no profits at all, in which case there will be no profit of manufacture."

It was held that the profits attributable to the manufacture of oil accrued at Raichur, though they were realised at the place where the oil was sold, *i.e.*, in British India. There is no need to take exception to the view taken by the learned Judges, but this decision is no authority for holding that the apportionment of profits could be made in the absence of a statutory provision. So far as British India is concerned, the accrual of the entire profits was there and for the purpose of income-tax there is no restriction in the charging section to confine the assessment to profits attributable to the sale proceeds less the manufacturing profits. The decision in the *Hiralal Mills case*[1] and in *Chunilal Mehta's case*[3], are clear authorities on the interpretation of the language of section 4 (1) and the decision in *Ahmedbhai Umarbhai and Co.* v. *Excess Profits Tax Officer*[2] is not in conflict with that view, if understood in the manner suggested above. The decisions in *Jiwandas* v. *Income-tax Commissioner, Lahore*[4], *The Board of Revenue* v. *The Madras Export Co.*[5] and *Suda-*

1. (1946) I.T.R. 417 at 425.
2. (1948) I.T.R. 192.
3. (1938) L.R. 65 I.A. 332 : I.L.R. (1938) Bom. 752.
4. (1929) I.L.R. 10 Lah. 657 (F.B.).
5. (1922) 44 M.L.J. 290 : I.L.R. 46 Mad. 360.

laimani Nadar v. *Commissioner of Income-tax Madras*[1] relate to businesses of a simple nature of purchase at one place and sale at another place and it has been held that the profits accrued and arose at the place of sale and not at the place of purchase. They are not cases relating to the business of manufacture and do not therefore, afford assistance in the solution of the question that arises in this case.

Mr. Subbaraya Aiyar learned counsel for the assessee, pressed upon us also three decisions : *Kirk's case*[2], *Federal Commissioner of Taxation* v. *W. Angliss Co. Pty. Ltd.*[3] In *Kirk's case*[2] the question was whether a company, which had its head office and residence in the colony of Victoria had any income in New South Wales, which was assessable to income-tax under the Act in force in that colony. The company carried on the business of mining and for this purpose obtained a lease of lands from the Crown in the colony of New South Wales, which was assessable to income-tax under the Act in force in that colony. The company carried on the business of mining and for this purpose obtained a lease of lands from the Crown in the colony of New South Wales ; where also the company had an office and a manager. A portion of crude ore extracted from the mine was sold in New South Wales ; and the purchase money was received either in London or Melbourne. The company made large amount of profits from this business operation. The question that had to be considered was whether in view of the language of the Income-tax Act, the company had earned any profits within the colony of New South Wales. Under section 15 of the Act, a person whose income exceeded £200 per annum was liable to pay income-tax in respect of incomes :

"1. Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales, whether the same be carried on by such person or on his behalf wholly or in part by any other person.

3. Derived from lands of the Crown held under lease or license issued by or on behalf of the Crown.

4. Arising or accruing to any person wheresoever residing from any kind of property excep from land subject to land tax as hereinafter specifically excepted, or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

Under section 27 (3) no tax shall be payable in respect of income earned outside the colony of New South Wales. Under the provisions of the Act it was immaterial whether the person resided in the colony or not and it was equally immaterial whether he received the income in the colony or not if it was earned outside the colony. The ore was derived from a mine in the colony and a portion of the crude ore was sold in the State. A part of the crude ore was treated at the Company's works in a place in South Australia and the contracts for sale were not made in New South Wales. The sale of the products of the company was made and the purchase money was received either in London or in Melbourne. The following passage on the construction of the Act which occurs at page 592 of the report is instructive :

"The word 'trade' no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures. But if you confine trade to its literal meaning, one may ask why is not this income derived (mediately or immediately) from lands of the Crown held on lease under section 15, sub-section 3, or from some other source in New South Wales under sub-section 4. Their Lordships attach no special meaning to the word 'derived,' which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil ; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process ; (3) the sale of the merchantable product ; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-section 3, and the second or manufacturing process, if not within the meaning of "trade" in sub-section 1, is clearly included in the words 'any other source whatever' in sub-section 4.

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales."

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1. (1941) 1 M.L.J. 99 : (1940) I.T.R. 619.
2. (1900) A C. 588.
3. 46 Commonwealth L.R. 417.

The simple question, therefore, which the Judicial Committee had to consider was whether there was any income, which was earned and arose and accrued in New South Wales. On the language of the section it was held that the income was earned in New South Wales. This decision can in no sense be treated as an authority for separating manufacturing profits under section 4 (1) of the Indian Income-tax Act. The question before us is not whether the profits accrued and arose in British India but whether from the profits that accrued here in British India, the manufacturing profits could be separated. The decision in *Federal Commissioner of Taxation* v. *Angliss Co., Pty. Ltd.*[1], is also of a similar nature as the *Kirk's case*[2]. The Company was incorporated in Victoria and its head office and the principal works were in Victoria. It had a branch office in London. The company exported from Australia preserved meat, which was prepared in Australia to London, where it was sold at a profit. The company exported also tallow, part of which was produced by the company's own operations and the remainder was bought in Australia. The contract for the sale of the meat and tallow were made and performed in England, but the net proceeds were brought to Australia. It was held by the majority of the Judges that in ascertaining the liability of the company for war time profits tax, no part of the moneys obtained by the sale outside Australia of preserved meats or tallow produced by the company, which exceeded the value of the goods in Australia before exportation should be taken into account and that no part of the money obtained from resale outside Australia of tallow bought and not produced by the company for the purpose of war time profits should be taken into account. In the statute there in force the place of the source from which the income or profit was derived was important and therefore the decision is of no assistance under the Indian Act. The decision in *International Harvestor Company of Canada Ltd.* v. *Provincial Income-tax Commissioner*[3], arose under the Income-tax Act of 1932 of Saskatchewan in Canada. Under that Act income was defined by section 3 and in the case of business it provided that income means only net profits or gain received by a person from any trade, manufacture or business as the case may be, whether derived from sources within Saskatchewan or elsewhere. Section 7 imposed a tax on a non-resident and sub-section 1 (*d*) of that section provided that a person shall be assessed to incometax who, not being resident in Saskatchewan, is carrying on business in Saskatchewan during such year. Section 21 was as follows :

> "Where any corporation carrying on business in Saskatchewan purchases any commodity from a parent, subsidiary or associated corporation at a price in excess of the fair market price, or where it sells any commodity to such a corporation at a price less than the fair market price, the Minister may, for the purpose of determining the income of such Corporation, determine the fair price at which the purchase or sale shall be taken into the accounts of the Corporation,"

and section 21 (*a*), which is the most important section was as follows :

> "The income liable to taxation under this Act of every person residing outside of Saskatchewan, who derives income for services rendered in Saskatchewan, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Saskatchewan, shall be the income so earned by such person in Saskatchewan."

Person included under the Act a Corporation. Power was also given to the Lt. Governor-in-Council to make regulations. The assessee was a company registered and incorporated under the Companies Act of the Province of Ontario having its head office at Hamilton in the Province. The business of the assessee was manufacture and sale of agricultured implements and parts thereof. The manufacturing operations were carried out entirely outside the Province of Saskatchewan, but the selling operations were carried on partly in Saskatchewan and partly in other Provinces and countries. The company had no directors resident in Saskatchewan and the entire central management and control was at the head office. The selling business in Saskatchewan was carried on at this branch office and the money received by the assessee in Saskatchewan was deposited in separate bank accounts, which were thereafter remitted to the Head Office. The assessee, there-

1. 46 Commonwealth L.R. 417.
2. (1900) A.C. 588.
3. (1949) A.C. 36.

fore, was a resident outside Saskatchewan. He was assessed to income-tax in Saskatchewan in respect of the business in Saskatchewan. The assessee claimed that out of the net profits arising from the business in Saskatchewan the manufacturing profit earned outside the Province should be excluded. In construing the language of the statute Duff, C.J., of the Supreme Court of Canada expressed himself thus :

"Nowhere does the statute authorise the Province of Saskatchewan to tax a manufacturing company, situated as the appellant company is, in respect of the whole of the profits received by the company in Saskatchewan. It is not the profits received in Saskatchewan that are taxable ; it is the profits *arising from its business in Saskatchewan*, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's *operations in Saskatchewan*" (The italics are mine).

These observations were approved by their Lordships of the Judicial Committee. According to their Lordships, sections 21 to 25 of the Act contain a scheme for dealing with the taxation of profits from the activities of persons or Corporations, who carry on certain activities within the Province of Saskatchewan and other activities outside the Province. At page 51 their Lordships observed :

"Section 21 applies both to resident and to non-resident corporations, and is plainly directed to preventing an artificial reduction of the net profit arising from the business of such corporations in Saskatchewan. Section 22 contemplates the case of a person residing and regularly employed outside Saskatchewan who renders certain services within that Province. Sections 23 and 24 show that the Legislature contemplated in the case of a non-resident person, a charge of tax on an apportioned part of income, which although it might be received outside the Province of Saskatchewan, could fairly be regarded as having been partially earned inside that Province. In their Lordships' view it would be reasonable to suppose that in the present case the legislature would regard a proportion of the profit received by the appellant in Saskatchewan as 'arising' from its manufacturing business carried on outside that province, and as being, in consequence, exempt from taxation under the Act. They think that no distinction is intended between income 'earned' in the province and income 'arising' within the province. The word 'earn' is employed in sections 23 and 24 merely because of the grammatical structure of the sections. In each case the intention is to bring within the ambit of section 21-A an apportioned part of the 'profit' mentioned in section 23 and the 'income' mentioned in section 24, because such part of the profit or income is regarded as being earned within the province. Their Lordships think that if section 21-A is construed as excluding from taxation a 'manufacturing profit' earned outside the province, effect is given to the general scheme of taxation set out in the Act. Further, this construction seems to their Lordships to result in a fair and reasonable scheme of taxation, in accordance with that comity which naturally prevails between one province and another."

These observations have been quoted in extenso to show that the scheme underlying the Act under consideration in that case is totally different from the scheme underlying the Indian Act. In my opinion, therefore, this decision does not at all support the contention of the assessee.

I am therefore clearly of opinion that the decision of the Appellate Tribunal cannot be sustained even on the second of the arguments urged on behalf of the assessee. The profits arose in British India and they exceed the profits outside. The company is therefore "resident" in British India within the meaning of section 4-A (*c*) (*b*) of the Act. The question referred to us must in my judgment be answered in the affirmative and in favour of the Commissioner of Income-tax. The Commissioner of Income-tax is entitled to his fee, which we fix at Rs. 250.

R.C. No. 59 *of* 1946.—The decision in R.C. No. 57 of 1946 also governs the decision in this case. The facts are similar and the question referred to is also identical. The answer to the question in this case also must be in the affirmative and the Commissioner of Income-tax is entitled to his fee, which we fix at Rs. 250.

Viswanatha Sastri, J.—These two references raise the question of the liability of two limited companies to pay income-tax as "residents in British India". The two assessees are limited companies registered at Madras and they manufacture and sell an ointment and some medicines. The year of account for both of them was the calendar year 1942. Owing to the scare created by War conditions, the companies shifted their office and "factory"—a rather high sounding name for a small and unpretentious affair—to Mysore on 22nd April, 1942 and brought them back to Madras in May 1943. In R.C. No. 57 of 1946 the company made a nett profit of Rs. 50,157 during the second half year of 1942, there being no profits in the first half year. The total sales of the company amounted to Rs. 2,42,917

out of which sales to the extent of Rs. 1,96,358 took place in British India. The company had a depôt in Bombay where goods were stocked and sales effected. Another limited company was appointed as the sole selling agents of the assessee in Calcutta. The Appellate Assistant Commissioner held that the company was a "resident" within the meaning of section 4-A (*c*) (*b*) of the Income-tax Act as more than 50 per cent. of its profits arose in British India. The Appellate Tribunal accepting the above facts came to a different conclusion with may be summarised in its own words as follows :

> "In our opinion no profit arises in British India from the sale in British India of any merchandise exported to British India and as such the requirements of section 4-A (*c*) (*b*) are not fulfilled . . . . Thus in the case of the appellant (company) who is a "non-resident" we find it should be held that the profits from the sale in British India whether by the appellant company's own depot at Bombay or their agents at Calcutta or through V. P. P. or through bankers do not arise or accrue in British India but should be held as deemed to have arisen or accrued in British India . . . . . We further find that as sales to the extent of Rs. 1,96,358 have been made in British India, the profits that should be deemed to have arisen or accrued out of such sales under section 42 (3) are to be computed. As the matter has not been considered by the Officers below, it will have to be done by the Income-tax Officer now."

In the view of the Appellate Tribunal the company was a non-resident whose profits had to be apportioned for purposes of assessment under section 42 (3) of the Act. The facts and conclusions in R.C.No. 59 of 1946 are similar, only the figures vary. The following question has been referred to us :

> "Whether in the circumstances of the case, the profits made on the sales which took place in British India were 'income arising in British India' within the meaning of section 4-A (*c*) (*b*) of the Income-tax Act?".

The sections of the Act that have a bearing on this matter are sections 3, 4, 4-A, 6, 10 and 42 which need not be set out here. Section 3 which is the charging section expressly includes companies among the persons or bodies liable to charge and levies income-tax at the rate current for the year. Section 4 confines the levy to income, profits and gains accruing or arising or received in British India or deemed to accrue, arise or be received in British India. Section 4 imposes a heavier burden of tax on residents than on non-residents or persons not ordinarily resident and sections 4-A and 4-B define "residents" and "ordinary residents" as applied to individuals, undivided Hindu families, firms, association of persons and companies. Section 6 classifies income, profits and gains under different heads and sections 7 to 12 provide rules and directions regulating the manner in which the income, profits and gains under each of the heads specified in section 6 have to be computed. In view of the arguments advanced before us it is necessary to state at the outset that the tax is not levied on the sources of income situated or having their location in British India. The test of liability under section 4 of the Act is the place of the accrual or arising of the income, profits and gains, though the source may, in many cases, point to the place of accrual or arising of the income. Though the tax is levied in respect of the income of a person and the liability to tax is measured by the total income of a person computed in accordance with the provisions of the Act, still it is the person to whom income accrues or arises or by whom it is received or to whom the income is deemed to arise or accrue or by whom it is deemed to be received that is assessed and made personally liable for payment of the tax.

It is artificial to attribute residence to a company, and no less artificial is the selection of its place of residence by section 4-A (*c*) of the Act. In a series of decisions of the House of Lords it was held that the residence of a company was where its real business was carried on and the real business of the company was carried on where the central management and control abided (*De Beers Consolidated Mines* v. *Howe*[1]; *Mitchell* v. *Egyptian Hotels, Ltd.*[2]; *Egyptian Delta and Investment Co.* v. *Todd*[3]. The decision in *Swedish Central Railway Co.* v. *Thompson*[4] is reconcilable with the cases above cited only if one assumes that the management and control of a limited

1. (1906) A.C. 455.
2. (1915) A.C. 1022.
3. (1929) A.C. 1.
4. (1925) A.C. 495.

company could be divided so as to make the company resident in more than one place. The Indian Legislature did not adopt in its entirety the English pattern but provided in section 4-A, two alternative tests of residence in the case of companies. Either the control and management of the company's affairs should be situated wholly in British India in a particular year or its income arising in British India in that year should exceed its income arising without British India. There need be no connection between the company and British India except the derivation from British India of the major part of the income during the previous year and the company in that event, would be taxable on all its profits and gains including income arising without British India. The justification of this piece of legislation, whose legality is not open to question, is found in the following passage of the judgment of the Judicial Committee in the case of *Wallace Bros. and Co.*[1] :

> "When a company in any particular year derives the major portion of its income from a country, it is a legitimate conclusion that the company has rooted itself there in that year. The connection that results is at least as solid as the connection given by the place of central control ; and in a search for a home for income-tax purposes as respects that year that connection might well be thought more pertinent than the connection, readily changeable and often changed, given by the place of central control. In such a search the place where commercial activities yield the result is at least as relevant as the place where they are conceived. A company which in substance lives on a country may rationally be treated as living in it."

In my opinion the Appellate Tribunal went wrong in holding that no profits at all arose here in British India from the sale of goods manufactured by the company in Mysore and all the profits made by the company by the sale of its products in British India should only "be deemed to have arisen or accrued" under section 42 (1) and should therefore be apportioned under section 42 (3) of the Act. It is pointed out on behalf of the assessee that section 42 (1) has recently been amended so as to apply equally to residents and non-residents and that section 42 (3) has been amended so as to lay down a rule for apportioning and determining the quantum of profits of the assessee, resident or non-resident, chargeable to Indian Income-tax under section 42 (1). It is argued that if goods are manufactured and sold in British India the whole of the resultant profits arise in British India, but if the "manufacture" which is also included in the definition of a "business" in section 2 (4) of the Act, takes place outside British India and only the sales take place here, the profits attributable to the selling operations should be separated from the "manufacturing profits" under section 42 (2) of the Act and the selling profits alone should be held to arise in British India within the meaning of section 4-A (*c*) (*b*) of the Act. Section 42 (3) of the Act deals only with cases where the profits and gains of a business are deemed under section 42 (1) to accrue or arise in British India. Mr. Subbaraya Ayyar argues, if I understand him aright, that even incomes arising in British India are treated as "deemed incomes" for the purpose of apportionment by the combined operation of sections 4 and 42 (1) and (3). I am unable to agree with this argument for this simple reason that the use of the words "shall be deemed to be income accruing or arising in British India" in section 42 (1) denotes something which is a contradiction to the actual facts of the case. To adapt the language of Lord Dunedin in *Bombay Trust Corporation's case*[2], when a thing is deemed to be something, the only meaning possible is that whereas it is not in reality that something, the statute requires it to be treated as if it were. I cannot accept the contention that by enacting section 42 (1) and (3) the Legislature wanted to treat all cases of income, profits and gains accruing or arising in British India within the meaning of section 4 (1) (*c*) of the Act as falling within the category of income described in section 42 (1) of the Act. The logical result of the argument would be that the distinction drawn in section 4 (1) (*c*) between income, profits and gains arising or accruing in British India and income, profits and gains deemed to arise or accrue in British India is meaningless. Indeed section 4 (1) (*c*) would stand superseded by section 42 (1) of the Act and an argument which leads to this result cannot possibly be accepted. It was rejected in a recent judgment of this Court

1. (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86 : (1948) F.L.J. 32 (P.C.).
2. (1929) 58 M.L.J. 197 : L.R. 57 I.A. 49 : I.L.R. 54 Bom. 216 (P.C.).

in *Nagayya* v. *Commissioner of Income-tax*[1], which followed the decision of the Allahabad High Court in the *Hira Mills case*[2]. I therefore hold that the principle of apportionment in section 42 (3) of the Act cannot be applied when ascertaining the amount of income arising in British India for the purpose of section 4-A (*c*) (*b*) of the Act. It is not possible to ignore the difference between section 42 (3), as it is stood before the amendment of 1939 and section 42 (3) as it stands after the amendment and hold that profits arising from sales effected in British India must always be put in the category of profits which are "deemed to have arisen or accrued in British India".

The further contention of the assessee's learned advocate raises a point of difficulty and importance. It is to the effect that where the business activities or operations that produce profits and gains are carried out in more than one State, the tax should be levied in each of the States only on that portion of the income which is reasonably attributable to that part of the operations carried on in the State levying the tax. This is stated to be a general principle underlying the scheme of our income-tax legislation and recognised by sections 4 and 4-A (*b*) (*c*) of the Act. It may be conceded that the ideal system of taxation is to tax the whole of a person's income, gains and profits but that they should be taxed only once and the liability should be distributed or divided among the several tax jurisdictions according to their relative importance in the scheme of profit making. It is said that where there is a composite business consisting of manufacture of goods outside British India and their sales in British India, you must as a matter of common sense and common fairness, apportion the profits realised by the sales and attribute to the British Indian business only the selling profits which it would have derived if the business were an independent enterprise engaged only in the sale of the goods and dealing at arm's length with the manufacturer. This portion of the profits alone, it is said, arises in British India. The rest of the profits would be "manufacturing profits" which would accrue or arise outside British India. It is said that these principles are inherent in the very conception of profits accruing or arising at a particular place, and reliance is placed on the analogy of section 42 (3) which provides for an apportionment of profits in cases where they are deemed to arise or accrue in British India and the business operations are not all of them carried out in British India. It is said that section 42 (3) is only an illustration of a general principle in the background of which sections 4 (1) (*c*) and 4-A (*b*) (*c*) have to be construed. In effect the arguments of the learned advocate come to this: If a non-resident trader manufactures goods outside British India and sells his goods here through an establishment or branch or agency, his profit is the difference between the amount for which the goods are sold in India and the amount for which they could be sold to a wholesale buyer in similar circumstances in the country of manufacture, less any expenses incurred in transporting the goods to and selling them in India; if the trader is not the manufacturer of the goods sold, the "difference" between the amount for which the goods are sold and their purchase price, less the cost of transporting the goods to and selling them in India. I am unable to read into the Income-tax Act any such general scheme or principle however desirable its adoption may be. It is difficult to say *a priori* what is or ought to be the scheme of income-tax and one can only look to the actual terms of the Act to find out its scheme.

As considerable stress was laid on the principle that double taxation should be avoided by Courts, I have to point out that there is here no question of double taxation in the proper sense of that term. It is not as if the same person is charged in respect of the same piece of income under two different sections of the Act by the same taxing authority either directly or indirectly. As already pointed out it is not incompetent for the Indian Legislature to enact that a company shall pay income-tax on the whole of its profits, if the profits arising in British India exceed its profits arising outside, even though the foreign profits might be liable to pay income-tax

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1. (1949) 1 M.L.J. 623: (1949) I.T.R. 194. 2. (1946) 14 I.T.R. 417.

in the foreign country. Double taxation in that sense and in such cases is due to the co-existence of a personal and impersonal tax liability, personal liability being based on the domicile or residence of the tax-payer and impersonal liability being based on the earning or receipt of income within the territory of a State which claims to tax such incomes without regard to the personal status of the recipient. It is beyond the province of this Court to redress any supposed hardship or injustice to the tax-payer by double taxation in this sense by importing qualifications and implications not required or warranted by the language of the Income-tax Act. Those are matters to be settled by conventional arrangements among States or by legislation. A Legislature which passes a law which, in certain circumstances, may have extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account and the Courts of the country must enforce the law as it has been enacted.

What is the meaning to be attributed to the words " income arising in British India " in sections 4 (1) (c) and 4-A (c) (b) of the Act? The answer would, to some extent, depend upon the nature of the business carried on by the company whose status is in question. To start with a simple case, no income is considered to arise from a mere purchase of goods in a particular place and no portion of the profits arising from the sale of goods in a foreign country can be considered to accrue or arise in this country merely by reason of the purchase of goods in this country. The profits in such a case accrue or arise at the place where the goods are sold. Where the business consists merely of buying and selling, the profits resulting from a purchase in one country cannot be separated or distinguished from the profits made on the sale of the goods abroad; in fact, there is but one profit. This view has been uniformly taken in decided cases both here and in England (see *Sulley* v. *Attorney-General*[1], *Grainger* v. *Gough*[2], *Lowell & Christmas, Ltd.* v. *Commissioners of Taxation*[3], *Greenwood* v. *Smith and Co.*[4], *Maclaine* v. *Eccott*[5], *The Madras Export Co.'s case*[6], *Jiwandas's case*[7] and *Sudalaimani Nadar's case*[8]. But, if the activities extend beyond mere purchasing and include acts such as sorting, grading, cleaning, or processing for export, these operations which are carried on in British India increase the value of the raw products and are deemed to yield a profit though the profits are realised by the sale of the goods abroad. In such cases the operations in British India have produced merchantable goods or have given or added value to things marketed abroad and wealth or value has been produced or increased in British India and is imbedded in the marketable goods. In other words unrealised profits exist in British India whence the goods are exported for sale. The Legislature has therefore enacted section 42 (1) and (3) of the Act to bring into the net of the Indian Taxation that portion of the profits which might be apportioned and attributed to the operations in British India.

In *Rogers Pyatt Shellac Co.'s case*[9], and *Steel Brothers Co.'s case*[10], it was held that section 33 (1) of the Act of 1918 corresponding to section 42 (1) of the present Act applied to cases of non-residents whose business connection with British India in the shape of a regular buying agency or establishment yielded profits though the goods were sold abroad. The view of Schwabe, C.J., in the *Madras Export Co.'s case*[6], that section 33 (1) of the Act of 1918, corresponding to section 42 (1) of the present Act was mere machinery and not a charging section, a view which was based on the interpretation of section 31 (2) of the English Finance Act of 1915 by the Court of Appeal and the House of Lords in *Greenwood* v. *Smith & Co.*[4], must now be held to be erroneous, in view of the radical difference between the scheme of the English and Indian enactments pointed out by the Judicial Committee in

1. (1860) 5 H. and N. 711 : 157 E.R. 1364.
2. (1896) A.C. 325, 340, 341.
3. (1908) A.C. 46, 52.
4. (1922) 1 A.C. 417.
5. (1926) A.C. 424.
6. (1922) 44 M.L.J. 290 : I.L.R. 46 Mad. 360.
7. (1929) I.L.R. 10 Lah. 657 (F.B.).
8. (1941) 1 M.L.J. 99 : 1940 I.T.R. 619 (F.B.).
9. (1924) I.L.R. 52 Cal. 1.
10. (1925) I.L.R. 3 Rang. 614.

Chunilal Mehta's case[1] *Shaw Wallace & Co.'s case*[2], *Pondicherry Railway Co.'s case*[3] and *Bijay Singh Dhudhuria's case*[4]. It cannot now be said that section 42 of the Act is mere machinery and therefore of any less importance or weight than section 4 which incorporates by reference incomes deemed to accrue or arise or be received in British India under section 42 of the Act. One has to look into all the sections as forming part of the enactment under which income-tax is levied. Section 42 (1) is so designed as to widen the net of taxation and it is a charging section in so far as it has the effect of rendering persons liable to tax on profits which do not accrue or arise or are received in British India but are merely deemed to be such profits. This view receives support from the later decisions of this and the other High Courts. (See *The National Mutual Insurance Association case*[5], *The Bank of Chettinad case*[6], *Currimbhoy's case*[7], *Hira Mill's case*[8] and *Rogers Pyatt Shellack Co.'s case*).[9] Section 42 (1) is not now confined in its application to non-residents and has been amended so as to apply to residents also.

As regards profits which result from a series of acts or transactions which enhance the value of the goods at each stage before they are finally sold, is it to be said that the entire profits arise in British India where the goods are sold even though the antecedent stages of purchase of raw materials and the manufacture of raw materials into marketable goods take place outside British India ? The contention of Mr. Rama Rao Sahib is that the question is answered in favour of the Department by the plain language of section 4-A (*c*) (*b*) of the Act, while the learned advocate for the assessee contends that such a construction of section 4-A (*c*) (*b*) would be opposed to the provisions of sections 4 (1) (*c*), 10 and 42 of the Act. In my opinion a literal reading of section 4-A (*c*) (*b*) tends to support the contention of the Department that business income arises only at the time when and at the place where the sales of goods are effected. Section 4-A (*c*) (*b*) refers only to "income" and discards its usual and familiar companions "profits and gains" and again refers to the word "arising" without its associate "accruing", an omission which I consider is deliberate. Income denotes a monetary return or money which comes in not as capital but as profit. In the Oxford Dictionary income is defined as

> "that which comes in as the periodical produce of one's work, business, lands, or investments considered in reference to its amount and commonly expressed in terms of money."

In Stroud's Judicial Dictionary the words "arising in the United Kingdom" are defined as "coming into the person's hands in the United Kingdom." The word "arises" should not in the context be taken as synonymous with "accrues." The expression "arises" means "comes into existence or notice or presents itself" while the word "accrues" means "growing up by way of addition or increase or as an accession or advantage." The word "accrues" connotes the idea of a growth or accumulation while the word "arises" signifies the idea of the growth or accumulation with a tangible shape so as to be receivable (per Mukherji, J., in *Rogers Pyatt Shellack Co.'s case*[9].)

In *Chunilal Mehta's case*[1], Sir George Rankin, delivering the judgment of the Court, observed :

> "Profits 'accruing or arising in British India' are words which, in their ordinary meaning, seem to require a place to be assigned as that at which the result of trading operations comes, whether gradually or suddenly into existence."

Evidently, the learned Judge was expanding the expressions "accruing" or "arising". Later, in the course of the judgment it was pointed out that under the Indian Income-tax Act profits did not necessarily arise at the place where the business was carried on or control exercised and the test of chargeability was not the location of the source of profits in British India, a test which was discarded

1. (1938) L.R. 65 I.A. 332 : I.L.R. (1938) Bom. 752 (P.C.).
2. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 : I.L.R. 59 Cal. 1343 (P.C.).
3. (1931) 61 M.L.J. 251 : L.R. 58 I.A. 239 : I.L.R. 54 Mad. 691 (P.C.).
4. (1933) 65 M.L.J. 283.
5. (1933) I.L.R. 57 Bom. 519 at 532.
6. (1939) I.T.R. 1, 18.
7. (1935) 70 M.L.J. 247 : L.R. 63 I.A. 1 : (1935) I.T.R. 395 (P.C.).
8. (1946) 14 I.T.R. 417, 424.
9. (1924) I.L.R. 52 Cal. 1.

by the Act, but the place where the profits accrued or arose to which alone the Act directed attention. After referring to an observation of Lord Macmillan in *Robinson Bros., Ltd.* v. *Assessment Committee*[1], that the profit of a brewer was actually made where the sales were effected, Sir George Rankin said:

> "Profits are frequently if not ordinarily regarded as arising from many transactions each of which has a result—not as if the profits need to be disintegrated with difficulty but as if they were an aggregate of the particular results. To discriminate between all kinds of income according to the place at which they accrue or arise is a plain dictate of the statute."

The learned Judge guarded himself against laying down any rule of general application but the trend of the judgment shows that the operations of a single business which contribute to the emergence of profits could not be cut up into parts and profits arise at the place where the contracts of purchase and sale are made and monies are realised. The decision in *Mathia's case*[2], serves only to emphasise the difficulty of finding a ready answer. In that case this Court held that income from coffee planted, grown and gathered in Mysore accrued or arose in Mysore though the raw coffee was cured and then sold in British India, relying upon a somewhat analogous decision of the Judicial Committee in *Kirk's case*[3]. The decision of this Court was reversed by the Judicial Committee on another point but with reference to the point now under consideration Sir George Rankin observed:

> "But the green coffee itself cannot be regarded as income, profits or gains within the meaning of the Act; it is grown for purposes of sale and in order that profit might be earned. The business operations cannot be arbitrarily cut into two portions but must be regarded as a whole. Thus, if the coffee market may be assumed to have its ups and downs, the assessee, if he delayed his sales in expectation of rise but found that prices fell, would not expect to be charged on the profits that he would have made had he sold without delay. On the other hand upon the question whether the profits and gains accrued or arose in British India it may be that the fact that coffee was grown in Mysore is by no means to be disregarded notwithstanding it was sold in British India especially if it be true that it was sold without further process of a manufacturing character. For the moment it is enough to say that it may be without examining the matter and without prejudice to either view."

The different views referred to above were those of the Madras High Court in *Mathia's case*[4] and of the Calcutta High Court in the *Mohanpur Tea Co.'s case*[5]. The Judicial Committee refrained from expressing any opinion as to the effect of *Kirk's case*[3], on the interpretation of the relevant provisions of the Indian Income-tax Act. I have already referred to the observation of Lord Uthwatt in the case of *Wallace Bros., Ltd.*[6] that the place "where the commercial activities yield *the result*" (italics mine) is the test of residence of a company under section 4-A (*c*) (*b*) of the Act. These are the relevant decisions of the Judicial Committee under the Indian Act.

I am of the opinion, therefore, that the profits of the assessees in these cases arose in British India where the bulk of the goods manufactured by them in Mysore was sold, the true measure of such profits being the price realised by the sales of their products in British India through their Bombay and Calcutta depots and agents less the cost of production, manufacture, transport and distribution of the goods whether incurred in Mysore or in British India. The circumstance that the goods were produced or manufactured in Mysore can make no difference to the place where the income of the business arises. There is nothing in sections 4 and 4-A (*c*)-(*b*) to suggest that the profits derived from a continuous process of manufacture and sale of goods should be cut up into different parts and allocated proportionately to the several places where the several stages of production and manufacture and sale take place. The business of the assessees is to manufacture ointment and medicinal tablets *only* for sale. The income from that business arises only if their products are sold and at the place where and at the time when they are sold. Till sales are effected no "income" would have "arisen". At

1. 54 T.L.R. 568.
2. (1939) 1 M.L.J. 454: L.R. 66 I.A. 193: I.L.R. (1939) Mad. 178 (P.C.).
3. (1900) A.C. 588.
4. (1937) 2 M.L.J. 310: I.L.R. (1938) Mad. 25 (F.B.).
5. I.L.R. (1937) 2 Cal. 201.
6. (1948) 2 M.L.J. 62: L.R. 75 I.A. 86 (P.C.).

every stage of the process from the purchase of raw materials down to the marketing of the finished goods there may be an increase or enhancement in values, but the profits arise only when those enhanced values get converted or transmitted into money by the sale of the goods. In the case of a mercantile business the primary object is to sell the goods and thereby make a profit. Profits are obtained by selling goods and the place where profits emerge as profits is where the goods are sold. It is true that buying raw products and manufacturing them into marketable medicines are necessary parts of a business of the kind now in question which derives its profits from selling the medicines. But it does not follow that in order to determine where the profits arise it is proper to enquire into all the causes which in combination or succession operate to produce them. The different links in the chain of causation of profits do not require to be severed. The Court has to ascertain not why but where the profits come into existence. Here the assessees had an agent in Calcutta and a depot in Bombay, the goods were stocked in those places, contracts for sale of the goods were entered into and deliveries of the goods were effected in those places and the price was realised by payment to the account of the assessees in their banks in British India.. The income of the assessees could therefore properly be considered as arising in British India. This is my view on the construction of the language of section 4-A (*c*) (*b*). The cases cited by learned counsel on both sides remain to be noticed.

In *Rogers Pyatt Shellac Co.'s case*[1], the assessee, a limited company incorporated in the United States, had a branch office in Calcutta for the purchase of forest produce which was worked into a form available for export to America. The branch also acted as buying agents for other concerns in the United States. No sales were effected in India by the company. It was held that though the goods were sold and the profits and gains accrued or arose outside British India, the company was assessable under section 42 of the Act on the basis that the profits attributable to the business activities of the company in British India must be deemed to have arisen or accrued in British India and were therefore liable to income-tax under section 42 of the Act. In the *Port Said Salt Association case*[2], a foreign company manufacturing salt in Egypt imported it into India and sold it here. In addition to the expenses of producing, transporting and marketing the salt the company claimed to deduct manufacturing profits earned in Egypt. Rankin, C.J., who delivered the judgment of the Full Bench disallowed the deduction of manufacturing profits earned in Egypt from the sale price of the salt in India in arriving at the taxable profits of the company. The following passage in the judgment of the learned Judge is very much in point:

> "But profit, though it may be anticipated by valuation or otherwise, is not realised before price, and when the article is sold the whole profit is realised for the first time. . . . Section 10 (2) contains no hint that part of the profits will be exempted although they arise or are received in British India because they have been earned elsewhere."

In the view of the Full Bench the profits and the whole of the profits arose on sale in India and no portion of the profits was exempt from tax on the ground that it represented manufacturing profits earned in Egypt. In the *Mohanpur Tea Co.'s case*[3], it was held that until manufactured goods were sold it could hardly be said that there was any income profits or gains and that profits arose at the place where the goods were sold though the process of manufacture was carried on outside British India. This decision was dissented from by a Full Bench of this Court in *Mathia's case*[4], relying on the decision of the Judicial Committee in *Kirk's case*[5]. Later, in the course of this judgment I shall examine *Kirk's case*[5], and in this context it is sufficient to note that when the decision of this Court went up on appeal to the Judicial Committee they expressly refrained from deciding whether this Court was right in relying on *Kirk's case*[5], and reaching the conclusion it did. See *Mathia's case*[6]. In *Jiwandas' case*[7], the Court held that

1. (1924) I.L.R. 52 Cal. 1.
2. (1932) I.L.R. 59 Cal. 1226 (F.B.).
3. I.L.R. (1937) 2 Cal. 201.
4. (1937) 2 M.L.J. 810: I.L.R. (1938) Mad. 25 (F.B.).
5. (1900) A.C. 588.
6. (1939) 1 M.L.J. 45: L.R. 66 I.A. 23: I.L.R. (1939) Mad. 178 (P.C.).
7. (1929) I.L.R. 10 Lah. 657 (F.B.).

"In ordinary cases, profits can be ascertained only when the price is realised, because until realisation it cannot be said that the transaction will result in profits . . . . It is beyond dispute that the place, where the sale is effected and the price realised, is certainly the principal place, if not the place, of the accrual of profits."

In the *Hira Mills case*[1], the assessee, a limited company incorporated and manufacturing cloth in Gwalior State sold its goods through salesman at Cawnpore where the sale proceeds were also received. It was held by the Allahabad High Court that the profits derived from the sales, accrued or arose to the assessee in British India within section 4 (1) (*c*) of the Act and that

"the difference between the gross costs to the seller of the goods at the moment and at the point of sale and the nett price which he received"

represented the taxable profits of the non-resident.

Mr. Subbaraya Aiyar, the learned advocate for the assessee relying upon two decisions of the Judicial Committee interpreting the Income-tax legislation of Australia and Canada argues that unrealised profits do exist and that a sale in one place of goods manufactured elsewhere is merely a conversion into money of the profit made by the treatment of the goods at the place of manufacture. Before I consider the two decisions cited by him I have to observe that in Australia and Canada, unlike India, income-tax is leviable by the Legislature of each State or Province, within its own territory. In India income-tax is levied only by the centre under one enactment though the tax is partially apportioned among the Provinces. Legislation in Australia and Canada has proceeded on the basis that each State or Province could tax only that part of the income that was produced in its territory. The territorial law only provided for taxation within the State and in effect limited the subject of taxation to profits arising from sources within that territory. In the case of a two territory business it was found necessary to divide the actual profits into those which arise from such sources and those which did not. The apportionment of the profits between different territories where the business activities of an individual or company which result in the profits, are carried on, has therefore been either provided for by Statute or left to be determined by rules and regulations framed under the statute.

I now proceed to examine *Kirk's case*[2]. Taxation by reference to "source" or "sources" of income or profits has been a special principle of Australian Legislation even from the pre-Federation days, and where business was conducted partly within and partly without a colony it was provided that taxation should be directed to that part of its income or profits of which its business connection with the colony could be predicated. In the New South Wales Land and Income-tax Act of 1895 the word "source of income" was used in order to describe acts and things done in that colony which could be regarded as leading to the "income" to be taxed. The words "arising" or "accruing" and "derived" were employed to refer to the relationship of the income sought to be taxed to the "sources" of the business in New South Wales. The New South Wales Act designated as a "source" the operations or transactions taking place within the colony which resulted in the receipt of income either within or without the colony. It is in this background that the decision in *Kirk's case*[2], has to be understood. I am examining this case at some length because it has been strongly relied upon by Courts in this country especially by the Full Bench of this Court in *Mathia's case*[3]. In the Australian cases the profits in question were derived from the business of mining in leasehold lands held from the Crown in New South Wales. It was held that the process resulting in the profits consisted of four parts: (1) extraction of ore from soil; (2) conversion of the crude ore into a merchantable state; (3) sale of the merchantable product; and (4) the receipt of the monies arising from the sale. It was further held that as the first two processes took place in New South Wales the profits were "derived from lands of the Crown held under lease from the Crown" within the meaning of section 15 (3) or accrued or arose "from any kind of property or other source whatsoever" in New South Wales within the meaning of section 15 (4) of the New

1. (1946) 14 I.T.R. 417.
2. (1900) A.C. 588.
3. (1937) 2 M.L.J. 310 : I.L.R. (1938) Mad. 25 (F.B.).

South Wales Land and Income-tax Assessment Act, 1895. Though there was no provision for apportionment in the New South Wales Act of 1895 the Judicial Committee on a construction of section 15 of the Act came to the following conclusions: The business operations numbered as (1) and (2) above established the existence of a source within the colony; these initial stages should not be left out of account and attention should not be fastened on the final stage of sale in the production of income; it was erroneous to suppose that the income was not earned in the colony because the finished products were sold outside the colony; some portion of the income was earned in the colony although the sales of the products took place outside; and that portion had to be fixed having regard to the relative importance of the profit earning operations carried on in New South Wales. The Indian Income-tax Act, however, does not regard the source from which income is derived as the criterion of assessability but the place where the income accrues or arises or is deemed to accrue or arise. The place where income accrues or arises need not necessarily be the place where the source from which it accrues or arises is situated as pointed out by the Judicial Committee in *Chunilal Mehta's case*[1].

In *The Saskatchewan case*[2], agricultural implements manufactured by a limited company in Ontario were partly sold in Saskatchewan where the profits were sought to be assessed and income-tax levied on the company. Under section 21 (*a*) of the Income-tax Act, 1932, of Saskatchewan, the net profits of an assessee from his or its "business in Saskatchewan" was liable to tax. In making the assessment the Commissioner acting under Regulation II made under section 7 (4) of the Act computed the net income of the assessee everywhere and then fixed the "assessee's income applicable to Saskatchewan" by applying the percentage specified in the Regulation. The assessee objected to this method of computation of profits on the ground that the Commissioner thereby taxed a percentage of the assessee's "manufacturing profits all of which were earned outside Saskatchewan". It was held by the Judicial Committee that so much of the profits as might fairly be attributed to the manufacturing operations outside Saskatchewan, referred to as "the manufacturing profits" did not arise "from the business of the assessee in Saskatchewan" within the meaning of section 21 (*a*) of the Act and should be excluded in computing the income of the assessee liable to tax under that section. The Judicial Committee observed that the phrase "manufacturing profit" was inaccurate in the sense that no company made an actual profit merely by manufacturing goods and that the profit did not come into the company's hands until the goods were sold. If an article is sold at a profit by a company which has manufactured it through its own selling organisation, there are two stages in the production of the net profits, (1) the manufacture of the article, and (2) the sale of the article, and a part of the net profit might be attributed to each stage, the part attributed to the earlier stage being described as a "manufacturing profit". The several provisions of the Colonial Statute and the Regulations framed thereunder for apportionment of profits set out in the judgment of the Judicial Committee show that only the profits arising from the business in Saskatchewan and not the profits arising from the company's business carried on in Saskatchewan and elswhere, or received in Saskatchewan were taxable. The Judicial Committee concluded their observations as follows:

"Their Lordships think that if section 21 (*a*) is construed as excluding from taxation 'a manufacturing profit' earned outside the province, effect is given to the general scheme set out in the Act. Further this construction seems to their Lordships to result in a fair and reasonable scheme of taxation in accordance with that comity which naturally prevails between one province and another."

This decision cannot govern the interpretation of sections 4 and 4-A (*c*) (*b*) of our Act whose scheme and language are wholly different. There may be practical difficulties in working out the principle suggested by the assessee. The manufacturing profit may accrue or arise in one year and the selling profit in another year when sales are effected. Are they to be apportioned in different years, and if so, on what basis?

1. (1938) L.R. 65 I.A. 332: I.L.R. 1938 Bom. 752 (P.C.).
2. (1949) A.C. 36.

It is true that two income-tax investigation committees which functioned in this country recommended a change in the law on the lines of the Canadian and Australian enactments. It may be that a more equitable system of taxation should proceed on the lines suggested by Ayer's Committee and Sir S. Varadachari's Committee, but it is a matter for the Legislature and not for us. The Legislature could have, but has not said, in section 4 that profits accruing or arising or received from sources located or situated in British India or from business operations carried on and conducted in any place in British India, shall alone be taxable. Nor is there any provision for apportionment of profits under section 4 similar to that contained in section 42 (3) in respect of income, gains and profits accruing or arising in British India or received in British India.

I may now briefly refer to the Indian decisions cited on behalf of the assessee. In the *Steel Bros. case*[1], a limited company registered in London carried on large business operations in Burma which was then a part of British India. The company exported raw materials purchased in Burma and worked up in its factories as well as commodities purchased in Burma without being subjected to any process of manufacture, to London where the goods were sold. The question arose whether the profits made as a result of the sales effected in London of commodities purchased here and exported in the same state to London could be taxed. It was held by the Rangoon High Court relying on *Kirk's case*[2], that in determining whether any profits and gains accrued or arose in British India it was not only the last stage or accrual that had to be looked to, but the previous stages as well and the fact that the sales took place in London and the price was realised there, did not prevent the profits accruing or arising or from being deemed to accrue or arise in British India. It was held that the provisions of section 42 of the Income-tax Act were wide enough to bring the profits into the net of Indian income-tax even if section 4 did not catch them. The Court went further and held that in arriving at the amount of profits liable to income-tax a reasonable agent's commission should be deducted in respect of goods exported to and sold in London. In calculating the net profits due deductions in respect of the London establishment were claimed and allowed but in addition thereto a sum representing the selling agent's commission was also held exempt from tax. Evidently the business profits were apportioned between Burma and London and the selling agency commission represented the profits attributable to that part of the trading operations consisting of sales in London. It is difficult to support this part of the judgment especially when it is remembered that at the time the case was decided there was not even a provision corresponding to section 42 (3) of the Act. Further it has to be borne in mind that in cases decided before the decision of the Privy Council in *Chunilal Mehta's case*[3] English decisions given on the language of the English Income-tax Act levying a charge on profits and gains accruing or arising from the exercise of a trade, were accepted as governing the interpretation of the Indian enactment and sufficient attention was not paid to the place where income, profits and gains accrued or arose which, as pointed out by the Judicial Committee, is the crucial matter for consideration under our Act. In *Mathiah's case*[4], Varadachariar, J., delivering the judgment of the Full Bench observed :

> "Whatever may be said as to 'profits or gains' the view that 'income from agriculture' can be said to arise or accrue only when and where the produce is sold and converted into money seems to us difficult to reconcile with the reasoning in *Kirk's case*[2]."

This Court held that income from a coffee estate situated in Mysore accrued or arose in Mysore where the coffee beans were collected and delivered though the place of sale and receipt of the sale proceeds was in British India. The agricultural produce of one's own estate was held to constitute "income" unlike goods which are bought for sale, whether subjected to a manufacturing process or not, in which case the profits and gains would arise only on a sale of the goods. This Court

1. (1925) I.L.R. 3 Rang. 614 (F.B.).
2. (1900) A.C. 588.
3. (1938) L.R. 65 I.A. 332 : I.L.R. (1938) Bom. 752 (P.C.).
4. (1937) 2 M.L.J. 310 : I.L.R. (1938) Mad. 25 (F.B.).

dissented from the *Mohanpur Tea Co's case*[1], which held that even in the case of agricultural produce "income, profits and gains" would accrue or arise only on the sale of the produce in the market. Though the judgment of this Court was reversed by the Privy Council in *Mathias case*[2], the Judicial Committee expressly avoided resolving the conflict between the views of this Court and the Calcutta High Court.

I may now refer to a recent decision of the Bombay High Court in *Ahmed Umarbhai's case*[3], which arose under proviso 3 of section 5 of the Excess Profits Tax Act (XV of 1940) running in these terms:

> "Where the profits of a part of a business accrue or arise in an Indian State, such part shall for the purpose of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in an Indian State and the other part of the business shall, for the purposes of this Act be deemed to be a separate business."

The Excess Profits Tax Act treats all the separate businesses of the same person as one business while the Income-tax Act recognises them as different. In interpreting the expression "a part of a business" in the proviso above cited, the Court held that the production and manufacture of oil in a Native State and the sale of the oil in British India, were different parts of the business and the profits realised by the sales in British India should be apportioned between the two different parts of the business and an appropriate part should be allotted as the manufacturing profits of the business in the Native State. The following passage in the judgment of Chagla, C.J., deals with the principle in these terms:

> "It is true that both these parts constitute one business but profits do accrue and arise as far as manufacture of oil is concerned and profits also arise and accrue as far as the sale of oil is concerned. It is impossible to say that at the stage where the manufacture of oil is completed no profits would have accrued or arisen in respect of that business. A man who just sells oil may buy it in the market and the profits that may accrue to him would be the difference between the selling price and the cost price; but if he were to get the goods direct from the factory then the position would be different. More profits undoubtedly would accrue to him and it could not be stated that all these profits accrue only with regard to the sale of that particular commodity. A part of the profits must accrue or arise with regard to the manufacture of that particular article."

These observations are no doubt of a general nature and are not confined to the apportionment of profits under the Excess Profits Tax Act. The learned Chief Justice relied upon *Kirk's case*[4] and *Mathias case*[2] for the conclusion that the profits of one continuous process of manufacture and sale should be considered to arise in part at the place of manufacture and in part at the place of sale and not entirely at the place of sale. The learned Judges also dissented from the *Mohanpur Tea Co's case*[1] and the *Hira Mill's case*[5]. This decision, however, is not a direct authority on the interpretation of section 4 (1) (c) and 4-A (c) (b) of the Income-tax Act though the principle enunciated by the Bombay High Court is general and might be extended to the interpretation of these provisions as well.

Though the matter is not free from difficulty I have come to the conclusion that the process of manufacture, while it may increase the value of the raw product, does not in itself produce a profit. Profits are realised only on sale and at the time and place of sale. The expression "manufacturing profits" referred to in the decisions refers only to a notional apportionment of the profits resulting from sale of goods between the two stages of manufacture and sale, an apportionment which is recognised in cases falling within section 42 of the Act but not by section 4 or 4-A (c) (b) of the Act. Income-tax is not like an excise duty levied upon a manufacturer or producer in respect of the commodity produced or manufactured. It is not a tax on goods or even on the sale proceeds of goods like a sales tax (*Governor-General in Council* v. *Province of Madras*[6].) It is a tax upon profits which arise only on sales. Profits on coming into existence attract tax at that point. (*The Pondicherry Railway Co.'s case*[7].)

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1. I.L.R. (1937) 2 Cal. 201.
2. (1937) 2 M.L.J. 310 : I.L.R. (1938) Mad. 25 at pages 28-29.
3. A.I.R. 1948 Bom. 425.
4. (1900) A.C. 588.
5. (1946) 14 I.T.R. 417.
6. (1945) 1 M.L.J. 225 at 228 : L.R. 72 I.A. 91 (P.C.).
7. (1931) 61 M.L.J. 251 : L.R. 58 I.A. 239 : I.L.R. 54 M. 691 (P.C.).

For these reasons I would answer the question referred to us in the affirmative and hold that the profits made by the assessee on sales which took place in British India constituted " income arising in British India " within the meaning of section 4-A (*c*) (*b*) of the Income-tax Act. I agree in the direction for costs given by my learned brother both in Referred Case No. 57 and in Referred Case, No. 59 of 1946.

K.S. ——— *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

The Anglo-French Textile Co., Ltd., by Agents Messrs. Best and Co., Ltd., Madras .. *Applicant* *

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 42 (1) and (3)—Scope—Non-resident purchasing raw materials through agent in British India—When liable to income-tax—Right to apportionment of profits due to such purchases.

Where there is a regular agency established in British India by a non-resident company for the purchase of the entire raw materials required for the purpose of manufacture abroad and the agent is chosen by reason of his skill, reputation and experience in the line of trade it can be held that there is a " business connection " in British India. Section 42 of the Indian Income-tax Act has the effect of rendering persons liable to tax on profits which do not accrue or arise or are not received in British India but which are deemed to be such profits by virtue of that section. The language of section 42 (3) is wide enough to include systematic and regular purchases of raw materials through an established agency in British India by a foreign company and this would be within the import of the term " operation." The income profits or gains accruing or arising to the foreign company abroad must be attributable in some measure, to the " business connection " in British India. The profits, however, which are liable to Indian Income-tax must be apportioned in the manner prescribed by section 42 (3) of the Income-tax Act.

(Case-law reviewed).

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act 1939 (Act VII of 1939) in 66 R.A. 126 (Madras) of 1946-47 on its file for decision.

O. T. G. Nambiar for Messrs. King and Partridge for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The following two questions have been referred to us for decision.

(1) Whether in the circumstances of this case, the assessee company had any business connection in British India within the meaning of section 42 (1) of the Act?

(2) Whether any profits could reasonably be attributed to the purchase of entire cotton made in British India by the Secretaries and Agents of the Assessee Company, within the meaning of sections 42 (1) and 42 (3) of the Income-tax Act?

The facts which have given rise to this reference are these : the Anglo French Textile Company, Limited, a public Limited Company incorporated in the United Kingdom, owns a spinning and weaving mill located at Pondicherry in French India. The mill manufactures yarn and cloth at Pondicherry. The year of account for the company is the calendar year. In the year 1939 no sales of yarn or cloth manufactured by the company were effected in British India, though in the previous years, such sales were effected. It is, however, common ground that all the purchases of cotton required for the mills were made in British India, by Messrs. Best and Co., Limited, a company having its head office in Madras. Under an agreement between the Anglo French Textile Company, Limited. and

* Referred Case No. 27 of 1947. 18th January, 1950.

Messrs Best & Co., Best & Co. were constituted the agents of the Anglo French Textile Company, Limited for the purposes of its business in India. Messrs. Best & Co., hereinafter called the Agents, have under the terms of the agreement constituting the agency full powers in connection with the business of the company in the matter of purchasing stock, signing bills and other negotiable instruments and receipts and settling, compounding or compromising any claim by or against the company. The agents were empowered to do all things conducive to and necessary in the interests of the said business or the carrying on of the same. The agents were empowered to borrow money on behalf of the company and to make advances to the company upon such security and upon such terms and conditions as the agents considered advisable. The agents were also expected to secure the best commissions, brokerages, rebates, discounts and other allowances in respect of or in connection with the business of the company. The agents were enjoined to keep proper accounts of the company and to pay over to the company the sums standing to the credit of the company. The agents were remunerated by a salary of Rs. 6,500 per month and a percentage commission on the profits made, the percentage varying with the amount of the profits earned. Now it is common ground that all the purchases of cotton required for the mills at Pondicherry were made by the Agents in British India and no purchases were made through any other agency. The agents exercised their judgment and purchased such qualities and quantities of cotton and at such prices as they in their experience, considered most advantageous in the interests of the Company.

Prior to 1939-40 the company was assessed to Income-tax in British India on the profits earned by the sales of the goods manufactured by the company effected in British India. The income was computed on a turnover basis. In the course of the assessment for the year 1939-40 the company stated that it discontinued its business in British India with effect from 1st April, 1939 and claimed relief under section 25 (3). The relief claimed was granted. But the Income-tax Officer in the course of his further enquiries found that though the company was not selling its goods in British India and earning a profit thereby, it continued to have an active business connection in British India having regard to the way in which the business of purchasing goods and materials for the mills was carried on. The Income-tax Officer held that there was a business connection in British India and that a part of the profits earned by the foreign company as a result of such business connection was assessable to tax under sections 42 (1) and 42 (3) of the Income-tax Act. The net income of the company was computed to be Rs. 2,81,176 and 10 per cent. of this sum was apportioned under section 42 (3) of the Act, as being the profits and gains reasonably attributable to that part of the business operations carried out in British India. The company appealed against this assessment but the Appellate Assistant Commissioner upheld the order of the Income-tax Officer. A further appeal to the Appellate Tribunal was also unsuccessful. Hence the present reference.

It is argued on behalf of the company that a mere purchase of raw materials or goods in British India does not result in the accrual or arising of profits; that the profits on the sale of goods arise and accrue only at the place where the sales are effected, and that in the present case there being no sales effected in British India in the year of account 1939 no profits accrued or arose to the company in British India nor would any profits be deemed to have accrued or arisen in British India. It is contended that section 42 (1) has no application to the case of non-residents purchasing goods in British India and selling them abroad. It is further argued that section 42 (3) has no application to a case where no portion of the profits and gains has accrued or arisen in British India and that the question of apportionment under section 42 (3) is relevant only in cases where you can predicate that the profits or a portion of the profits has accrued or arisen in British India. The learned counsel relied in support of his contentions on the decisions of this Court in the *Madras Export Company's case*[1] and *Sudalaimani Nadar, case*[2], of the Lahore

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1. (1922) 44 M.L.J. 290 : I.L.R. 46 Mad. 360. 2. (1941) 1 M.L.J. 99 : (1940) I.T.R. 619.

High Court in *Jivan Das's case*[1] and of the Bombay High Court in *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Co., Ltd.*[2] which was taken up on appeal to the Privy Council in *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Co.*[3]. We have considered the scope and effect of sections 42 (1) and 42 (3) in our judgments in Referred Case Nos. 57 and 59 of 1946[4] both with reference to the legislative history of these provisions and the decisions that have been rendered on the language of section 42 (1) and the corresponding section 33 (1) of the Income-tax Act of 1918. It is unnecessary to repeat here the considerations which led us to the opinion that section 42 (1) and 42 (3) would be applicable to cases like the present. Suffice it to say that an isolated transaction between a non-resident and a resident in British India without any course of dealings such as might fairly be described as a business connection, does not attract the operation of section 42. To constitute a business connection some continuity of relationship between the person in British India who helps to make the profits and the person outside British India who receives or realises the profits is requisite. There is no definition of the words ' business connection ' and its import is only to be gathered from the context as well as the previous decisions on this topic. It may be that where all that is known is that a few transactions of purchases of raw materials have taken place in British India and the manufacture and sale of goods have taken place outside British India, the profits arising from such sale cannot be considered to have arisen out of a business connection in British India. Where, however, as in this case there is a regular agency established in British India for the purchase of the entire raw materials required for the purpose of manufacture abroad and the agent is chosen by reason of his skill, reputation and experience in the line of trade it can be held that there is a business connection in British India. This has been the view taken in the decisions in *Rogers Pyatt Shellac Company's case*[5] and *Steel Brothers Company case*[6]. Section 42 proceeds on the basis that where there is such a business connection the operations carried on in British India have given added value to things which are manufactured and marketed abroad and such additional value is embedded in the marketable goods and takes shape when the sale of these goods are effected abroad. It can no longer now be maintained that section 42 of the Act is a mere machinery section. It has the effect of rendering a person liable to tax on profits which do not accrue or arise or are not received in British India but which are deemed to be such profits by virtue of the section. This view receives support from the decision of the Privy Council in *The National Mutual Life Association of Australasia's case*[7] and of the Allahabad High Court in *The Hira Mills case*[8].

The Legislature, having regard to the fact that only a part of the operations which eventually result in the realisation of profits is carried on in British India, has directed an apportionment of the profits so as to render liable to Indian Income-tax only that portion of the profits that can reasonably be attributed to the business operations that are carried on in British India. We are unable to accede to the argument of Mr. O. T. G. Nambiar, the learned counsel for the assessee that the operation contemplated under section 42 clause (3) of the Act must be an operation which by itself and without reference to other connected activities is capable of producing a profit or must result in the realisation of a profit. According to the contention of the learned counsel an operation in section 42, clause (3) means a completed operation and not merely an activity which is part of or in the course of a business, such as buying commodities for manufacture or sale. We are unable to accept the contention that the word ' operation ' in section 42 (3) connotes a cross-section of the entire business of the assessee including the purchase, manufacture and sale of goods resulting in the realisation of profits. The language of section 42, clause (3) is wide enough to include systematic and regular purchases of raw materials through an established agency in British India and this would be

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1. (1929) I.L.R. 10 Lah. 657.
2. A.I.R. 1946 Bom. 185.
3. (1949) 1 M.L.J. 149 : L.R. 76 I.A. 1 : 1949 I.T.R. 125.
4. (1950) 2 M.L.J. 777.
5. (1924) I.L.R. 52 Cal. 1.
6. (1925) I.L.R. 3 Rang. 614.
7. (1935) 70 M.L.J. 412 : L.R. 63 I.A. 99 : I.L.R. 60 Bom. 248 (P.C.).
8. (1946) 14 I.T.R. 417.

within the import of the term 'operation'. It follows from what we have said that in this case the assessee which is a foreign company had a business connection in British India by means of a regular agency and that the income, profits and gains accruing or arising to the assessee abroad must be attributable in some measure, to its business connection in British India. The profits, however, which are liable to Indian income-tax must be apportioned in the manner prescribed by section 42, clauses 3 (3) of the Act. Of the decisions cited by the learned counsel for the appellant the observations in *Jiwandas' case*[1] and *Sudalaimani Nadar's case*[2] do not support his contention because in those cases there was no regular agency established in British India for carrying out the transaction of purchase of goods which were exported abroad. We have expressed the view in our judgments in Referred Cases Nos. 57 and 59 of 1946[3] that the observations of Schwabe, C.J., in *Madras Export Company's case*[4], could no longer be considered to be a correct exposition of the scope and effect of section 33 (1) of the Income-tax Act of 1918. The decision of the Bombay High Court in *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Co., Ltd.*[5], has no relevancy because there the assessee was a resident of British India and the question related to the assessment of interest on foreign securities held by the assessee but not brought into British India. The learned Judges of the Bombay High Court held that the third proviso to section 4 (1) (*c*) of the Income-tax Act applied to the case. Incidentally the learned Judges expressed the opinion that section 42 (1) of the Income-tax Act had no application to the case of residents. When the matter went up on appeal to the Judicial Committee in *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Co., Ltd.*[6], their Lordships reversed the judgment of the High Court on the ground that the third proviso to section 4 (1) (*c*) had no application to the case because the income of the Insurance Company had to be computed on an artificial basis prescribed by rule 2 of the rules framed for the assessment of the Income of insurance companies and therefore no question of deduction in respect of the sum of Rs. 4,500 allowed by section 4 (1) (*c*), third proviso, arose in the case. On the question whether section 42 (1) applied to residents or whether it was confined in its application to non-residents as held by the learned Judges of the Bombay High Court, the Judicial Committee expressly reserved their opinion. The Bombay case has therefore no bearing on the present question. For these reasons we answer the first question referred to us in the affirmative and against the assessee. It follows from our answer to the first question that a portion of the profits, that is to say, such portion as the Income-tax officer thinks just and reasonable in the circumstances of the case, is attributable to the purchase of cotton made in British India by the agents of the assessee and such profits could be apportioned under section 42 (3) of the Act. The second question also is answered in the affirmative and against the assessee. The assessee having failed will pay the Commissioner of Income-tax his costs which we fix at Rs. 250.

K.S. ———— *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

The Anglo French Textile Co., Ltd., by Agents, Best & Co., Ltd., Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 4 (1), 4-A (c) (b) and 42 (1) and (3)—Scope and applicability—Foreign company selling goods manufactured by it abroad in British India—If makes company resident in British India—Computation of profits.

1. (1929) I.L.R. 10 Lah. 657.
2. (1941) 1 M.L.J. 99: (1940) I.L.R. 619.
3. (1950) 2 M.L.J. 777.
4. (1922) 44 M.L.J. 290: I.L.R. 46 Mad. 360.
5. (1945) 13 I.T.R. 405: A.I.R. 1946 Bom. 185.
6. (1949) 1 M.L.J. 149: L.R. 76 I.A. 1: (1949) 17 I.T.R. 125 (P.C.).

* Case Referred No. 25 of 1947. 18th January, 1950.

Sections 4 (1) and 4-A (c) (b) of the Indian Income-tax Act are not *ultra vires* the Indian Legislature. Section 42 (1) and (3) of the Act have no application to the computation of income accruing or arising to a foreign company in British India for the purposes of section 4-A (c) (b) even if the manufacturing process of the goods which were sold in British India took place outside British India. The entire profits and gains arising to the foreign company in British India should be taken into account for the purpose of applying the test laid down in section 4-A (c) (b), and not merely that part of the profits which could be attributed to the operations carried on in British India.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. Nos. 140 and 141 (Madras) of 1946-47 on its file.

O. T. G. Nambiar for *Messrs. King and Partridge*, for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The questions that have been referred to us are three in number. It is however conceded by the learned counsel for the assessee that the third question has been answered against the assessee by the decisions of the Federal Court and the Judicial Committee, which are binding upon us. We therefore answer the third question referred to us by stating that the provisions of section 4 (1) and section 4-A (c) (b) of the Income-tax Act are not *ultra vires* the Indian Legislature.

The other two questions which remain to be considered by us are these :

"(1) Whether on the facts and in the circumstances of the case section 42 (1) and (3) of the Act alone and not section 4 of the Act have application to the income accruing or arising by reason of sales in British India of manufactured goods where the manufacturing process took place outside British India."

The question as here stated has been the result of an agreed amendment of the question originally framed by the Appellate Tribunal, both the learned counsel for the revenue authority and the assessee having stated that the question may be raised in the form in which we have stated it above.

"(2) Whether on the acts and in the circumstances of the case the entire profits and gains arising to the assessee company in British India should be taken into account for the purpose of applying the test laid down under section 4-A (c) (b) or only that part of the profits which could be determined after the application of section 42 (3) of the Act as reasonably attributable to that part of the operations carried on in British India."

The facts relevant to this reference have mostly been stated in our judgment in R.C. No. 27 of 1947[1]. The additional facts that have to be considered in connection with the present reference are these. The assessee concedes that all contracts with reference to the sales of goods manufactured in Pondicherry were entered into in British India. The deliveries of goods were effected and the price was received in British India. Even in respect of the sales effected abroad it is stated in the statement of the facts sent by the Tribunal that the profits were received in British India. This is a finding of fact which we have to accept for the purposes of this reference. We have already stated that the entire cotton for the mills was purchased in British India through the agent of the assessee. On these facts the Income-tax Officer found that the assessee was a resident company in British India within the meaning of section 4-A (c) (b) by reason of its income arising in British India in the year of account exceeding its income arising without British India. On that basis he assessed the company for the two assessment years 1942-43, as a resident in British India on the profits and gain which had accrued to the company both within and without British India under section 4 (1) (b) (i) and (ii) of the Act. The assessment was confirmed on appeal and by the Appellate Tribunal. Hence the present reference.

The contention of Mr. O. T. G. Nambiar, the learned counsel for the assessee, is that the company is a non-resident company and the profits that have accrued or arisen to the company in British India must be determined by the process of

1. (1950) 2 M.L.J. 798.

apportionment prescribed by section 42 (3) of the Income-tax Act, the profits attributable to the manufacturing operations carried on outside British India must be excluded from the computation of the profits and gains accruing or arising in British India from the sales effected here. In our judgment in R.C. Nos. 57 and 59 of 1946[1] we have considered this question with reference to the language of sections 4 (1) (*b*) (i) and (ii), 4-A (*c*) (*b*) and 42 (1) and (3) of the Income-Tax Act and the decisions of the Indian Courts with reference to the construction of these provisions. It is unnecessary to repeat here the reasons which we have given in that judgment for reaching the conclusion that for the purpose of ascertainment whether a company is resident within the meaning of section 4-A (*c*) (*b*) of the Act the entire income accruing or arising in British India to the company should be taken into account and not merely a portion of the income apportioned under section 42 (3). The sales of the goods having been effected in British India the profits arising by reason of such sales accrued or arose in British India and no portion of such profits can be left out of account on the ground that that portion represents the profits attributable to manufacturing operations carried on outside British India. Section 42 (3) which allows an apportionment of profits, where the profits are the result of operations, some of which are carried on in British India and some outside, is made applicable only to cases where the profits and gains of a business are "deemed" under this section to accrue or arise in British India. In other words section 42 (3) of the Act applies only where section 42 (1) of the Act would apply. Under section 4-A (*c*) (*b*) it is the income arising in British India that has to be taken into account and profits and gains which are deemed to accrue or arise in British India do not enter into the computation. Therefore section 42 (1) and (3) do not override the provisions of section 4-A (*c*) (*b*) of the Act and for the purposes of the latter section, we have only to take into account profits, arising in British India in the year of account without recourse to section 42 (1) and (3). If on such a computation of profits and gains, the conclusion is reached that the company is a resident within the meaning of section 4-A (*c*) (*b*), then the provisions of section 4 (1) (*b*) are attracted, with the result that the income, profits and gains accruing or arising to the resident either within or without British India are brought into charge. There is no question here of any apportionment under section 42 (1) and (3).

For these reasons our answer to the first of the questions referred to us is that section 42 (1) and (3) of the Act have no application to the computation of income accruing or arising to the company in British India for the purposes of section 4-A (*c*) (*b*) even if the manufacturing process of the goods which were sold in British India took place outside British India.

The answer to the second question is that the entire profits and gains arising to the company in British India should be taken into account for the purpose of applying the test laid down in section 4-A (*c*) (*b*), and not merely that part of the profits which could be attributed to the operations carried on in British India. In other words, section 42 (3) of the Act has no application to the computation of profits under section 4-A (*c*) (*b*).

All the three questions having been answered against the assessee, the Commissioner of Income-tax would be entitled to the costs of this reference which we fix at Rs. 250.

K.S. *Reference answered against the assessee.*

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1. (1950) 2 M.L.J. 777.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

A. P. Abdul Lazeez .. *Petitioner* *

v.

Kandoth Pakker and others .. *Respondents.*

Muhammadan Law—Wakf—Muthavalli in management though not a validly constituted muthavalli—Application for appointment of a muthavalli —Maintainability.

A District Court has no jurisdiction to appoint a muthavalli to a wakf in an application where there is already one in *de facto* management thereof even though without colour of title. Such a relief can be asked only in a suit under section 92, Civil Procedure Code.

S. Salihuddin v. *S. Mohiuddin*, (1947) I.L.R. 26 Pat. 531, *Mohammad Yusuf* v. *Mohammad Ayub*, A.I.R 1938 Pat. 537 and *Nawab Mirza Abdul Hasan Khan* v. *Hakim Mirza Jafar Husain*, (1937) I.L.R. 12 Luck. 323 followed.

Petition under section 115 of Act V of 1908, praying, that the High Court will be pleased to revise the order of the District Court, South Malabar, dated 18th September, 1948, in O.P. No. 10 of 1947.

G. Ramakrishna Aiyar and *P. Narayanaswami* for Petitioner.

N. Sundara Aiyar and *I. Govinda Menoki* for Respondents.

The Court delivered the following

JUDGMENT.—The question that arises for determination in this case is whether an application filed for the appointment of a Muthavalli when there is already one in management of the wakf though not a validly constituted muthavalli is sustainable. This question was answered against the petitioner by the District Judge of South Malabar.

For a proper understanding of the contentions raised on either side, it is useful to set out briefly a few facts. One K. P. Mohammad created a wakf by a document dated 19th May 1935 dedicating a house, a shop and a paramba in Ponnani, South Malabar district, the object of the wakf being feeding of the poor and other charitable functions like the chanting of Katham etc. on the anniversary day of the founder's father's death. Under the deed he constituted himself as the first Muthavalli and appointed his mother to succeed him as muthavalli in case she survived him and directed that thereafter his daughter who was then a minor should become the muthavalli with his wife as her guardian. It was also provided in the deed that after the death of his existing daughter the female children that may be born to him in future in the order of seniority from time to time should become the muthavalli. Sometime after the creation of the wakf the founder died and his mother succeeded him as muthavalli and continued in that office till her death in 1944. It may be mentioned here that the founder's minor daughter predeceased his mother. Subsequent to the death of the founder's mother, her sister who is the second respondent herein assumed the management of the trust and has been continuing ever since as such. It must be mentioned here that the founder did not provide under the deed for any mode of appointment of muthavalli or for any other line of succession.

In January 1947, the petitioner herein who is the nephew of the late K. P. Mohammad filed an application for the appointment of a muthavalli alleging that on the death of the founder's mother, the line of succession to the office of muthavalli has become extinct and therefore a vacancy in the office of muthavalli had arisen. To that application he impleaded the second respondent, the sister of the founder's mother, the second respondent's brother who is the first respondent herein, and also the founder's wife's brothers and sisters. The application was opposed mainly by the second respondent who is also the contesting respondent herein, *inter alia* on the ground that a mere application for the appointment of a

*C. R. P. No. 283 of 1949. 24th August, 1950.

muthavalli does not lie and that the proper remedy is a suit. She put forward the contention that she was in management of the wakf

"agreeably to the presumed intention of the founder and to the wishes of the relations of the founder and others interested in the wakf"

and has been functioning as such ever since, and as she has been administering the wakf property as prescribed by the founder, she could not be removed in an application. The learned District Judge who heard the petition rejected it holding that it is barred by section 92, Civil Procedure Code and that it was not competent for the Court to entertain this summary application.

In this petition what is urged by Mr. Ramakrishna Aiyar the learned counsel for the petitioner is that the Court erred in assuming that it had no jurisdiction to entertain this application merely because there was some person in office without any colour of title putting forward a right to continue in possession thereof. According to him the existence of such a person in office did not make any difference for the decision of the question whether there was a vacancy in the office of muthavalli or not and by virtue of the fact that the person who was in office was one without any colour of title, the lower Court must have proceeded on the assumption that there was a vacancy in the office of muthavalli. In support of his contention that such a matter can be agitated in a mere application and that a suit under section 92, Civil Procedure Code is not the only remedy a passage in Mulla's Principles of Mahomedan Law, 12th Edition, at page 180 in the following words was cited ;

"Where there is a vacancy in the office of muthavalli, and there is no question of removing an existing trustee, the vacancy may be filled up by an application to the Court. It is not necessary to bring a suit under section 92, Civil Procedure Code ; but before making the appointment the Court should issue notices to all persons interested."

This statement of law has been accepted in *Abdul Alim Abed* v. *Abir Jan Bibi*[1] and in several other decisions ; see *Muhammad Ali Khan* v. *Ahmed Ali Khan*[2] and *Mohamed Bhai* v. *Wasibi*[3]. This position is not disputed by the respondent's counsel. So it is unnecessary for me to labour this point any further.

The next question that has to be considered by me is whether in a case where there is already a muthavalli in office, whether he be a *de jure* or *de facto* muthavalli, an applicant could avail himself of a remedy by an application.

It was urged for the petitioner that a vacancy must be held to have occurred when the line of succession to the office of muthavalli has become extinct, despite the fact that there was some person in *de facto* management of the trust and in support of this contention he placed reliance on *Bibi Zohra* v. *Bibi Habibunnessa*[4]. In that case what happened was that on the death of the last muthavalli, an application was made for the appointement of a muthavalli on the ground that there was a vacancy in the office of muthavalli. This application was resisted by one Bibi Zohra claiming to be in actual charge of the trust property. It was found that Bibi Zohra had not really assumed the office of muthavalli because the interval between the death of Zaibunnissa, the last muthavalli, and the date on which an application was made by Bibi Zohra for substitution of her name in the proceedings started under Act XIV of 1920, was very short, being only five days, and there was thus a vacancy in the office of Muthavalli. So this case is not an authority for the proposition advanced by the counsel for the petitioner. On the other hand a passage occurring at page 12 of the report contains an answer to the contention put forward on behalf of the petitioner. After referring to the decision in *Abdul Alim Abed* v. *Abir Jan Bibi*[1], with approval the learned Judges state as follows :—

"It was further held that sub-clauses (*a*) and (*b*) of clause (1) of section 92, Civil Procedure Code are correlative and not disjunctive ; that is to say, the power to appoint a new trustee given by the section is dependent on the removal of the old. In other words, it was held that when there is a vacancy and no muthavalli is otherwise available, the District Judge may appoint one on application,

1. (1928) I.L.R. 55 Cal. 1284.
2. I.L.R. 1945 All. 818.
3. I.L.R. 1946 Nag. 646.
4. (1939) I.L.R. 18 Pat. 417.

but that he cannot do so in that way if the conditions of section 92 (a section which is available for the removal of a trustee *de son tort* also) are satisfied."

These observations make it clear that it was the view of the learned Judges that when there is already a trustee whether *de jure* or *de son tort*, an application for the appointment of a muthavalli does not lie but that it can only be agitated in a suit under section 92, Civil Procedure Code and not by an application in summary proceedings. No doubt on the facts of that case, the learned Judges came to the conclusion that there was no person in actual management of the trust and as such there was a vacancy in the office of muthavalli which could be filled up. But, as already pointed out, the discussion indicates that if there was a person holding the office of muthavalli whether *de jure* or *de facto* the court has no jurisdiction to appoint a muthavalli in summary proceedings as it is hit by section 92, Civil Procedure Code. It follows that this decision does not afford any support to petitioner's contention.

The point whether a District Judge has jurisdiction to entertain an application for the appointment of a muthavalli, when there is already one in management though not validly appointed, has been considered in a number of decisions in other High Courts though it is bare of authority so far as our High Court is concerned.

In *S. Salihuddin* v. *S. Mohiuddin*[1], what happened was that the applicants claiming to be entitled to succeed to the office of muthavalli, filed an application for the removal of persons in *de facto* management of the trust and for the appointment of a receiver in their stead. The District Judge allowed the application by removing the muthavalli holding office *de facto* and appointed a Receiver. This order appointing a Receiver was called into question by the aggrieved parties in the High Court on the ground that the District Judge had no jurisdiction to make such an order in an application, section 92, of the Civil Procedure Code, being a bar to such an application. This contention was upheld by Bench of the Patna High Court which heard the appeals. While dealing with the question, the learned Judges stated that the District Judge had no jurisdiction in a summary proceeding to remove a *de facto* muthavalli from office or to interfere with his possession, though he might be no more than a trustee *de son tort* and that it was only when the property was in medio and the office had fallen vacant, the Court had power to fill up the vacancy on an application.

The next case that was cited before me by Mr. Sundara Aiyar for the respondent is *Nawab Mirza Abul Hasan Khan* v. *Hakim Mirza Jaffar Husain*[2]. In that case also the point that arose for consideration was whether the District Judge in an application could appoint a muthavalli, on the ground that there was a vacancy when actually there were two persons in *de facto* management, though not validly appointed. This was answered in the negative by the Bench of the Chief Court of Oudh at Lucknow. The following observations of the learned Judges at page 528 of the report are apposite:

"As regards the last contention there no doubt seems to be some force in it. It seems to us that it can be said that section 92, Civil Procedure Code does not show that its provisions are exhaustive or that beyond a suit of the description prescribed in that section, no other remedy is open to a person for the purposes mentioned in that section. The learned counsel for the applicants before us relies on sub-section 2 of section 92 but what that sub-section provides amounts to no more than this that a suit brought for any reliefs specified in sub-section 1 must conform with the provisions of sub-section 1. The section does not expressly bar applications like those now before us. It seems to us, however, that though this is so, section 92 of the Civil Procedure Code bars applications of the kind that are before us by necessary implication. It is hardly conceivable that when the Legislature deemed it necessary that a suit brought for the purposes mentioned in the section should be incompetent unless brought with the consent in writing of the Advocate-General, they meant to permit a mere application to be brought by a private individual without any official sanction whatever for the same purpose."

Dealing with the contention on behalf of the opposite parties that they only want their appointment as trustees of the wakf in question and do not pray for the removal of any trustee, the learned Judges observed thus:

1. (1947) I.L.R. 26 Pat. 531. 2. (1937) I.L.R. 13 Luck. 523.

"Though in their applications the opposite parties did not specifically pray for the removal of the applicants from trusteeship, yet that is really what their purpose was and what the learned Civil Judge's order has actually amounted to so far as at least one of the applicants is concerned."

In *Mohammad Yusuf* v. *Mohammad Ayub*[1], it was held that the removal of a muthavalli cannot be asked for in summary proceedings, the proper remedy being a suit for such removal. If I may say so with respect, I agree with the rule of law stated in the rulings quoted above. The principle laid down in all these cases is that the District Court has no jurisdiction to appoint a muthawalli to a wakf in an application when there is already one in *de facto* management thereof even though without any colour of title and that such a relief can be asked only in a suit under section 92, Civil Procedure Code. It follows that the order of the learned District Judge rejecting the application for the appointment of a muthawalli on the ground that section 92, Civil Procedure Code, is a bar when no vacancy has arisen is correct and ought to be confirmed. I reject this Civil Revision Petition and direct the petitioner to pay the costs of the contesting respondent.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Gurizala Vuddandam .. *Petitioner**

v.

Juluri Venkatakameswara Rao .. *Respondent.*

Transfer of Property Act (IV of 1882), section 55 (1) (f) and Contract Act (IX of 1872), section 39—Agreement to sell—Advance paid—Possession to be delivered at the time of registration—Possession not possible to be given—Rescission of contract and suit by vendee for recovery of advance—Rights of vendee to recover.

When a vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the purchaser will be entitled by virtue of section 55 (1) (*f*) of the Transfer of Property Act and section 39 of the Indian Contract Act to rescind the contract and claim the advance that has been paid by him.

Panchapakesa Ayyar v. *Arunachala Mudaliar*, (1932) M.W.N. 122, followed.

A person agreeing to purchase immoveable property paid to the owner an advance amount, the owner agreeing to receive the balance of consideration from the purchaser within two months of the contract and to deliver possession at the time of registration. But the purchaser on finding that the owner was not in a position to give him vacant possession rescinded the contract and sued for the refund of the advance paid setting up an agreement to deliver vacant possession.

Held : That the fact the vendee did not prove the alleged subsequent agreement, would not be a ground for the dismissal of the suit by the purchaser for the recovery of the sum paid by him as advance.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Guntur, in S. C. S. No. 207 of 1947.

V. Rangachari for Petitioner.

B. V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition arises out of the judgment of the learned Subordinate Judge of Guntur in a suit filed by the plaintiff for the recovery of the advance paid by him to the defendant in respect of a contract of purchase of immoveable property.

The contract of purchase is vouched by Exhibit A-1. In that exhibit the parties have agreed on the 24th of July, 1947, that the defendant should sell the property to the plaintiff for a sum of Rs. 19,800, and that on that date a sum of Rs. 500 was paid by way of advance, the defendant agreeing to receive the balance of consideration of Rs. 19,300 from the plaintiff within two months from the date of the

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1. A.I.R. 1938 Pat. 537.

* C.R.P. No. 1732 of 1948. 9th August, 1950.

contract and to execute and deliver registered to the plaintiff on appropriate stamp paper a sale deed. In and by the terms of the said contract, it was further agreed that the defendant shall put the plaintiff in possession of the property under sale at the time of the registration of the document. Before the period of two months actually elapsed, *i.e.*, on the 17th of September, 1947, the plaintiff issued a notice to the defendant stating that the balance of consideration was ready and that the defendant might make arrangement for vacating the site agreed to be sold and possession may be delivered to the plaintiff. In the said notice there were also allegations to the effect that the defendant had agreed to keep the site vacant and ready for delivery after removal of the thatched houses and huts constructed on the said site. It was further alleged in that notice that on the plaintiff having approached the defendant some time before the issue of the notice in question, the defendant had told the plaintiff that it was not immediately possible for him to deliver possession of the properties, that the people who were in occupation of the huts did not appear to vacate them. To this notice a reply was sent by the defendant repudiating all the allegations contained in the said notice. Thereupon the plaintiff filed the suit to recover the advance paid by him as also the sum of Rs. 400 as and by way of damages.

In regard to the claim of damages there was no proof that the plaintiff had actually suffered any damage at all and there is no finding of the learned Subordinate Judge on that point. No question therefore arises in this Revision Petition as to whether the plaintiff was or was not entitled to any damages.

The real point that arises for consideration is, as to whether the plaintiff was entitled to rescind the contract of purchase by him of the defendant's land when he found that the defendant was not in a position to deliver vacant possession of the site contracted to be sold. It will be seen from the judgment of the learned Subordinate Judge that this point has not been adverted to at all in his judgment. On the other hand, the learned Subordinate Judge has heard evidence of two witnesses on behalf of the plaintiff and one witness on behalf of the defendant on the point as to whether there was any subsequent agreement to deliver vacant possession. The plaintiff's witnesses spoke to the fact that there was an agreement subsequent to Exhibit A, to the effect that the defendant should vacate the tenants on the land agreed to be sold and deliver vacant possession. As against this there was the evidence of D. W. 1 to the effect that the plaintiff himself had agreed to vacate the tenants and take possession. The learned Subordinate Judge did not believe the subsequent agreement set up by the plaintiff and he did not believe the evidence of the plaintiff's witnesses in that behalf. He was inclined more to believe the evidence of the defendant and believing the evidence of the defendant, which, in his opinion, was more probable, he dismissed the suit.

It has to be observed, however, that the learned Subordinate Judge has not approached the real issue in the case in the proper light. He has not devoted any attention to the import of section 55 of the Transfer of Property Act, which is to the effect that in the absence of a contract to the contrary the buyer and seller of immoveable property respectively are subject to the liabilities and rights mentioned in the rules next following, or such of them as are applicable to the properties sold. One of the rules, which is numbered as clause (1) (*f*), is that the seller is bound to give, on being so required by the buyer or such person as he directs, such possession of the property as its nature admits. This section imposes a statutory liability on the vendor to give to the buyer or such person as he directs such possession of the property as its nature admits and this liability is to be discharged by the vendor in the absence of any contract to the contrary. A perusal of the agreement entered into between the parties, namely, Exhibit A-1, would show that there has been no agreement to the contrary in this case. Exhibit A-1 merely recites that there should be possession delivered at the time of the registration of the document and that the balance of the sale price should be received simultaneously. The learned Subordinate Judge ought to have appreciated the fact that even though the specific agreement set up by the plaintiff with regard to the delivery of vacant

possession subsequent to this contract was not true and the evidence in respect thereof could not be accepted, still there was a statutory liability imposed upon the defendant to give vacant possession to the buyer. That aspect of the case has not been touched at all by the learned Subordinate Judge. On the facts, as revealed by the evidence, it is obvious that irrespective of any subsequent agreement which has been set up by the buyer, namely, the plaintiff, as against the defendant, and irrespective of the fact whether the plaintiff was able to prove or not this agreement still his right to possession of the property and, such possession as the property admits of, could not be disputed, and this obligation the defendant was in any event bound to discharge. In the present case the plaintiff has, within the time stipulated for the payment of the balance of the sale price, demanded that the defendant should arrange to deliver vacant possession and the defendant was bound to satisfy the plaintiff on that point. Instead of doing so, he made it clearly intelligible to the plaintiff that he was not in a position to deliver vacant possession. The question then arises, as to whether in the circumstances created by the defendant, the plaintiff was entitled to a rescission of the contract and ask for a refund of the amount paid to him. This is exactly what the plaintiff has done at an earlier stage before filing the suit. He has told the defendant that inasmuch as he was not in a position to deliver vacant possession, it was but proper on his part to refund the amount which he had received by way of advance. This, the defendant has not acceded to. In *Panchapakesa Aiyar* v. *Arunachala Mudaliar*[1], Madhavan Nair and Jackson, JJ., have held that if the buyer has legitimate expectation of vacant possession and if such possession is not forthcoming then the buyer is entitled to rescind the contract. On the question as to when or at what stage the non-fulfilment of that expectation of vacant possession arises to justify the rescinding of the contract, the learned Judges have held that section 55, clause (1) (*f*) of the Transfer of Property Act is silent as to when the obligation to give possession becomes enforceable and that in these buying and selling transactions it would be difficult for the law to lay down the exact point of time. They have stated further that in such cases mere suspicion that possession will not be forthcoming will not be enough and that a party cannot insist that one action shall precede another in time merely because he happens to be suspicious. They hold that if the plaintiff knows and can prove that he will not get immediate possession, that if under his contract he is entitled to immediate possession, he may, under section 39 of the Contract Act, put an end to the contract even before he has completed the purchase by paying the full consideration. They have also further said that if section 55 of the Transfer of Property Act be read as a whole, there is no warrant for taking buyer and seller to mean those who have actually completed a sale. Those in the course of the transacting a sale are also contemplated by the said section. Therefore, in the course of a transaction a buyer who can prove that a seller is disabled from performing his promise in entirety, is justified in putting an end to that contract.

On a consideration of the facts in the present case, I am of opinion that the facts in the report cited above do apply in their entirety to the present case, and the decision is good authority to hold that when the vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the purchaser will be entitled by virtue of section 55, sub-clause (1) (*f*) of the Transfer of Property Act and section 39 of the Indian Contract Act to rescind the contract and claim the advance that has been paid to him.

In this case what has been paid to the defendant is not earnest money. As per the terms of the contract, it is only advance though in the plaint the plaintiff has loosely used the word earnest money. There is, therefore, no warrant to say that it being earnest money it could be forfeited for non-performance. Again, even if this aspect of the case has not been dealt with by the learned Subordinate Judge, the fact is that according to the contract it is an advance paid to the vendor by the intending purchaser, and that amount being part and parcel of the sale price itself, cannot be retained by the defendant who has failed to give possession

1. (1932) M.W.N. 122.

of the property to the plaintiff. It may be that the defendant is entitled to sue for specific performance of the contract. But I do not want to say anything on that aspect of the case in this petition. The rights of the parties in that regard will be left open. In the circumstances, I think that the learned Subordinate Judge is not right in having dismissed the suit on the mere ground that the plaintiff did not prove the subsequent agreement which he set up in respect of the defendant having agreed to deliver vacant possession after the original agreement, Exhibit A-1 had been entered into. This Revision Petition has therefore to be allowed. The plaintiff will be entitled to recover the sum of Rs. 500 paid by him to the defendant, together with cost and interest at 6 per cent. per annum. The respondent will pay the costs of the petitioner in this petition.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Hari Rowjee Gore Sastri .. *Petitioner**

v.

The Malabar District Board, Kozhikode, by its Special Officer .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 4—Fixing of fair rent—Date from which it takes effect—Scope of jurisdiction of Rent Controller and appellate authority in such a matter.

The jurisdiction of the Rent Controller or the appellate authority being only to declare the fair rent pertaining to a building, the landlord could claim the fair rent on the basis of that order from a date to which he is entitled under the Act, *i.e.*, the date of the filing of the application for fixing of fair rent.

Subba Rao v. *Devji Govindji*, (1950) 1 M.L.J. 551, relied on.

Where the landlord applied to the Rent Controller on 20th March, 1947, for fixing of fair rent and on the Rent Controller fixing the fair rent the landlord claimed that it should take effect from the date of the coming into force of the Act, *i.e.*, on 1st October, 1946,

Held : That the order of the Rent Controller takes effect from the date on which the application was presented. Consequently the landlord will be entitled to an enhanced rent from the date of the application.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of Small Causes, Kozhikode, in S. C. S No. 138 of 1947.

K. P. Ramakrishna Aiyar for Petitioner.

The Advocate-General (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in S. C. S. No. 138 of 1947 has filed this petition in revision against the decree and judgment of the District Munsiff of Calicut. This petition arises out of a suit filed by the plaintiff for recovery of a sum of Rs. 129-8-0 being the arrears of rent at enhanced rate from 1st October, 1946, to 2nd July, 1947. The plaintiff, who is the owner of two buildings in Calicut, let them out to the District Board at a rental of Rs. 15 and Rs. 25 each. After the Madras Buildings (Lease and Rent Control) Act (XV of 1946) came into force, he claimed enhanced rent at the rate of Rs. 20 and Rs. 34 respectively from the District Board. The respondent-District Board replied that they could not of their own accord agree to pay enhanced rate, but that if he so chose, he could move the Rent Controller for fixing the fair rent. Thereupon the plaintiff filed an application before the Rent Controller for fixing fair rents at the rate claimed by him, namely, Rs. 20 and Rs. 24 from 1st October, 1946, the date on which the Act came into force. The answer given to that claim by the defendant was that they were agreeable to pay any enhanced rent that the Rent Controller might

* C.R.P. No. 1586 of 1948. 23rd August, 1950.

fix. The Rent Controller passed an order on 8th July, 1947, fixing the fair rent as claimed by the plaintiff.

Subsequent to this order, the plaintiff-petitioner called upon the respondent-District Board by notice on 6th September, 1947, to pay the rent at the enhanced rate from 1st October, 1946, to which the District Board's reply was that the plaintiff was not entitled to the enhanced rate from 1st October, 1946, but only from the date on which the order was passed by the Rent Controller fixing the fair rent. Thereupon the plaintiff filed the present suit which has given rise to this petition claiming enhanced rent from 1st October, 1946, to 8th July, 1947. The suit was contested by the District Board on the ground that the plaintiff was not entitled to enhanced rent from the date on which the Act came into force, but only from the date of the order fixing the fair rent. The trial Court, upholding the contention raised by the defendant, dismissed the suit. Hence the present Revision Petition.

In this petition it is contended by Mr. Ramakrishna Aiyar, the learned counsel for the petitioner, that the landlord is entitled to rent at the enhanced rate from the date of this petition. On the other hand, it is urged for the respondent, that the rent, fixed under the contract, should be deemed to be in force until it is varied by an order of the Court, and, therefore, the plaintiff-petitioner would be entitled to enhanced rent only from the date on which the existing rent was varied by the order of the Rent Controller. I think the contention of the petitioner must prevail.

It was laid down in C. M. P. No. 8658 of 1949 by the learned Chief Justice and Viswanatha Sastri, J., that:

> "Where the fair rent fixed under section 4 of Madras Act XV of 1946 is in excess of the rent which was being paid before such date, the landlord cannot claim the difference from any date anterior to the date of filing the application under section 4, which, in this case, was the 9th October, 1947."

(*See also* the decision in *Rajammal* v. *The Chief Judge, Court of Small Causes, Madras*).[1] The effect of these decisions is that a landlord who files an application for fixing a fair rent is entitled to an enhanced rent from the date of his filing the application under section 4 of Madras Act XV of 1946.

It was next contended by the learned counsel for the respondent that, in any event, the plaintiff cannot claim a higher rate of rent from the date anterior to 8th July, 1947, for the reason that though the plaint contained a prayer that the enhanced rent should be granted from 1st October, 1946, the order fixing the fair rent did not indicate the date from which the plaintiff was entitled to the enhanced rate and, therefore, the prayer for enhanced rent from 1st October, 1946, must be deemed to have been rejected. I find great difficulty in accepting this argument. Under section 4 of Madras Act XV of 1946, the Rent Controller could only fix the fair rent and he has no jurisdiction to fix the date from which his order could have effect. To this effect is the decision of the learned Chief Justice and Somasundaram, J., in *Subba Rao* v. *Devji Govindji*[2]. It is observed by the learned Judges that:

> "On an application under section 4 of the Act, the only jurisdiction which the appellate authority and the Rent Controller have is to fix the fair rent. What rights accrue to the landlord and the tenant is not within their province on an application under section 4."

It follows from this decision that the jurisdiction of the Rent Controller or the appellate authority being only to declare the fair rent in respect of a particular building, the landlord could claim the fair rent on the basis of that order from a date to which he is entitled under the Act, *i.e.*, from the date of his filing the application.

On the decisions referred to above, I must hold that the order of the Rent Controller takes effect from the date on which the application was presented. Consequently, plaintiff will have a decree for enhanced rent from 20th March,

1. (1949) 2 M.L.J. 555.
2. (1950) 1 M.L.J. 551.

1947, to 8th July, 1947, at the rate fixed by the Controller by his order dated 8th July, 1947. The decree of the trial Court is accordingly modified and the petition is accepted to that extent. In the circumstances of the case I make no order as to costs. Each party will bear his own costs throughout.

K.C. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Kosaraju Thirupathirayudu and others .. *Appellants**

v.

Kosaraju Venkatasubbayya and others .. *Respondents.*

Arbitration Act (X of 1940), section 5—Applicability—Further reference—One of the points in dispute settled by parties—Duty of arbitrator to take note of such settlement.

A reference was made to an arbitrator of various points in dispute between the parties and subsequently a "further reference" was made with respect to one of the points in dispute that it was settled by the parties. The arbitrator did not accept the later reference and passed an award which was set aside by the lower Court.

Held, (i) the later reference could not be treated as a revocation of the earlier one and 5 of the Arbitration Act cannot be called in aid to invalidate it.

(ii) When one of the points in dispute among the parties referred to the arbitrator is settled among themselves and brought to the notice of the arbitrator he must make a note of the same and the refusal to do so would amount to improper conduct.

Case-law discussed.

Appeals against the orders of the Court of the Additional Subordinate Judge, Tenali, dated 6th August, 1947, in O. P. Nos. 28 and 40 of 1946, respectively.

M. S. Ramachandra Rao for Appellants.

K. Kotayya, Y. G. Krishnamurthi and *G. Venkatarama Sastri* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—By an agreement, Exhibit A-1, dated 20th September, 1945, six persons referred the disputes between them to an arbitrator and in that document various points in dispute have been recited which the arbitrator had to decide and pass an award. One of the points was with regard to the cash in the possession of one of the executants by name Venkatasubbiah, who was the second executant of Exhibit A-1. Subsequently, on 7th October, 1945, there was another document styled "an agreement of further reference," Exhibit A-2 by which it was stated that if Venkatasubbiah were to pay Rs. 10,000 in the manner mentioned in that document into the hands of the arbitrator in order that the same may be paid over to the other partners in full satisfaction, he should not thereafter have any concern in respect of the profits or losses of the mill and that the others will have nothing to do with the cash balances then with him. The arbitrator, after an elaborate consideration, was of opinion that Exhibit A-2 the further document of reference, was the result of fraud, and did not act upon it. On the evidence the arbitrator found that Venkatasubbiah was liable to pay a sum of Rs. 25,000 to the other partners for the sums appropriated by him and which he had no authority to do. Thereafter, under section 33 of the Indian Arbitration Act, Venkatasubbiah filed a petition to the Subordinate Judge to set aside the award and the learned Judge has found that the arbitrator had no jurisdiction not to abide by the terms of the further agreement and held that the award was not binding upon Venkatasubbiah. This appeal is by the aggrieved parties praying that the award should be restored after the decision of the Subordinate Judge is set aside.

Mr. Ramachandra Rao for the appellants raises two points, the first of them being that under section 5 of the Indian Arbitration Act it is not open to the parties, when once an agreement of reference has been made and accepted by the arbitra-

* A.A.O. Nos. 58 and 59 of 1948. 11th July, 1950.

tor, to revoke the same except with the leave of the Court unless a contrary intention was expressed in the arbitration agreement itself. It is plain that Exhibit A-1 does not contain any such intention to revoke it. Therefore the learned advocate contends that the subsequent document Exhibit A-2 should be construed as one revoking the earlier one and as such invalid. We are not satisfied that the further terms of the reference can be construed as one revoking the earlier agreement. All that the subsequent document says is that with regard to one of the points in dispute between the parties there is an agreement and the arbitrator has to take note of that. By that agreement if Venkatasubbiah pays Rs. 10,000 he is completely absolved from all liability so far as the profits and losses of the rice mill are concerned. In our opinion it cannot be said that the provisions of section 5 of the Indian Arbitration Act can be called in aid to invalidate the second document.

The next point on which Mr. Ramachandra Rao relies is that on a true and proper construction of Exhibit A-2 it should be held that the Rs. 10,000 mentioned therein is only the liquidated amount which Venkatasubbiah had in his possession at the time the reference was made, though it is stated in the accounts that he had only a sum of Rs. 45 and odd. According to the learned advocate Exhibit A-2 crystallizes and fixes the amount that was with Venkatasubbiah and it is only that portion of the dispute between the parties that the arbitrator need not thereafter go into. We are not satisfied that that is a proper construction. As we have already stated, all the rights and liabilities in the rice mill have been settled so far as Venkatasubbiah was concerned by the payment of the sum of Rs. 10,000. If that were so, the question arises as to whether such an agreement between the parties pending an arbitration should be taken note of by the arbitrator. In *Makund Ram Sukal* v. *Saliquram Sukal*[1], the Privy Council has observed that the parties to an arbitration can waive one of the points in dispute that have arisen between them leaving only the other points for decision by the arbitrator. Their Lordships observe as follows :

> "If the arbitrators had done this by their own authority only, the cases referred to by Mr. Finlay might have been applicable, but it was competent to the parties, when they were before the arbitrators to agree to the division being made by steps, and that each division should be final. It was a convenient plan and it was for their interest to adopt it. They might waive the condition that a complete partition must be made of the whole of the property. The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so."

This decision has been followed in *Jnanendra Nath Bagchi* v. *Sureschandra Roy*[2]. There is also authority for this position in the case reported in *Lawrence and others* v. *The Bristol and North Somerset Railway Co.*[3] Following these authorities, we are of opinion that what Exhibit A-2 contemplated is that one of the points in dispute between the parties and which had been referred to the arbitrator for settlement has been settled among themselves and the arbitrator is requested to take note of that agreement and incorporate that agreement in the award. The arbitrator would be guilty of misconduct if he fails to incorporate such an agreed solution of the point in dispute between the parties. We are of opinion that the learned Subordinate Judge was right in allowing the application. The award itself says that Venkatasubbiah has paid the Rs. 10,000 into the hands of the arbitrator and in such circumstances it is unnecessary to remit the case back to the arbitrator for passing a proper award. It is not open to Venkatasubbiah in view of our decision to claim any portion of this Rs. 10,000 back at all. The appeal therefore fails and is dismissed with costs of the first respondent.

The memo. of cross-objections filed by the respondent relates to the learned Judge's discretion in awarding only Rs. 5 as costs to the successful party. We are not satisfied that there are any legal principles on which this discretion exercised by the learned Judge can be interfered with. In such circumstances, the memorandum of cross-objections fails and is dismissed but without any order as to costs.

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1. (1894) L.R. 21 I.A. 47 : I.L.R. 21 Cal. 590 at 600 (P.C.).
2. (1927) I.L.R. 6 Pat. 556 at 563.
3. 16 L.T.R. 326.

C. M. A. No. 59 *of* 1948 : In view of our decision in C. M. A. No. 58 of 1948 this appeal does not arise for consideration and hence is dismissed. In the circumstances we make no order as to costs.

Appeals and memorandum of objections dismissed.

V. P. S.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Nanduri Saradamba .. *Appellant**

v.

Konala Gayaramma and another .. *Respondents.*

Execution—Mortgage decree—Adjustment after passing of preliminary decree, but before final decree pleaded by judgment-debtor—Whether can be enquired into—Civil Procedure Code, Order 21, rule 90—Judgment-debtor ordered to furnish security—Grounds for rejection of security offered.

A judgment-debtor filed an execution application to record an agreement with the decree-holder alleged to have been entered into after the passing of the preliminary decree and before the final decree was passed that the decree-holder would not have the final decree passed and would accept a lesser sum in full quittance of the decree debt. The lower courts refused to enquire into the petition.

Held, that the agreement was rightly refused to be gone into as this question was not raised by the judgment-debtor when the final decree was passed of which the judgment-debtor had full notice.

In an application filed to set aside the sale the judgment-debtor was ordered to furnish security. The security offered was subject to an encumbrance in favour of the decree-holder, but even taking that into account was sufficient to satisfy the decree-holder's debt for which the property was brought to sale. The lower Court rejected the security offered and ordered cash security.

Held, the grounds of rejection by a Court must be judicial grounds and as the security offered was ample the order of the lower Court cannot be sustained.

Appeal against the order of the District Court, West Godavari, dated 28th December, 1946, in C. M. A. No. 41 of 1946, preferred against the order of the Court of the District Munsiff, Tanuku, in C. F. R. No. 4360 of 1946, in O. S. No. 153 of 1940, etc.

T. Satyanarayana for Appellant.

O. Chinnappa Reddi for Respondents.

The Court delivered the following

JUDGMENT.—These are all connected matters and present a story of tangled and chronic litigation. The facts in a nut-shell are these. Saradambal is the judgment-debtor in O. S. No. 153 of 1940, a mortgage suit. The preliminary decree in the suit was passed against her and in favour of Gavaramma, the decree-holder, for more than Rs. 3,400 on 28th August, 1941. The final decree was passed on 16th February, 1945. The sum due by the judgment-debtor at the time of the sale, on 11th March, 1946, of 2 acres 40 cents, out of the mortgaged properties amounting to 6 acres 16 cents. was about Rs. 4,250, according to her counsel, and Rs. 4,500, according to the decree-holder's counsel. The 2 acres 40 cents were, admittedly, sold on 11th March, 1946, for Rs. 4,150, leaving only a sum of Rs. 100 as balance, according to the judgment-debtor, and a sum of Rs. 300 or Rs. 350 as balance, according to the decree-holder. The judgment-debtor alleged that there was an agreement entered into with her by the decree-holder some time in March, 1944—the exact date is not given—agreeing to take Rs. 2,700 in full quit and allowing her to pay the amount before the end of April, 1946, and promising that the final decree proceedings and execution would not be taken out till the end of April, 1946. But the said agreement, according to her, was broken by the decree-holder, when she got a final dercree, behind her back, on 16th February, 1945, and took out execution and brought her properties to sale on 11th March, 1946. One curious thing here is that the agreement itself was not produced in Court by the judgment-debtor and that not one pie was paid actually by her before the end of

*A.A.A.O. Nos. 78 of 1947 and 102 of 1948 and C.R.P. Nos. 672 of 1947 and 241 of 1949. 18th August, 1950.

April, 1946, to the decree-holder or deposited into Court, though it is alleged that the judgment-debtor once tried to take Rs. 1,500 to the decree-holder but without succeeding in making her accept that sum. What is more, the judgment-debtor's attempt to get the final decree (alleged to have been passed without notice to her) set aside collapsed and the final decree became conclusive ten months before the filing of E. A. No. 4 of 1946 to record the alleged arrangement, of March 1944. The judgment-debtor tried in both the lower Courts to get an enquiry made into this alleged agreement after execution was taken out regarding the final decree; but both the lower Courts held that there was no merit in the application and that such an application was not maintainable after the passing of the final decree and the knowledge of the final decree by the judgment-debtor months before. C. M. S. A. No. 102 of 1948, is filed against the order of the lower appellate Court confirming the first Court's order refusing to go into this alleged agreement.

Mr. Satyanarayana, the learned counsel for the judgment-debtor, relied on the Full Bench rulings in *Chidambaram Chettiar* v. *Krishna Vathiar*[1], and *Adappa Papamma* v. *Dhanba Venkayya*[2], and argued that such an agreement should be enquired into even during the execution proceedings, despite the passing of a decree. But the question really is not that. The question is whether this agreement deserved to be enquired into in the circumstances of this case, where the judgment-debtor knew about the final decree preoceedings and did not raise the question then. I am of opinion that this agreement was rightly refused to be gone into by both the Courts below in view of this and the ruling of the Privy Council in *Madan Theatres* v. *Dinshaw and Co.*[3], though but for it, it might be *technically* maintainable. The alleged agreement is of uncertain but ancient date. The time fixed for payment of the alleged Rs. 2,700 in full satisfaction has also elapsed without a pie being paid. Four years have gone by, and nothing has been paid. So, there is no question of recording any agreement, compromise or satisfaction in the execution petition proceedings. The agreement itself was not produced in the Courts below. The final decree was passed after sufficient service, and therefore will be binding on the judgment-debtor, all whose attempts to get it set aside proved futile. In these circumstances no useful purpose of any kind would have been served by the lower Courts' going into this alleged stale agreement of March, 1944, even if it was open to them to do so which I doubt. I, therefore, dismiss C. M. S. A. No. 102 of 1948 with costs.

Leave refused.

Now I come to the other three matters. The facts relating to these may be briefly stated. The judgment-debtor filed a petition under Order 21, rule 90, Civil Procedure Code on 8th April, 1946, for setting aside the sale of the 2 acres 40 cents. of the mortgaged properties held on 11th March, 1946, relying on various grounds. She was asked to furnish sufficient immoveable property security or cash security, and she offered 2 acres 91 cents out of the unsold mortgaged lands stating that they would be worth seven thousands even after deducting the Rs. 100 due to the decree-holder. An amin of the first Court valued these 2 acres 91 cents at Rs. 7,000 and certified that the only encumbrance on these lands was the sum due to the decree-holder which is admitted by the decree-holder's counsel before me to have been only Rs. 300 or Rs. 350 at the time the security was offered. Even supposing that these 2 acres 91 cents were only worth at the same rate as 2 acres 40 cents, sold on 11th March, 1946, it being admitted that these lands are at least of equal value with the lands sold, their value would be nearly Rs. 5,000, and deducting the Rs. 300 or Rs. 350 due to the decree-holder, they would be worth more than Rs. 4,500, and should have sufficed as ample security. But, somehow, the first Court considered that the properties mortgaged to the decree-holder should not be offered as security, and that cash security should have been given, though I see no distinction in principle between the properties mortgaged

1. (1916) 32 M.L.J. 13 : I.L.R. 40 Mad. 233.
2. (1935) 69 M.L.J. 451 : I.L.R. 58 Mad. 994.
3. (1945) 2 M.L.J. 367 : L.R. 72 I.A. 277 : I.L.R. 20 Luck 461 (P.C.).

to the decree-holder and properties mortgaged to others, in the matter of security, and though in this case there was no doubt that the properties offered as security were more than ample to serve as security for this petition under Order 21, rule 90, of the Code, but no cash security was really necessary. Every order rejecting security has, of course, to be based on sound judicial grounds. Nor was even time given for furnishing cash security after this ample security was rejected offhand. What is even more curious is that the first Court confirmed the sale on 16th April, 1946, even before rejecting the security, nay, even before the Amin's report regarding the test was received on 17th May, 1946. It rejected the security only on 5th July, 1946. C. R. P. No. 672 of 1947 and C. M. S. A. No. 78 of 1947 have been filed against the order rejecting the unregistered petition under Order 21, rule 90, Civil Procedure Code without any enquiry, after rejecting the security on 5th July, 1946. The C. R. P. and C. M. S. A. have both been filed by way of abundant caution owing to the doubt as to which of them would be maintainable in the circumstances. C. R. P. No. 241 of 1949 has been filed against the order of the District Judge, West Godavari, dismissing A. S. No. 338 of 1946 confirming the first Court's order dated 6th July, 1946, confirming the sale without enquiring into the petition under Order 21, rule 90, Civil Procedure Code filed long before the confirmation.

After hearing the learned counsel for the judgment-debtor and the learned counsel for the decree-holder, I have no doubt whatever that the first Court should have accepted the security of 2 acres 91 cents tendered by the judgment-debtor and gone into the petition under Order 21, rule 90, Civil Procedure Code, and decided it on the merits, and deferred the confirmation of the sale held on 11th March, 1946, till such decision. After all, a Court of justice, equity and good conscience, (every Court in the Indian Republic is that) should not stand on mere technicalities, especially when these technicalities are also no real bar, as here. As a Court of *equity*, the first Court could and should have tempered the rigour of *law*, and rendered *justice* by accepting the ample security tendered, and numbering the petition under Order 21, rule 90, Civil Procedure Code and deciding it on merits. Mr. Satyanarayana urged that the judgment-debtor was a helpless and ignorant *woman* and so deserved some more consideration than the usual run of litigants. This is not allowable under the law, which looks not to caste, creed, colour, class, sex or country, though it is well known that, sometimes our Courts view minors, women, temples, trusts etc., with a little extra indulgence. But, here, no extra indulgence was required. The judgment-debtor was entitled as of right under the law to have her security accepted and to have her petition numbered and enquired into.

In the result, I set aside the orders of both the Courts below, dismissing the petition, filed by the judgment-debtor under Order 21, rule 90, Civil Procedure Code and direct the District Munsiff of Tanku to take the petition under Order 21, rule 90, Civil Procedure Code, on his file, after accepting the security of 2 acres 91 cents tendered and taking a bond in the proper form, and to proceed with it and dispose of it according to law. The confirmation of the sale held on 11th March, 1946, is also set aside, and the confirmation will await the disposal of the petition under Order 21, rule 90, Civil Procedure Code. In the circumstances, there will be no orders as to costs in these three matters.

Leave refused in C. M. S. A. No. 78 of 1947.

V. P. S.

C. M. S. A. No. 102 *of* 1948, *dismissed. C. R. P. No.* 672 *of* 1947, *C. R. P. No.* 241 *of* 1949 *and C. M. S. A. No.* 78 *of* 1947, *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Sree Kalahasteeswaraswami Varu Devasthanam .. *Appellant**

v.

Mareedu Adinarayana and others .. *Respondents.*

Practice—Leave to appeal to Supreme Court—Separate application—Necessity—Question whether the Provincial Insolvency (Amendment) Act XXV of 1948 is ultra vires the Dominion Legislature—Leave to appeal to the Supreme Court—If can be granted.

It was agreed that there need be no separate petition for leave to appeal to the Supreme Court.

The question whether the Provincial Insolvency (Amendment) Act XXV of 1948 is *ultra vires* the Dominion Legislature involves a substantial question of law as to the interpretation of the Constitution and leave to appeal to the Supreme Court can be granted.

Appeal against the decrees of the Subordinate Judge, Masulipatam dated 22nd October, 1946.

C. A. Vaidhyalingam, K. Ramachandra Rao and *T. Venkatadri* for Appellant.

M. Appa Rao for Respondents.

The Judgment of the Court was delivered by

Raghava Rao, J.—In this appeal by defendant 2, in a suit for partition by the undivided sons of defendant 1, the point taken for the appellant is that the person under whom he claims as devisee—one C. Seetharamanjaneyulu—acquired, at the sale by the Official Receiver in the insolvency of defendant 1, not merely the interest of the insolvent in the joint family estate as would be the case under the Full Bench ruling of this Court in *Ramasastrulu* v. *Balakrishna Rao*[1], but also the interest of the sons, the plaintiffs as well, by reason of Act XXV of 1948, which as pointed out in the ruling of this Court in *Ammanna* v. *Ramakrishna*[2], has altered the law as laid down by the Full Bench and altered with retrospective effect. The point so taken has not been, as indeed it could not be resisted by the learned advocate for the respondents 1 and 2. A question of *ultra vires* in relation to Act XXV of 1948, was raised recently before another Bench of this Court (Subba Rao and Panchapakesa Ayyar, JJ.) in A. S. No. 473 of 1946 which was decided adversely to the contention that it was *ultra vires* the Legislature. Mr. Ramachandra Rao for the contesting respondents urges that that point may also be noted as one raised by him before us. He further asks that we may grant him leave to appeal to the Supreme Court. We accordingly note the point of *ultra vires* that he has raised, but shall take up this matter for consideration tomorrow on the question whether leave to appeal can be granted by us even now or only by means of a separate petition.

This appeal is accordingly allowed but in the circumstances without costs.

The memorandum of objections shall stand dismissed with costs.

(This appeal having been set down this day for orders, the Court made the following order) :

Raghava Rao, J.—We have heard arguments on the question whether we are to certify that the present case involves a substantial question of law as to the interpretation of the Constitution. It is pointed out to us that a certificate was granted by another Bench of this Court, before which the question of *ultra vires* of Act XXV of 1948 was raised.

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* Appeal No. 396 of 1947. 2nd February, 1950.

1. (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.).
2. (1949) 1 M.L.J. 249 : I.L.R. (1949) Mad. 904.

It is agreed that there need be no separate petition for the certificate now sought. We accordingly certify that the case involves a substantial question of law as to the interpretation of the Constitution, namely, whether Act XXV of 1948 is *ultra vires* the Dominion Legislature which passed it.

V. S. *Appeal allowed. Leave to appeal granted.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE SATYANARAYANA RAO, MR. JUSTICE PANCHAPAGESA SASTRY, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE SOMASUNDARAM.

Muruga Mudaliar (deceased) and others .. *Appellants**

v.

Subba Reddiar .. *Respondent.*

Registration Act (*XVI of* 1908), *section* 49—*Unregistered agreement of lease required to be registered—If can be used as evidence of the agreement in a suit for damages for its breach.*

Held by the Full Bench (Panchapagesa Sastri, J. *Contra*). An agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach.

Raja of Venkatagiri v. *Narayana Reddi*, (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.)—Approved. *Narayana Chetti* v. *Muthiah Servai*, (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.)—Overruled.

Per *Rajamannar, C.J.*—Section 49 (*c*) of the Registration Act prohibits the use of an unregistered instrument in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or in immoveable property. So long as the document is not sought to be relied on as evidence of any right, title or interest to or in immoveable property, there is nothing to prevent the document being received in evidence. In this view it may be that a distinction will have to be made between a suit for specific performance and a suit for damages. If the only claim in the proceedings is a personal one for damages for breach of contract then there can be no possibility of immoveable property being affected by the reception of the unregistered document which may be only used in support of the claim for damages.

Per *Satyanarayana Rao, J.*—The prohibition against admissibility enacted by section 49 of the Registration Act is not an absolute one, but the section renders the unregistered document inadmissible only for the two limited purposes specified in clauses (*a*) and (*c*) and leaves it available to be used in evidence for *other purposes*.

A plaintiff in a suit for damages for breach of an unregistered agreement to lease immoveable property is not seeking to establish a "transaction affecting immoveable property", for he is not seeking to prove a present demise of the land. He is no doubt asking that the document be received in evidence. The reception of the document in evidence is not prohibited by clause (*c*) of section 49 of the Registration Act.

Per *Panchapagesa Sastri, J.*—What is prohibited by section 49 (*c*) of the Registration Act is the reception of the unregistered document in evidence of the transaction itself. The section does not merely prohibit the granting of a relief by way of an ultimate decree, a relief affecting immoveable property. The reference to the conjoint words "any transaction affecting such property" is significant. A relief for damages for breach of a contract to lease can be given only if the plaintiff succeeds in establishing that there was a contract which was broken. It is to establish that contract that he wants the unregistered lease to be received in evidence. The section prohibits the reception of the document as evidence of the transaction. The section cannot be construed to mean that the document can be received in evidence as establishing the transaction but relief should be denied on the basis of the transaction so established in so far as such relief affects immoveable property alone.

Appeal against the decree of the District Court, Tiruchirapalli, in A.S. No. 263 of 1944, preferred against the decree of the Court of the District Munsiff, Karur in O. S. No. 404 of 1942.

T. L. Venkatarama Aiyar for *M. C. Srinivasan* for Appellant.

K. Bhashyam and *L. A. Gopalakrishna Aiyar* for Respondent.

(This Appeal coming on for hearing before Raghava Rao, J. on 4th November, 1949, the Court made the following Order of Reference to the Full Bench)—

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* S.A. No. 2048 of 1946. 3rd April, 1950.

The suit in this case is for damages for breach of an agreement of lease. The document evidencing the agreement has been ruled out by both the Courts below for want of registration. The question is whether it has been rightly so ruled out.

A typed translation of the document has been placed before me by the learned counsel for the respondent, which has been accepted by the learned counsel for the appellant as correct. It runs as follows :—

"Agreement, dated 30th May, 1942, executed by R. Subba Reddiar residing at Chinnakavandanur, Velliyanai village, Karur taluk in favour of R. Muruga Mudaliar of Mohanur village, Namakkal taluk.

Having agreed this day for a lease on a rent of Rs. 600 per year in respect of four acres known as Onnekalkani, etc., belonging to me in Vangal, I have received this day Rs. 100 as advance.

You having agreed for 3½ years (in respect of) the above lands you shall pay the rent at the end of Kalavati each year and shall get receipt therefor."

It is argued for the appellant that the Courts below are in error because the document on its true construction must be regarded as nothing more than a receipt acknowledging payment of Rs. 100 as advance by the plaintiff which even if it required registration as falling within section 17 (1) (c) of the Indian Registration Act and could not be used as evidencing the agreement of lease itself referred to therein owing to the prohibition of section 49 (c) might still be used for the collateral purpose of proving an anterior oral agreement which would nonetheless be valid because oral. I cannot accept this view of the document and my judgment in C.M.A. No. 255 of 1946 relied on for the appellant does not govern the present case.

The document is styled an agreement. The label given to it by the parties is of some significance as to their intention although not conclusive. It may be noted that the English word "agreement" itself is used at the head of the vernacular document. If the document is an agreement, as it purports to be, it can be nothing else than an agreement of lease. It contains the terms of the bargain between the parties and is in my opinion the bargain itself, the agreement itself as it professes to be on its face, and not merely an informal or incomplete memorandum of the terms of a bargain already concluded and later sought to be reduced to writing. It is not that the reference to the transaction of lease in the body of the document occurs as a thing of an incidental character or of only subordinate significance as it might well be if the document purported to be something else than an agreement, if the document called itself, say, a receipt and only proceeded to refer to the transaction of lease in order to indicate the situation in connection with which the payment was made which is acknowledged by the receipt. The land by its name, the rate of rent per year and the period of the lease are all mentioned. The dominant purpose of the document seems to be not to serve as a receipt in respect of the payment as such so much as to register the terms of the transaction as a whole in connection with which the payment came to be made. The word "agreement" is used not merely in the preamble but twice again in the body of the document and seems designated deliberately to emphasise such purpose. Some point was sought to be made by the learned counsel for the appellant of the fact that according to his case in the plaint there were also certain other terms agreed upon between the parties than those mentioned in the document. That is however disputed by the respondent in the written statement. Moreover on its face the document does not bear to be an informal or incomplete record of the terms of the transaction. It rather reads like the sole authentic repository of the terms of the bargain, and evidence adding to the terms of the document stands accordingly forbidden by section 92 of the Evidence Act. It was also submitted for the appellant that the learned District Judge is wrong in stating that the document specifically purports to come into force "from this day", *i.e.*, from the date of its execution. The learned District Judge is no doubt wrong in so stating; but that is hardly material. Admittedly the document does not say that it is to come into force only from a later date, and the presumption must therefore hold good that it creates a present and immediate demise and operates from its very date.

The point next argued for the appellant is that the present suit being one for damages for breach and not for specific performance there is the authority of a Full Bench ruling of this Court in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], supporting the admissibility of the document for the purpose of the present suit. I have referred to the exact state of authority in this Court on this point in my judgment in C.M.A. No. 255 of 1946, wherein however I did not find it necessary to decide the point. I there observed on the point thus :

"With reference to the latter submission I am of opinion that it does not strictly arise for consideration. The document with which I am concerned is not an unregistered document affecting immoveable property but an unregistered document acknowledging the payment or receipt of consideration on account of the creation of a right, title or interest to or in immoveable property. If the question arose with reference to 'an unregistered document affecting immoveable property' I should find myself in some difficulty to decide it; for although it seems to me that the submission of the learned counsel for the respondents might in such a case have to be held correct on a reading of the judgment of the Full Bench in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], as it stands, there would then be the difficulty created by the explanation given of that judgment by the later Full Bench ruling in *Narayana Chetti* v. *Muthiah Servai*[2], wherein it is said that the earlier Full Bench must be understood

1. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).

to have only ruled that a Kabuliat signed by the lessee but inadmissible to prove the lease for want of registration was admissible to prove the karar or the agreement to lease which preceded it, and wherein it is further pointed out that there is no distinction on principle between a suit for specific performance and a suit for damages. The difficulty would stand further accentuated by the circumstance that a later decision of a Division Bench consisting of Sir John Wallis, C.J. and Oldfield, J., reported in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[1], has accepted the law as laid down by *Narayana Chetti* v. *Muthiah Servai*[2], giving the earlier Full Bench ruling only a restricted operation; and sitting as single Judge if the question arose for determination, I should deem it proper to hold myself bound in this state of authority to follow the ruling in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[1], which has stood the field for the last about three decades and more. As against that difficulty, it has no doubt been pressed upon me by the learned counsel for the respondents that the view expressed by the Privy Council in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[3], serves to rehabilitate in its wider operation *Rajah of Venkatagiri* v. *Narayana Reddi*[4], which although not cited in the argument before the Privy Council or referred to in its judgment proceeds on the same line of reasoning as is employed in *Ulfatunnissa Elahijan Bibi* v. *Hoosain Khan*[5], one of the several cases cited before the Privy Council. It has also been pressed upon me that even an *obiter dictum* of the Privy Council is bound to be followed by Courts in India, and that in fact in the case in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[3], the expression of view by their Lordships became necessary as part of their reasoning founded upon the consideration *prima facie* entering into the decision of the question whether the point of the inadmissibility of the document therein in question for want of registration was to be allowed to be raised before their Lordships for the first time. As I have said, it is not necessary for me in this case to arrive at a definite decision upon the submission made to me by the learned counsel for the respondents, because the document with which this case is concerned is not an unregistered document affecting immoveable property but an unregistered document acknowledging receipt or payment of consideration on account of the creation of right, title or interest to or in immoveable property.

The question whether an agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach not decided by me in that case accordingly falls to be decided here. The question is one which calls in my opinion for decision by a Full Bench, preferably of more than three Judges, in view of the conflict that exists between the two Full Bench rulings in *Rajah of Venkatagiri* v. *Narayana Reddi*[4] and *Narayana Chetti* v. *Muthiah Servai*[2]. It is true that the former ruling is by a Bench of five judges which ordinarily speaking ought to prevail as against the later ruling of three Judges in any conflict between the two. But as I have observed in my judgment in C.M.A. No. 255 of 1946 there is the explanation given of the earlier Full Bench ruling in the later Full Bench case which I should have been prepared to accept in view of the manner, by no means unreasonable, in which Sir John Wallis, C.J. and Oldfield, J., actually dealt with the legal position in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[1]. On account of that explanation, it may be well that the earlier Full Bench ruling ought to be given only a restricted operation which renders it unavailing to the respondent. But then, there are the observations of the Privy Council in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[3], which seems to support *Rajah of Venkatagiri* v. *Narayana Reddi*[4] in its wider operation and consequently invalidate the explanation of that decision by the later Full Bench which decided *Narayana Chetti* v. *Muthiah Servai*[2].

In these circumstances I direct that the papers be placed before the Chief Justice for appropriate orders being passed in regard to the reference of the question whether an agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach, to a Full Bench preferably consisting of more than three Judges as already observed by me.

In pursuance of the aforesaid Order of Reference, this appeal coming on for hearing, the Court expressed the following—

OPINION: *The Chief Justice.*—I have had the advantage of perusing the opinions prepared by my learned brothers Satyanarayana Rao and Panchapagesa Sastri. After a deep consideration of the two conflicting views propounded by them, I find myself in agreement with the conclusion arrived at by Satyanarayana Rao, J., and I would answer the question referred to the Full Bench in the affirmative.

As the entire case-law on the point has been fully and exhaustively discussed by my learned brothers, I shall not go over the whole ground, but shall confine myself to a discussion of the general principles. As the question referred to us is in general terms, I shall not make any reference to the actual facts of the case.

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1. (1917) 33 M.L.J. 596.
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
3. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).
4. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
5. (1883) I.L.R. 9 Cal. 520 (F.B.).

I shall proceed on the basis that the question relates to an agreement of lease in writing which is required to be registered, because it is a document which creates a present and immediate interest in land and operates as a lease (*Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[1]) but has not been registered. I shall also bear in mind that the question is as regards a suit for damages for breach of the agreement.

Section 49 of the Registration Act in so far as it is material runs thus :

"No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—(*a*) affect any immoveable property comprised therein, or . . . . . (*c*) be received as evidence of any transaction affecting such property . . . . . unless it has been registered."

I am omitting the proviso for the present. It is clear that this section enacts both a rule of substantive law and a rule of evidence. "Affect" means "have effect on". The document which is required to be registered but has not been registered shall not have any effect on immoveable property comprised in it. The effect which is contemplated is, in my opinion, an effect which has a relation to a right, title or interest, whether vested or contingent, in or to immoveable property. It is not necessary for the purpose of answering the question referred to us to say whether the interpretation adopted by Spencer, J., in *Saraswatamma* v. *Paddayya*[2], is unduly restricted, though I am inclined to agree that the word "affect" in section 49 was employed to compendiously express what had been set out in section 17. The words "create, declare, assign, limit or extinguish" are very wide and would ordinarily comprise every kind of transaction which is in any manner concerned with right, title or interest to or in immoveable property. Even assuming there are transactions which may not fall within the categories denoted by the above words but which may be said to affect immoveable property, it appears to me that such transactions should concern in some manner right, title or interest to or in immoveable property. There may be several documents which may relate to immoveable property but which do not nevertheless affect immoveable property. It is true as Panchagesa Sastri, J., observes that it is neither necessary nor desirable to lay down an exact and exhaustive test to ascertain whether a document affects immoveable property, but I think any criterion must have reference to right, title or interest to or in immoveable property. If the document does not in any manner concern any right, title or interest to or in immoveable property, I find it difficult to call that document as a document which affects immoveable property.

Clause (*c*) of section 49 prohibits the reception of an unregistered document in evidence of any transaction affecting immoveable property comprised in it. For a proper appreciation of the scope of this prohibition I think the nature of the proceeding in which it is sought to be offered as evidence is very material. A sale or a lease is certainly a transaction affecting immoveable property because it does concern the right, title or interest to or in immoveable property. But I cannot imagine an unregistered sale deed or lease deed being excluded from evidence in a criminal case when it is sought to be used as evidence that the executant was present at a particular place at a particular time or as evidence of handwriting or even as evidence of *mens rea*. This is because clause (*c*) is only an application of the rule of substantive law contained in clause (*a*) to proceedings in Court. After declaring that the unregistered document shall not have any effect on immoveable property, the section goes on further to enact that such a document shall not be received to bring about such an effect. If an unregistered sale deed cannot transfer the ownership of the property comprised in it, it shall not also be used in evidence to bring about that result. A party cannot obtain such relief on the basis of such a document and for that purpose it cannot be admitted in evidence. The document shall not be received as a document affecting land, *i.e.*, a document which has any effect on land. As early as *Ulfatunnissa Elahijan Bibi* v. *Hoosain Khan*[3], the words "shall be received as evidence of any transaction affecting land" were construed as meaning "shall be received as evidence of any transaction, so far as it affects

1. (1919) 37 M.L.J. 525 ; L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
2. (1922) 44 M.L.J. 45 : I.L.R. 46 Mad. 349.
3. (1883) I.L.R. 9 Cal. 520 (F.B.).

land." This, I think, is a reasonable construction and the true construction. I wish only to point out that the decision in *Ulfatunnissa* v. *Hoosain Khan*[1] was given at a time when there was no proviso to section 49 like the proviso inserted by Act XXI of 1929. The learned Judges also expressly say that the view they took of the section rendered it unnecessary to consider the question whether a document embodied only a single transaction or may properly be said to contain two.

My view of section 49 (*c*) of the Indian Registration Act is this. It prohibits the use of an unregistered document in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or in immoveable property. So long as the document is not sought to be relied on as evidence of any right, title or interest to or in immoveable property, there is nothing to prevent the document being received in evidence for other purposes. In this view it may be that a distinction will have to be made between a suit for specific performance and a suit for damages. In a suit for specific performance, the relief sought does concern title to or interest in land; whereas a claim for damages is personal and may be enforced without in any manner affecting immoveable property.

With all respect I think that this is the view which the Full Bench took in *Rajah of Venkatagiri* v. *Narayana Reddi*[2]. The learned Judges say:

"If the plaintiff's action was founded on an alleged title in virtue of a lease granted by the defendant . . . . there can be doubt that the document VI could not be admitted in evidence. The plaintiff would then be seeking to use it as evidence of a transaction affecting immoveable property. It is clear that the plaintiff does not assert his title under the incomplete lease, and that he does complain of the breach of contract on the part of the defendant in refusing to register the kabuliat and give him a cowle, and also in disturbing his possession."

Though I see the force of the remarks of Panchapagesa Sastri, J., about the observations of Lord Tomlin in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[3], that they cannot be deemed to be a final pronouncement of the Judicial Committee on the point, yet, I do not think it right to dismiss altogether those observations. They appear to me to throw some light on the subject, particularly in the manner of approach to the construction of the section. The unregistered document will be excluded from evidence only when it is sought to be used "as the foundation of a judgment affecting immoveable property comprised in such document." (I think the word "judgment" there is used in the sense of adjudication or decision.) Further, if the proceedings do not in any respect affect any immoveable property, that is to say, if the proceedings do not result in a decision which has any effect on immoveable property, then, the section does not apply. If the only claim in the proceedings is a personal one for damages for breach of contract, then, there can be no possibility of immoveable property being affected by the reception of the unregistered document which may be only used in support of the claim for damages.

It is true that the proviso to section 49 of the Indian Registration Act inserted by Act XXI of 1929 does not in terms apply to a suit for damages. But I fail to see any principle or policy which justifies the admission of an unregistered document as evidence of a contract in a suit for specific performance but at the same time requires its rejection as evidence of a contract in a suit for breach of that contract. I venture to think that the omission to provide for the reception of such a document in a suit for damages was due to the fact that such a provision was unnecessary as a suit for damages was not concerned in any manner with a right, title or interest to in immoveable property, that is to say, was not one affecting immoveable property.

Satyanarayana Rao, J.—In view of the important and difficult question of law raised in this reference I wish to state my reasons in support of the conclusion I have reached in the case.

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1. (1883) I.L.R. 9 Cal. 520 (F.B.).
2. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
3. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).

Raghava Rao, J., referred the following question to the Full Bench :

"Whether an agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach ?"

In his judgment on which the reference is based, the learned Judge made it clear that the document in question, though in form an agreement of lease, does create a present and immediate demise and operates from its very date.

Section 2 (7) of the Registration Act contains the definition of lease. According to this provision,

"'Lease' includes a counterpart, Kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease".

Section 17 (1) (*d*) provides :

"Leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent shall be registered."

The effect of non-registration of documents required to be registered is stated in section 49 of the Act. Under it

"No document required by section 17 (or by any provision of the Transfer of Property Act, 1882) to be registered shall :

(*a*) affect any immoveable property comprised therein, or

(*b*) . . . . or

(*c*) be received as evidence of any transaction effecting such property unless it has been registered : provided that an unregistered document affecting immoveable property and rquired by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part-performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, as evidence of any collateral transaction not required to be effected by registered instrument."

The proviso was added by the amending Act, Act XXI of 1929. Until the decision of the Judicial Committee in *Dayal Singh* v. *Indar Singh*[1], it was considered that an agreement for the sale of immoveable property containing an acknowledgment of receipt of part of the purchase price paid by the buyer as earnest money did not require registration. The decision in *Dayal Singh's case*[1], however, revolutionized the law, notwithstanding the clear provision in section 54 of the Transfer of Property Act that a contract for the sale of immoveable property does not by itself create any interest or charge on such property. This decision was pronounced in 1926. Immediately it was realised by the Legislature that this view was erroneous and caused great hardship with the result that an Amending Act, Act II of 1927 was passed by which an Explanation was added to section 17 in these terms :

"A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money."

This provision, as the language clearly indicates, is retrospective in its operation and the law, therefore, as it stood before 1926 was restored by the timely intervention of the Legislature.

The definition of lease contained in the Registration Act includes an "agreement to lease" and, therefore, under section 17 (1) (*d*) "agreements to lease" are made compulsorily registrable. Until the decision of the Judicial Committee in *Hemanta Kumari Debi* v. *Midnapur Zemindari Co.*[2], it was thought that all agreements to lease whether they created a present and immediate interest in the land, or intended to operate *in futuro*, required registration, but the decision of the Judicial Committee in the aforesaid case finally established that an agreement to lease contemplated by the definition is a document which affects actual demise and operates as a lease. In other words, the document contemplated is one which creates a present and immediate interest in the land. In this respect the Judicial

1. (1926) 51 M.L.J. 788 : L.R. 53 I.A. 214 (P.C.).

2. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).

Committee accepted the view of Jenkins, C.J., in *Panchanan Bose* v. *Chandi Charan Misra*[1]. It therefore follows from this decision of the Judicial Committee that there are two classes of agreements to lease :—

(*a*) agreements which do not operate to create a present and immediate interest in the land, but operate in future. Such agreements, it must now be taken as well established do not require registration and do not in any manner affect any immoveable property. (Vide *Swaminadha Mudaliar* v. *Ramaswami Mudaliar*[2]).

(*b*) Agreements to lease, which create a present and immediate interest in the land. Such agreements alone are compulsorily registrable under section 17 (1) (*d*).

For convenience sake, in the course of this judgment agreements falling under clause (*b*) are referred to as *registrable* agreements in contradistinction to those falling under clause (*a*), which are not registrable, and are described as mere agreements to lease.

Before 1929, there was a conflict of decisions on the question whether a document, which was unregistered but purported to create rights in immoveable property, such as a sale or a lease, and inoperative in law and wholly ineffectual to create title in the property covered by it could be used as evidence of a valid agreement either to execute a sale deed or a lease, as the case may be, so as to found an action for specific performance. This Court answered the question in the negative in *Satyanarayana* v. *Chinna Venkatarao*[3]. The Calcutta High Court, however in some decisions, had taken the contrary view. The decision of the Judicial Committee in *James Skinner* v. *R. H. Skinner*[4] upheld the view in *Satyanarayana* v. *Chinna Venkata Rao*[3] and ruled that such a document could not be used to spell out an agreement to transfer the property and make it a foundation for a suit for specific performance. This decision of the Privy Council was pronounced in 1929. To supersede and wipe off the effect of these decisions, the Legislature introduced in 1929 by the amending Act, Act XXI of 1929, the proviso to section 49 permitting the use of an unregistered document affecting immoveable property to be received as evidence of a contract in a suit for specific performance and also as evidence of part-performance of a contract for the purpose of section 53-A of the Transfer of Property Act and even as evidence of any collateral transaction not required to be effected by a registered instrument.

The sum and substance of the aforesaid decisions of the Privy Council and the legislative changes introduced in the Registration Act in 1927 and 1929 may be stated as follows :

(1) Agreements of sale and agreements to lease immoveable property do not require to be registered and therefore the prohibition contained in section 49 of the Registration Act does not apply to such agreements.

(2) Unregistered documents affecting immoveable property in which term must be included *registrable agreements* operating by way of present demise and creating immediate interest in the property, are admissible in evidence to prove an agreement to transfer, in a suit for specific performance, or as evidence of part-performance of a contract, or as evidence of a collateral transaction. The decisions, therefore, which are by no means unanimous and pronounced before 1929 to the contrary must all be taken to have been overruled.

In this view the agreement now under consideration would have been admissible in evidence if the suit was one to enforce specific performance of an agreement to lease. The view taken in *Narayana Chetti* v. *Muthiah Servai*[5] and *Streeramulu Naidu* v. *Ramaswami Mudaliar*[6] to the contrary is no longer good law.

The question, therefore, that remains for consideration is whether the registrable agreement in the present case is admissible in evidence to establish the claim

1. (1910) I.L.R. 37 Cal. 808.
2. (1920) 40 M.L.J. 161 : I.L.R. 44 Mad. 399.
3. (1925) 50 M.L.J. 674 : I.L.R. 49 Mad. 302.
4. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 : I.L.R. 51 All. 771 (P.C.).
5. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
6. (1917) 33 M.L.J. 596.

for damages. An agreement to lease, which is not compulsorily registrable in the sense contemplated by the decision in *Hemanta Kumari's case*[1] is outside the purview of the Act and is certainly admissible like an ordinary contract for sale in a suit for damages for breach of the agreement. Such an agreement is not a transaction affecting immoveable property and is not required to be registered and the restriction in section 49 does not apply in *Swaminatha Mudaliar* v. *Ramaswami Mudaliar*[2]. The question, therefore, resolves itself to this, namely, whether in the present case the registrable agreement, but not registered, could be admitted in evidence in the suit for recovery of damages for breach of the agreement.

There is a direct conflict between two decisions of this Court, one a decision of a Full Bench of five Judges in *Rajah of Venkatagiri* v. *Narayana Reddi*[3], and the other a Full Bench decision of three Judges in *Narayana Chetti* v. *Muthiah Servai*[4]. If the case first mentioned was correctly decided, the appellant should succeed and the question referred to must be answered in the affirmative. If, on the other hand, the latter mentioned case lays down the law correctly and holds the field the appellant must fail and the answer to the question must be in the negative.

I might observe at the outset that the prohibition against admissibility enacted by section 49 of the Act is not an absolute one, but the section renders the unregistered document inadmissible only for the two limited purposes specified in the section, clauses (*a*) and (*c*) and leaves it available to be used in evidence for other *purposes*. Under clause (*a*) of section 49 the document required to be registered, but unregistered, is wholly inoperative and ineffectual to create, declare, assign, limit or extinguish any right, title or interest in immoveable property. As pointed out by Spencer, J., in *Saraswathamma* v. *Paddayya*[5], the verb "affect" in section 49 is only a compendious term employed by the Legislature to express the meaning of the longer phrase

"purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent to".

(See also *Kanjee and Mooljee Bros.* v. *Shanmugham Pillai*[6], where the view of Spencer, J., was accepted). This conclusion of the learned Judge follows from the language employed in section 49, as it refers to a document required by section 17, or by any provision of the Transfer of Property Act to be registered. The consequence of non-registration is to prevent the document from operating in the manner and to the extent indicated in section 17; in other words, to make the document wholly inoperative and ineffectual to achieve the purpose of the document contemplated by section 17. The other consequence of non-registration is to prohibit the document from being received not "*in*" evidence, but "*as*" evidence of any transaction affecting such property. The emphasis on the word "as" was, in my opinion, rightly laid by Venkatasubba Rao, J., in *Saraswathamma* v. *Paddayya*[5], where the learned Judge observed:

"What is prohibited by the section is receiving a document *as evidence of a transaction*, not merely receiving it *in evidence*, i.e., as a piece of evidence having a bearing on the question to be ultimately decided."

In other words, the prohibition is to prevent a person from establishing, by the use of the document in evidence a "transaction affecting immoveable property". A person should not be permitted to establish indirectly by use of the document what he is prevented from doing directly under clause (*a*). The section in the present form was introduced by the Registration Act III of 1877. Under the previous Registration Act XX of 1866 the language of the section was:

"No instrument required by section 17 to be registered shall be received in evidence in a civil proceeding in any Court, or shall affect any property comprised therein if unregistered."

1. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
2. (1920) 40 M.L.J. 161 : I.L.R. 44 Mad. 399.
3. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
4. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
5. (1922) 44 M.L.J. 45 : I.L.R. 46 Mad. 349 at 359.
6. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169 at 174 and 175.

The prohibition in that section was against reception in *evidence altogether* and not, as in the present section, receiving *it as evidence* of any transaction affecting immoveable property; so that the scope of the prohibition in the present section is not absolute as in the Act of 1866, but is a limited and narrower one.

In the present case the plaintiff is not seeking to establish a "transaction affecting immoveable property", for he is not seeking to prove a present demise of the land. He is no doubt asking that the document be received in evidence. The reception of the document in evidence in my judgment, is not prohibited by sub-clause (*c*). What one has to see under the clause is to consider what is it that he is seeking to establish in evidence by using the document. Is he attempting to prove by the document a "transaction affecting immoveable property". In other words, is he seeking to prove a present demise of the property, or a lease of the property? That is not the object of the plaintiff in the present case. The object is to establish an agreement to lease the property which was broken by the defendant. He is in no way attempting to show that an interest in immoveable property is created by a present demise of the land. Proof of a mere agreement to lease, if one remembers the distinction drawn by the Privy Council in *Hemanta Kumari's case*[1], between agreements which merely enable a person to obtain a lease in future and agreements which operate to create a present demise, or an immediate interest in land, is not prohibited. The former agreement is not a transaction affecting immoveable property. The agreement, therefore, in such a case is not hit at by clause (*c*) of section 49, as a mere agreement to lease *without more* does not create any interest in immoveable property. It stands in the same footing as a contract of sale. Here it is necessary to bear in mind that under Indian law there is no distinction between legal interests and equitable interests in immoveable property. In other words, Indian law does not recognise, as under English law, a divided ownership in property. This has been pointed out by the Privy Council in more than one case, *Webb* v. *Macpherson*[2], being the earliest, where at page 72 of the report it was observed:

> "The law of India, speaking particularly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England."

(See also *Rani Chatra Kumari Devi* v. *Prince Mohan Bikram Shah*[3] and *M. E. Moolla and Sons, Ltd.* v. *Official Assignee, Rangoon*[4]).

The document may be also used in evidence to prove the extent of the damage that has been suffered by the plaintiff as a consequence of the breach. All these purposes for which the document is intended to be used in evidence are outside section 49. The restriction imposed by the section is confined to the use of the document to affect immoveable property and to use the document as evidence of a transaction affecting immoveable property and no more. If the object in putting the document in evidence does not fall within any of these two purposes, there is no reason for excluding the document from evidence altogether. The scope of the restriction or of the disability imposed cannot be extended beyond the limits imposed by the section.

Bearing these considerations in mind, it becomes necessary now to examine the decisions bearing upon the question. *Rajah of Venkatagiri* v. *Narayana Reddi*[5] arose out of a suit for damages for breach of a contract to lease immoveable property. In 1889 the plaintiff applied to the defendant, a zamindar, offering to take an izara for a term of five years at an early rent of Rs. 1,400. This offer was accepted by the Dewan of the Estate, on the 24th October, 1889. On 30th November, 1889, the plaintiff performed his part of the contract by executing and sending to the defendant's agent a Kabuliat, which is marked Ex. VI, in the case. He also executed other documents and was immediately put in possession of the villages.

1. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
2. (1903) 13 M.L.J. 389 : L.R. 30 I.A. 238 : I.L.R. 31 Cal. 57 (P.C.).
3. (1931) 61 M.L.J. 78 : L.R. 58 I.A. 279 : I.L.R. 10 Pat. 851 at 869 (P.C.).
4. (1936) 71 M.L.J. 440 : L.R. 63 I.A. 340 : I.L.R. 14 Rang. 400 at 416 (P.C.).
5. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).

On 28th April, 1890, the plaintiff demanded the defendant by a notice to register the Kabuliyat and execute a cowle. The defendant without carrying out the terms of the contract cancelled the lease without any excuse. The plaintiff thereupon instituted a suit for recovery of damages. The defendant himself produced in evidence the Kabuliyat and the other documents, which the plaintiff wanted to take advantage of in order to establish his case. This was objected to by the defendant, particularly, the admissibility of the Kabuliyat, Ex. VI. This matter came up for hearing in the first instance before the Chief Justice and Davies, J., who referred to the Full Bench the question :

"Can the Exhibits J, IV, V, VI and VII be considered to ascertain the nature and terms of the contract made between the plaintiff and the defendant for the purpose of assessing the damages caused to the plaintiff by the wrongful act of the defendant or for any other and what purpose."

At the time of the hearing of the case before the Full Bench, however, the objection based on the ground of want of registration was confined to Ex. VI the Kabuliyat signed by the plaintiff and given to the defendant. The question that had to be considered was whether the document could be admitted in evidence in support of the plaintiff's claim. It was ruled by the Full Bench that the document was admissible to prove the contract even though the document was not registered. The distinction between using the document to establish title and to prove an agreement to lease was pointed out in the judgment. At page 457 it was observed :

"The question is whether the document although not registered, can be admitted in evidence in support of the plaintiff's claim. If the plaintiff's action was founded on an alleged title in virtue of a lease granted by the defendant, and his case were that as lessee he had been unlawfully ejected from the demised land, there can be no doubt that the document (Ex.) VI could not be admitted in evidence. The plaintiff would then be seeking to use it *as evidence of a transaction affecting immoveable property*. But it is clear that that is not the case made in the plaint. The plaint sets out the agreement for a lease of the village which was to run from fasli 1299 and last for five years. It is stated that certain things were done in pursuance of the agreement, among other things, that the plaintiff was put in possession. Then it is charged that the defendant did not register the Kabuliyat and improperly deprived the plaintiff of possession. The cause of action alleged is the failure on the part of the defendant to act up to the karar (*i.e.*, the agreement for a lease) and the improper resumption of the village.

It is clear that the plaintiff does not assert his title under the incomplete lease and that he does complain of the breach of contract on the part of the defendant in refusing to register the Kabuliyat and give him a cowle, and also in disturbing his possession. The act of the defendant in thus disturbing the plaintiff's possession is merely a part of the defendant's conduct which the plaintiff complains of as a breach of the contract made with him. It is not an essential part, for, if the plaintiff had never been in possession he would have had his right of action. Having regard to the language of section 49 of the Registration Act, we think there is no doubt that the Kabuliyat, although not registered, is admissible *in evidence to prove the contract*."

The distinction that was drawn, as would be seen, is between using the document as evidence of a transaction affecting immoveable property and using it merely to prove the contract. There is no objection to the latter, but the former cannot be permitted under section 49. When the case went back to the Division Bench, these principles were again amplified and emphasised. At page 460, it is stated :

"The prohibition in section 49 is that no document required to be registered (and in this case, the lease being for five years, undoubtedly required to be registered) shall be received as evidence of any transaction affecting immoveable property. The real nature of this suit is for compensation for disturbing the plaintiff in his possession, and doing the necessary acts to entitle him to possession, such for example, as not executing the counterpart of the lease and duly registering it ; so that the non-registration is itself part of the plaintiff's cause of action"

and lower down it was pointed out :

"The proper answer, however, to the argument advanced is that this is not a suit brought upon the Kabuliyat and cowle (Exhibits VI and V), which, it should be noticed, were not filed for plaintiff as part of his case but by defendant, but a suit upon a breach of an implied contract by the defendant to do that which it was necessary for him to do in order to give effect to the agreement he had entered into with the plaintiff. The other unregistered documents that have been put in showing the terms of the lease have not been put in to enforce the lease, in which case they would not have been admissible as evidence as they would have been evidence of a transaction affecting immoveable property, but they must be deemed to have been put in simply as evidence of the character of the breach of the agreement by the defendant, and as a basis for calculating the measure of damages, neither of which things can, in the least, *affect the land lying* in the village of Valamid."

So that if the document is not the foundation of the suit of the plaintiff and the plaintiff does not seek to establish his title under the document, there is no objection to receive the document in evidence to establish the agreement and also to prove the acts which constitute the breach of the agreement.

This principle was extended in *Srinivasacharyulu* v. *Venkataraju*[1] to a suit for specific performance of a contract to grant a lease and it was held that the unregistered deed could be used in evidence to establish the agreement to give a lease. The Full Bench in *Narayana Chetti* v. *Muthiah Servai*[2] differed from the view in *Rajah of Venkatagiri* v. *Narayana Reddi*[3]. The agreement in that case was an agreement to execute a sub-lease and to get it registered at a future time. The suit was for enforcing the agreement by way of specific performance of the agreement and for damages. The document in question was marked as Ex. A and its terms are fully set out at page 64 of the report. It seems to have been construed as a mere agreement to sub-lease and get it registered on a future day. It does not appear to operate as a present demise and create an immediate interest in the property. It must be remembered, that at that time, the distinction pointed out in *Hemanta Kumari's case*[4] between agreements to lease which require registration and which do not require registration was not noticed. If really the agreement in the particular case was one which did not at all require registration the foundation of the decision falls to the ground. It proceeded on the assumption that the document did require registration, notwithstanding that it did not create any present interest. Krishnaswami Aiyar, J., delivered the leading referring judgment and the reasons given in that judgment were practically the reasons which were adopted by the Full Bench in the opinion which they delivered. The judgment of the learned Judge proceeded on a fundamental misconception that in *Rajah of Venkatagiri* v. *Narayana Reddi*[3] the agreement to grant a cowle was oral and was not in writing, while, in fact, there was the darkhast by the plaintiff in that case, which was in writing and the offer was accepted by the Dewan which was also in writing, so that the contract was concluded by the offer and acceptance of the plaintiff and defendant respectively contained in two separate written documents. The decision in *Rajah of Venkatagiri* v. *Narayana Reddi*[3] in allowing the Kabuliyat to be received in evidence, says the learned Judge,

"of the contract to grant a cowle and to register the Kabuliyat is not an authority for the position that an unregistered lease or agreement to grant a lease can be used in evidence for proving the lease or the agreement to grant it."

The Full Bench undoubtedly did not hold that the Kabuliyat could be used to establish the lease. On the contrary they distinctly said that the title based upon the document as a lease could not be established but they did hold that it could be used to prove an agreement to grant a lease. It was further laid down that the agreement to grant a lease was itself a transaction affecting immoveable property as such agreement created an equitable interest in the property in favour of the promisee and the twofold distinction of equitable and legal ownership of property obtaining in England was adopted by the learned Judge and that is, in effect, the basis of the judgment of the Full Bench. By reason of the assumption that the agreement to lease itself created an equitable interest in immoveable property, it was held that an attempt to prove an agreement amounted to proving a "transaction affecting immoveable property." The basis of this assumption, as pointed out by me already, is entirely wrong, as there is no distinction in Indian law between equitable interest in property and legal ownership. No such distinction is recognised under the Indian law. The enactment of a provision exempting agreements or documents, which do not themselves create an interest in immoveable properties under section 17 (2) (*v*) is taken as an indication that a document, which is only an agreement to execute another, may be deemed to affect the property and, but for this provision, a contract of sale would have required

1. (1907) 17 M.L.J. 218.
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
3. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
4. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).

registration. An agreement to grant a lease, being itself a lease, within the definition of section 2 (7) required registration under section 17 (1) (*d*). No exception is created under the Act in favour of agreements to grant a lease. It was argued, therefore, that it was a clear indication of the intention of the Legislature to treat agreements to grant a lease as creating interest in immoveable property. So ran the reasoning of the learned Judge. This view is no longer tenable in view of the decision of the Judicial Committee in *Hemanta Kumari's* case[1]. The opinion of the Full Bench proceeded substantially on the same grounds contained in the referring judgment of Krishnaswami Aiyar, J. The whole basis underlying the judgment is that a mere agreement to lease creates an interest in immoveable property and is, therefore, a transaction affecting immoveable property and the attempt, therefore, to use it in evidence to prove an agreement to grant a lease was to establish a transaction affecting immoveable property, which was not permitted by section 49 (*c*). This view of course is now untenable. The inference that agreements to lease create interest in immoveable property is sought to be based also upon the use of the expression "effect" employed in section 40 of the Transfer of Property Act and section 91 of the Trusts Act. The word "affect" is of a wider import and in the context in section 49, it must be read as a compendious expression to denote the long expression employed in section 17 as stated already. The conclusion of the Full Bench is stated at page 74 in these terms:

> "It is enough for the purpose of this reference to say that a contract to lease immoveable property which is compulsorily registrable under section 17, clause (*d*), affects the immoveable property and cannot, if unregistered, affect the property or be received in evidence to prove the contract. Suits for specific performance of a contract to sell were referred to in the course of the argument as suits affecting property. That is no doubt true as the relief asked for is the conveyance of property. The doctrine of *lis pendens* has been held to apply to a transfer of immoveable property pending a suit for specific performance."

It is difficult to see the relevancy of the doctrine of *lis pendens* applicable to suits for specific performance to determine the question whether an agreement to lease creates any interest in immoveable property, if it does not contain words establishing a present demise. The doctrine of *lis pendens* is based on section 52 of the Transfer of Property Act and when there is a dispute relating to immoveable property, the principle of *lis pendens* would apply. It does not therefore follow that the agreement sought to be enforced in a suit for specific performance does by itself create an interest in immoveable property. In the case of contracts to sell section 54 definitely states that it does not create an interest in immoveable property. It cannot be said that because the doctrine of *lis pendens* applies in suits to enforce contracts to sell, therefore, the contract to sell itself creates an interest in immoveable property. The whole basis of the reasoning of the Full Bench, in my opinion, is wrong, as it is coloured mostly by the doctrine obtaining in England that an agreement to sell or lease creates an interest in immoveable property.

The decision of the Full Bench in *Narayana Chetti* v. *Muthiah Servai*[2] was applied in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[3], where the suit was one for specific performance with a claim for damages in the alternative, instituted on foot of an unregistered agreement for a lease. The document in the suit in that case appears to be a mere agreement to grant a lease and does not create any immediate interest in the land. This decision was pronounced before the decision of the Judicial Committee in *Hemanta Kumari's case*[1]. In the light of the later decision of the Judicial Commitee and of the decision in *Swaminatha Mudaliar* v. *Ramaswami Mudaliar*[4], which construed that decision, it appears to be a case in which the agreement to grant a lease did not require registration. The claim for specific performance was rejected on the ground that the document required registration and therefore was inadmissible in evidence in view of the decision of the Full Bench in *Narayana Chetti* v. *Muthiah Servai*[2] which was taken as settling the question so far as this Court was concerned. The claim for damages was also rejected notwithstanding

1. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
3. (1917) 33 M.L.J. 596.
4. (1920) 40 M.L.J. 161 : I.L.R. 44 Mad. 399.

the decision of five Judges in *Rajah of Venkatagiri* v. *Narayana Reddi*[1] as it was held that from the decision in *Narayana Chetti* v. *Muthiah Servai*[2] it logically followed that if the agreement was inadmissible in evidence for specific performance it was equally inadmissible even in a suit for damages.

"The transaction affecting property" said Wallis, C.J., "if it does not affect it, is the agreement to lease (it is rather difficult to understand the meaning of this sentence).

"Therefore the section in this view prohibits the document from being given in evidence of the agreement to lease, and it seems to us that it prohibits it equally whether the claim be for specific performance or for damages. It appears to be the logical result that the claim for damages must also fail, if the view taken by the more recent Full Bench be adhered to, and, as I have already said, we are not preferred to reopen the question."

Of course, even as pointed out in the Full Bench decision in *Narayana Chetti* v. *Muthiah Servai*[2], there can be no logical distinction between a suit for specific performance and a suit for damages. Both stand on the same footing regarding the admissibility of the unregistered agreement to grant a lease. If it is admissible for one purpose, it must be equally admissible for the other purpose. This decision, therefore, treats the decision in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], as practically overruled by the later Full Bench of three Judges in *Narayana Chetti* v. *Muthiah Servai*[2]. The question in view of the direct conflict should have been then referred to a fuller Bench for an authoritative decision on the point instead of leaving the law in such an uncertain state.

In support of the view taken in the two decisions in *Narayana Chetti* v. *Muthiah Servai*[2], and in *Streeramulu Naidu* v. *Ramaswami Mudaliar*[3], Mr. Bhashyam, the learned advocate for the respondent relied on the decision in *Skinner* v. *Skinner*[4]. It arose out of a suit for specific performance of an agreement to sell certain properties. In proof of the agreement, a document, which was in form and in substance a sale-deed, which was unregistered, was relied on. The document relied on was construed by the Privy Council as itself creating an interest in the immoveable property specified in the schedules appended to the document and, therefore, was within the terms of section 17 of the Act and required registration. The next question to be considered was whether it could be admitted in evidence to establish an agreement to sell the property. This decision, it must be remembered was pronounced after the decision of the Judicial Committee in *Dayal Singh's case*[5] which held that an agreement to sell reciting payment of part of consideration as earnest money required registration under the provisions of the Registration Act as a document evidencing a transaction affecting immoveable property. The attempt, therefore, in that case being to establish an agreement to sell, it followed that it was tendered as evidence of a transaction affecting immoveable property and could not therefore be admitted in evidence without registration. At page 778 it was observed :

"In the present case, the document under consideration, in addition to creating an interest in the immoveable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale deed and it is contended for the first respondent that notwithstanding the non-registration he can sue upon this agreement putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immoveable property is a transaction 'affecting' the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provisions of section 17 (2) (v), which exempts from registration and therefore frees from the restriction of section 49, a document, which does not itself create an interest in immoveable property, but merely creates a right to obtain another document, which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act."

Putting the document in evidence as proof of the agreement according to the Privy Council is prohibited by section 49, the reason being an agreement for sale of immoveable property which is sought to be established by the document is a

1. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
3. (1917) 33 M.L.J. 596.
4. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 = I.L.R. 51 All. 771 (P.C.).
5. (1926) 51 M.L.J. 788 : L.R. 53 I.A. 214 (P.C.).

transaction affecting the property within the meaning of section 49. No doubt, as emphasised by Mr. Bhashyam, the reason for their holding that the transaction, namely, the agreement of sale, affects immoveable property is that if carried out the agreement would bring about a change of ownership. But, having regard to the whole passage above extracted and having regard to the fact that in *Dayal Singh's case*[1], the Judicial Committee held that even agreements to sell were within the mischief of sections 17 and 49 of the Registration Act, the only conclusion possible is that the Judicial Committee considered an agreement to sell immoveable property as by itself creating an interest in immoveable property and therefore constituted a transaction affecting immoveable property. The basis of the reasoning of the Judicial Committee has now been wiped out by the two amendments one, the Explanation to section 17 introduced in 1927 and the other, the proviso to section 49 enacted in 1929. The foundation, therefore, of this decision falls to the ground. An agreement for sale of immoveable property does not create any interest in immoveable property and, therefore, is not a transaction affecting such property. The unregistered document like the one considered by the Judicial Committee, even though it affects immoveable property can be now used in evidence in a suit for specific performance to establish an agreement to sell by virtue of the proviso to section 49.

The other decision on which considerable reliance was placed by Mr. Bashyam, the learned advocate for the respondent, is the decision of Page, J., in *Ramjoo Mahomed* v. *Haridas Mullick*[2], a decision of a single Judge. It was a suit for specific performance of an alleged agreement to lease certain properties and in the alternative for damages for breach of the agreement. The terms of the agreement were contained in two letters, which were construed by the learned Judge as operating a present demise of the premises and as creating an immediate interest in the properties. The documents not being registered, the question that arose for consideration was whether they could be admitted in evidence to prove an agreement to grant a lease. The learned Judge rejected the contention that the document could be adduced as evidence of an agreement under which the defendant contracted a personal obligation to grant a lease on the strength of the Full Bench decision in *Narayana Chetti* v. *Muthiah Servai*[3], and differed from the conclusion in *Rajah of Venkatagiri* v. *Narayana Reddi*[4], though *Narayana Chetti* v. *Muthiah Servai*[3], itself has followed the Calcutta High Court in two cases *Satyendra Nath Bose* v. *Anil Chandra Ghosh*[5], and *Hemanta Kumari Debi's case*[6]. The latter decision of Mukherji and Beachcraft, JJ., was affirmed by the Privy Council in *Hemanta Kumari Debi's case*[7]. Mookherji, J., at pages 350 and 351 followed *Srinivasa Charlu* v. *Venkataraju*[8] and *Satyendra Nath Bose* v. *Anil Chandra Ghosh*[5] and *Sarat Chandra Ghosh* v. *Shyam Chand Singh Roy*[9], where it was observed that the agreement to lease does not operate as a lease and does not affect the land. The decision of Page, J., in the case of *Ramjoo Mahomed* v. *Haridas Mullick*[2], was rested also upon the principle of *stare decisis*. The decision does not add any additional reason to the reasons given in *Narayana Chetti* v. *Muthiah Servai*[3].

On the other hand the view taken in *Rajah of Venkatagiri* v. *Narayana Reddi*[4], is supported by the decision of the Full Bench of the Calcutta High Court in *Ulfatunnissa* alias *Elahijan Bibi* v. *Hossain Khan*[10], and the recent decision of the Privy Council in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[11]. For a fuller report of the arguments in the Rangoon case see the report in the Calcutta Weekly Notes. (36 C.W.N. 677.).

In *Ulfatunnissa* alias *Elahijan Bibi* v. *Hossain Khan*[10], a suit was instituted on foot of an unregistered bond containing a personal undertaking to repay money borrowed

1. (1929) 51 M.L.J. 788 : L.R. 53 I.A. 214 (P.C.).
2. (1925) I.L.R. 52 Cal. 695.
3. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
4. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
5. (1908) 14 C.W.N. 65.
6. (1914) 19 C.W.N. 347.
7. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
8. (1907) 17 M.L.J. 218.
9. (1912) I.L.R. 39 Cal. 663.
10. (1833) I.L.R. 9 Cal. 520 (F.B.).
11. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).

and also a hypothecation of land of the value of over Rs. 100 as security. The point that arose for consideration was whether the document could be used in evidence to prove the personal obligation. A Full Bench of five Judges held that it could be used in evidence to establish the personal obligation. It was taken as settled law for the whole of India that an unregistered document like the one in suit was effectual " and might be used in evidence to charge the person, though not the land." And the conclusion of Field, J., at page 525 which was based on an earlier Full Bench decision in *Lachmipat Singh Dugar* v. *Mirsa Khairat Alli*[1], was as follows :

> " In the Full Bench case already referred to, the words "shall be received in evidence or shall affect " land were held to mean " should be received in evidence as a document affecting " land. We are applying exactly the same method of interpretation in holding that the words " shall be received as evidence of any transaction affecting land ", mean ' shall be received as evidence of any transaction so far as it affects land.' And this we think is the true construction. "

In *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[2], the Judicial Committee had to consider the question of the admissibility of an unregistered agreement to sell to establish a claim in liquidation proceedings for damages for breach of the contract. There was another question of fact, which was considered by the Judicial Committee, namely, whether or not the purchaser Moolla named in the contract had not acted as agent for the company. On the question of fact their Lordships agreed that Moolla was the undisclosed principal of the company and therefore was entitled to the damages. For the first time before the Judicial Committee the question of the admissibility of the agreement to sell on the ground of non-registration was raised, but the Judicial Committee had to consider the question whether at that stage of the case, the appellant should be permitted to raise the point of non-registration. The Judicial Committee had to consider the question permitting a party to a proceeding to raise a new point at a late stage in the light of the principles laid down by Lord Watson in *Connecticut Fire Insurance Co.* v. *Kavanagh*[3]. The passage from Lord Watson's judgment was extracted by the Judicial Committee. According to the principle laid down by Lord Watson a new point ought not to be allowed to be raised, unless the Court was satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. In other words, the Judicial Committee had to be satisfied whether there was any substance in the new plea. It is in that light their Lordships dealt with the construction of section 49 of the Registration Act and after examining the provisions, their Lordships' conclusion is stated at page 255 in these terms :

> "Their Lordships are satisfied that there is nothing in the section cited, when properly construed, to compel the court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document.
>
> Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further, the proceedings do not in any respect affect any immoveable property. The immoveable property affected by the agreement long since passed out of the picture, and, the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal. "

Two principles, therefore, emerge from this passage. *Firstly*, unless the document is the foundation of a judgment affecting immoveable property, or in other words, a document on which the title claimed in the suit is based, there is no objection to admit the document in evidence for other purposes. *Secondly*, there can be no objection if the claim in the proceedings in which the document is sought to be used as evidence of a personal claim, *i.e.*, for damages for breach of an admitted contract. This is exactly the view that was taken by the learned Judges in *Rajah of Venkatagiri* v. *Narayana Reddi*[4]. This decision shows that the restriction contained in section 49 is confined only to the use of the document as evidence of a transaction affecting such property and not its use for any other purpose. So long as the intended use is not to establish title to the property and is not made the basis

1. (1869) 4 B.L.R. 18 (F.B.).
2. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).
3. (1892) A.C. 473 at 480.
4. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).

or the foundation for a judgment affecting immoveable property, there is no objection for the use of the document in evidence. The effect of this judgment of the Judicial Committee cannot be belittled, as was attempted by Mr. Bhashyam, the learned Counsel for the respondent, on the ground that the Judicial Committee later decided not to permit the appellant to raise the point of non-registration. It was pointed out in conclusion that the appellant was not able to bring himself within the principles indicated by Lord Watson governing the conditions on which a new point could be permitted to be raised in the appeal.

In view of this decision of the Privy Council it seems to me unnecessary to refer to the other decisions of other Courts on which reliance was placed by Mr. Bhashyam, particularly as those decisions did not consider the decision in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[1]. Nor is it necessary to consider the scope and ambit of the new section (section 27-*a*) of the Specific Relief Act which relates to specific performance of contracts to lease where there was part-performance. The section was considered recently by a Bench in *Ranganatham Chetti* v. *Kanakaratnamma*[2]. The present suit is not one for specific performance and it is unnecessary to go into the question whether that section is exhaustive. Light is thrown on this question by the decision of the Calcutta High Court in *Gokal Chandra Law* v. *Haji Mahomed Din*[3].

Lastly, thre is one contention urged on behalf of the appellant, which requires consideration. The argument was that as the proviso to section 49 permitted the use in evidence of a document affecting immoveable property in a suit for specific performance, it followed on the principle of section 19 of Specific Relief Act that it could be used also in evidence in a suit for damages as under section 19 of the Specific Relief Act a person suing for specific performance of a contract is entitled to ask for compensation for its breach either in addition to, or in substitution for, such specific performance. This argument cannot be accepted for the simple reason that the right recognised in section 19 is available only to a person who sues for specific performance of a contract and does not enable a person to institute a suit for damages without reference to a claim for specific performance. It is only in a suit for specific performance that it is permissible for a party to ask for compensation for its breach either in addition to, or in substitution for, such performance. (See also *Ardeshir Mama* v. *Flora Sassoon*[4]).

It follows from the foregoing discussion that the decision in *Narayana Chetti* v. *Muthiah Servai*[5], must be overruled and the decision in *Rajah of Venkatagiri* v. *Narayana Reddi*[6], in my judgment lays down the law correctly. The question referred to us must, in my opinion, be answered in the affirmative.

Panchapagesa Sastri, J.—The question referred for the opinion of the Full Bench is as follows:

> "Whether an agreement of lease in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach."

My answer to the reference is in the negative.

An agreement to lease is, in my opinion, a transaction affecting immoveable property within the meaning of section 49 (*c*) of the Registration Act. Such an agreement does not of itself create any legal interest in the property. It is unnecessary to decide whether it creates at least an equitable interest. In *Narayana Chetti* v. *Muthiah Servai*[5], in the order of reference to the Full Bench, Krishnaswami Aiyar, J., was of the opinion that it creates an equitable interest in favour of the promisee. In *Hemanta Kumari Debi* v. *Midnapore Zamindari, Co.*,[7] the Judicial Committee observed that document in question there was not an "agreement to lease" coming under the definition of the term "lease" in the Registration Act and compulsorily

1. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).
2. (1948) 2 M.L.J. 189.
3. (1938) 1 Cal. 563.
4. (1928) 55 M.L.J. 523 : L.R. 55 I.A. 360 : I.L.R. 52 Bom. 597 (P.C.).
5. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
6. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
7. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).

registrable under section 17 (1) (*d*) as it was not a document that "effected an actual demise and operated as a lease". They, however, said that the document there "did purport to create a contingent right or interest in immoveable property within the meaning of section 17 (1) (*b*)". The document in that case was a decree of Court passed on a compromise and it contained all the terms of the compromise. One of the terms was an agreement to give a lease of immoveable property on the happening of a certain contingency in the future. It was with reference to this obligation to grant a lease that their Lordships remarked that the document purported to create a contingent right or interest. In view, however, of section 17 (2) (vi) of the Registration Act, as it then stood, a decree of Court was taken out of section 17 (1) (*b*). The particular document therefore was not compulsorily registrable, and section 49 of the Registration Act, therefore, was said not to stand in the way of the document being received in evidence of the agreement to lease in future on the happening of a contingency in a suit for specific performance thereof. Notwithstanding these two authorities, it would be difficult to hold now that an equitable interest is created in view of the later decisions of the Judicial Committee, particularly, the decision in *Ariff* v. *Jadunath Majumdar*[1].

A document, however, may affect immoveable property even though by itself it creates no legal or equitable interest in the same. The word 'affecting' cannot be limited to mean only "purporting or operating to create, declare, assign, limit, or extinguish, whether in the present or in future, any right, title or interest, whether vested or contingent to". The document cannot be treated as a transaction not affecting immoveable property merely because it does not, by itself, bring about any of the things stated above. In *James Skinner* v. *Skinner*[2], the Judicial Committee held that an agreement for sale of immoveable property is a transaction affecting the property within the meaning of section 49 (*c*) of the Registration Act "inasmuch as if carried out it will bring about a change of ownership". A contract for the sale of immoveable property does not by the statute law of India of itself create any interest in or charge on such property. Nevertheless, their Lordships had no difficulty in holding that such an agreement is a transaction affecting immoveable property. Their Lordships also referred to the provisions of section 17 (2) (*v*) as showing the intention of the Act. I am therefore unable to agree with the limited interpretation of the term "affecting" adopted by the Division Bench in *Saraswathamma* v. *Paddayya*[3], Spencer, J.'s definition of the term in that decision was really by way of *obiter* as the actual decision was only that a document declaring a division in status amongst Hindu coparceners does not affect immoveable property so as to require registration. On the other hand, the Full Bench decision in *Narayana Chetti* v. *Muthiah Servai*[4], considers the question very exhaustively and holds that an agreement to lease is a transaction affecting immoveable property. It may be noted in passing that the opinion of the Full Bench is not based on the view that an agreement to lease creates an equitable interest notwithstanding the observations to that effect in the order of reference by the Division Bench; it is based really on other grounds which are fully set out therein, particularly with reference to the provisions of section 40 of the Transfer of Property Act, section 91 of the Indian Trusts Act, and the applicability of the doctrine of *lis pendens* to a suit for specific performance of such an agreement. Nothing has been urged in the arguments against the cogency of the reasoning in the Full Bench opinion. All that was said was the provisions were statutory. No doubt, they are but what follows? It only shows that the Indian law does recognise unmistakeably that such agreements do affect immoveable property. They very word "affecting" is used in the statutes. I see no reason why the use of the term "affecting" there could not be taken as giving a proper clue to the meaning of the term in section 49 of the Registration Act.

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1. (1930) 60 M.L.J. 538 : L.R. 58 I.A. 91 : I.L.R. 58 Cal. 1235 (P.C.).
2. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 : I.L.R. 51 All. 771 (P.C.).
3. (1922) 44 M.L.J. 45 : I.L.R. 46 Mad. 349.
4. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).

While holding that the word "affecting" is wider than what it was attempted to be confined to by Spencer, J.'s definition in *Saraswathamma* v. *Paddayya*[1], it by no means follows that there may not be transactions in relation to an immoveable property which nevertheless do not affect immoveable property. An agreement to supervise the construction of a building for an agreed remuneration, an agreement to supply the necessary materials for carrying out repairs to an existing building are obvious instances. It may not be possible to define exhaustively what kinds of agreements affect the immoveable property comprised therein. It is not necessary or desirable to lay down an exact test applicable to all cases. Speaking generally and with no intention of laying down an exhaustive test, I may observe that an agreement which binds the land in its inception or concerns or touches the land so as to affect the nature or quality or value of the land, may be taken to be an agreement which affects immoveable property. It is sufficient to hold in this case that an agreement to lease immoveable property is a transaction affecting immoveable property. The opinion of the Full Bench in *Narayana Chetti* v. *Muthiah Servai*[2], should be accepted as correct and followed.

That decision of the Full Bench was no doubt one with reference to a suit for specific performance of an agreement to lease. It was held that section 49 (*c*) of the Registration Act as it then stood precluded the reception of the unregistered document as evidence of a transaction affecting immoveable property in a suit for specific performance of the agreement. That decision however was applied and extended to a case where the suit was for specific performance with a claim for damages in the alternative—vide *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[3]. While rejecting the claim for specific performance on the basis of the Full Bench decision, the Division Bench observed that the claim for damages in the alternative should also be rejected. They stated that if the view taken by the Full Bench is to be accepted as regards suits for specific performance the necessary consequences should be accepted as regards suits for damages. "Section 49 prohibits the document from being received as evidence of a transaction affecting immoveable property". They state the transaction affecting the property is the agreement to lease. The section in this view prohibits the document from being given in evidence of the agreement to lease; and it prohibits it equally whether the claim be for specific performance or for damages. "The logical result is the claim for damages also must fail if the view of the Full Bench is adhered to".

Since the above decisions were given, section 49 has been amended by a proviso being introduced therein by section 10 of the Transfer of Property Act (Amendment) Supplementary Act of 1929.

The newly introduced proviso has no application to the present case. The present suit is not one for specific performance under Chapter II of the Specific Relief Act, 1877. It is a suit *simpliciter* for recovery of damages for an alleged breach of contract to give a lease. It is well established that a suit for specific performance is in its origin and nature entirely different from a suit for recovery of damages for breach of the contract. Specific performance is asked for on the footing of the continued existence of the contract while damages are claimed on the basis of a breach of contract accepted by the party as a breach. The claim for specific performance requires continued readiness and willingness on the part of the plaintiff to perform the contract which he is keeping alive and trying to get enforced. Although a brief reference was made in the course of the argument to section 19 of the Specific Relief Act which empowers a person to ask for compensation for breach in addition to or in substitution for specific performance it was realised that a suit merely asking for damages on the footing of an accepted breach of contract cannot be described as a suit for specific performance. Section 29 of the the Specific Relief Act which bars a suit for compensation for breach of contract after the dismissal of a suit for specific performance is also significant in this connection. Moreover, with respect to agreements to lease, the suit contemplated by the

1. (1922) 44 M.L.J. 45 : I.L.R. 46 Mad. 349. (F.B.)
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63. 3. (1917) 33 M.L.J. 596.

proviso to section 49 would appear to be the suit provided for by section 27 (a) of the Specific Relief Act. It is however unnecessary to come to a definite conclusion as regards this last question.

The learned counsel for the appellant admitted that he cannot claim the benefit of the proviso on the ground that the present suit should be regarded as a suit for for specific performance.

Nor is it possible to invoke the provisions of the proviso on the ground that the document is asked to be received in evidence only of any collateral transaction not required to be effected by a registered instrument. The transaction which is sought to be established by tendering the document in evidence is the factum of the agreement to lease. There is no question of any collateral transaction in this case. There is only one transaction throughout and that is a contract to give a lease. The relief may be either specific performance where the breach is not accepted and a party wants to enforce the contract specifically or a right to recover damages where the breach of contract is accepted and the party sues for compensation for breach. It is not as if there are two transactions one of which gives a right to specific performance and the other a collateral transaction giving rise to a claim for damages for breach of the contract. A very faint suggestion was made that there is a primary obligation to carry out the terms of the contract and a secondary obligation in the nature of a further and a distinct agreement to compensate for its breach if the first contract is not carried out. This however was not persisted in and was withdrawn no sooner than it was mentioned. The learned counsel conceded that it would be impossible to agree that there was a collateral transaction as evidence of which he is trying to get the document in. Apart from this concession, I have no doubt that there is only one transaction and that is the transaction of an agreement to lease which by its nature is a transaction affecting immoveable property as I have already held. The proviso, therefore, is inapplicable to the present case.

We are left therefore with the only question of the applicability of sub-clause (c) of section 49 of the Act. The main argument of the appellant's counsel was that section 49 (c) precludes the document being received only in so far as the Court is asked to give relief to affect immoveable property comprised in the document. The decree granting damages for compensation for breach of contract is of course of money decree and the relief does not by itself affect immoveable property. I find myself unable to agree with the contention of the appellant's counsel on the construction of section 49 (c). The section reads as "No document, etc., etc., shall be received as evidence of any transaction affecting such property". It cannot be read as equivalent to "No document, etc., etc., shall be received in evidence so as to affect such property". What is prohibited is the reception of the document as evidence of the transaction itself. The section does not merely prohibit the granting of a relief by way of an ultimate decree, a relief affecting immoveable property. The reference to the *conjoint* words "any transaction affecting such property" is significant. The contrary construction is not warranted by the language. A relief for damages can be given only if the plaintiff succeeds in establishing that there was a contract which was broken. It is to establish that contract that he wants this document to be received as evidence. The section prohibits the reception of the document as evidence of the transaction. The section cannot be construed to mean that the document can be received as establishing the transaction but relief should be denied on the basis of the transaction so established in so far as such relief affects immoveable property alone. I entirely agree with the reasoning in *Streeramulu Naidu* v. *Ramaswami Mudaliar*[1], on this aspect of the matter. It may be mentioned in passing that the reference to *Ulfatunnissa* alias *Elahijan Bibi* v. *Hossain Khan*[2] which is found in *Narayana Chetti* v. *Muthiah Servai*[3], cannot be taken to mean that the Full Bench understood the section to mean that the document cannot be received as evidence of the transaction only so far as the relief to be decreed affects

1. (1917) 33 M.L.J. 596.
2. (1883) I.L.R. 9 Cal. 520 (F.B.).
3. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).

such property. In the particular case before the Full Bench the suit being one for specific performance there was no occasion to come to a conclusion on that matter.

Finally it was argued that the pronouncement by the Judicial Committee in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[1], was conclusive on the question. Strong reliance was placed upon certain observations in that judgment for the view that section 49 (*c*) does not preclude the reception of the unregistered document in a suit claiming damages only for breach of contract. It is necessary therefore to examine that case somewhat more closely in view of the arguments pressed on us by the appellant's learned counsel. The question there arose with respect to a document which was not registered. For the first time before the Judicial Committee it was sought to be argued that the document required registration and section 49 therefore stood in the way of its being received as evidence. Their Lordships finally declined to allow the point of non-registration to be raised before them. It is obvious, therefore, that there was no decision on the question before their Lordships. It was submitted however that the observations of their Lordships amounted to an *obiter dictum* which ought to be followed. The proceedings in the lower Court from out of which the appeal was filed arose out of a proof filed by a creditor in the liquidation of a company which proof was rejected by the liquidator. Their Lordships at the opening referred to it as a proof for an amount of Rs. 63,000 and odd

> "damages alleged to have been incurred by the creditor, by reason of the failure of the company to complete the purchase of property agreed to be sold under an agreement of 27th July, 1921."

The question in controversy in the suit related to one point and that was whether the agreement of sale, on the face of which the purchaser was one M. E. Moolla had been entered into by him on his own account or whether the company was the undisclosed principal of Moolla in respect of such an agreement. The petition for winding up of the company was presented on 6th April, 1927 and an order for winding up was made on the 21st of June, 1927. In between the two dates, the respondent, the other party to the agreement of sale, filed an affidavit claiming that she was a secured creditor of the company for Rs. 1,31,000 and odd, that being the sum which was claimed by her as owing under the agreement of sale. Moolla also was subsequently declared an insolvent sometime between April and June, 1927. Their Lordships state "What subsequently followed is not clear". No oral evidence was given at the trial by the liquidator. He was content with filing an affidavit. Their Lordships observe :

> "It is, however, reasonably clear from the affidavit (1) that the respondent had put in a proof of claim presumably on the same lines as that contained in her affidavit of the 18th June, 1927; (2) That for the purpose of minimising her claim to damages she had offered to take over the property at Rs. 4,500 per acre ; (3) that the liquidator had neither admitted nor rejected her claim, but had applied to the Court for directions, putting in the agreement and pointing out that there was a question whether Moolla was principal or agent".

The Court would appear to have given directions to sell the property by public auction. The sale was held and the proceeds were paid to the respondent. Their Lordships presumed that the proceeds were so paid under the orders of Court. Their Lordships further held that in order to confer a valid title on the purchaser in Court auction, there must have been some agreement between the Official Liquidator and the respondent, though the Official Liquidator did not admit that there was any such agreement. Their Lordships were inclined to find an agreement that the parties arranged to minimise the damages by concurring in a sale of property and in handing the proceeds of sale to the respondent, the question whether the company was the principal in respect of the agreement of sale being the *only* question left open for decision. The proof was subsequently amended by the amount being reduced to Rs. 63,219-15-0. It was in those circumstances that the question of non-registration of the document was sought to be raised for the first time before the Judicial Committee. As already stated, they decided not to allow the point

1. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).

to be raised. In so doing, they observed that there is nothing in section 49 of the Registration Act when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such a document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document. Their Lordships pointed out that the agreement had been admitted throughout and indeed it was put in by the liquidator himself. Then they observe :

"Further, the proceedings do not in any respect affect any immoveable property. The immoveable property affected by the agreement long since passed out of the picture, and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal . . . . There are indications of a course of conduct or agreement on the part of the liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the company and Moolla in regard to the agreement of 27th July, 1921."

In my opinion these observations could not be regarded as a considered opinion of the Committee. Their Lordships rejected the argument of counsel that the public policy underlying section 49 of the Registration Act compelled the Court to take notice of non-registration of even an admitted document. Their Lordships' observations are that the proper construction of the section did not make out any such obligatory duty on the Court. They no doubt add

"unless at any rate such a document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such a document."

In other words, their Lordships are holding that so far at any rate as the scope of section 49 (*c*) of the Registration Act is concerned, there is no such obligation on the Court in spite of the fact that the parties have admitted the agreement though contained in a compulsorily registrable but unregistered document. Whatever may be the force of the argument based on public policy underlying section 49 (*a*) of the Registration Act their Lordships would seem to have had no doubt that so far as section 49 (*c*) is concerned there was no such argument available. Section 49 (*a*) it will be observed lays down a rule of substantive law. The statute requires in certain cases a registered instrument for creating a title or interest in immoveable property. Section 49 (*c*) however embodies merely a rule of evidence. The guarded exception found in the latter portion of the sentence of their Lordships extracted above is, in my opinion, intended to reserve their Lordships' further consideration of the question whether even as regards section 49 (*a*) the Court could allow parties to waive the requirement of registration by admitting the existence of the agreement. The word "judgment" in that sentence really means a decree. Having regard to the statutory requirements even an admission cannot create title, that is all, it seems to me, that their Lordships intended to indicate by that reservation. Otherwise their Lordships found nothing in the section properly construed which prevents the parties from dispensing with proof and agreeing on the existence of certain agreements. There is no obligation on the Court in such circumstances to decline to give effect to the admission of parties and hold that the agreement was not established. The further reference to the fact that the property had long passed out of the picture and the only claim was one for damages was only to lead up to and emphasise the final consideration relied on by them for declaring to allow the point of non-registration to be raised, namely,

"that the *only* question which was reserved for the consideration of the Court and which it was competent for the liquidator and the creditor to raise in the proceedings before the Court was the point as to the respective position of the company and Moolla with regard to the agreement of sale."

I am unable therefore to read these observations as amounting even to an *obiter dictum* that section 49 (*c*) does not preclude the reception of the document as for the purpose of establishing a claim to damages and not for any relief affecting immoveable property. If their Lordships had intended otherwise, the lengthy discussion in the judgment would have been wholly superfluous as they had only to say that section 49 (*c*) did not preclude reception of the unregistered document (though compulsorily registrable) in a suit claiming merely damages for a breach of the contract to buy immoveable property.

Even apart from the observation of the Privy Council above referred to it was contended that the Full Bench case in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], had decided that an unregistered document can be received in evidence in a suit for damages for breach of contract. The precise scope of the decision in the above case was considered in the later Full Bench decision in *Narayana Chetti* v. *Muthiah Servai*[2]. It was explained there that the earlier Full Bench case related only to proof of an oral agreement and not to the reception of an unregistered document containing a written agreement to lease. An examination of the facts of the Full Bench case in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], bears out this distinction as correct. The order of reference to the Full Bench related to admissibility of five documents for ascertaining the nature and terms of the contract and for the purpose of assessing the damages for breach of the alleged contract. Before the Full Bench it was agreed that only one of these five documents raised any question of registration. That was a Kabuliat executed by the respondent in favour of the appellant. *That by itself was not relied on as the agreement to lease.* It was only an anterior oral agreement which was sought to be established as having existed for the breach of which the suit for damages was laid. This is made clear in several passages in the opinion of the Full Bench as well as in the judgment of the Division Bench after the receipt of the opinion of the Full Bench. The Full Bench opinion points out that the plaint set out the agreement for a lease of the village which was to run from fasli 1299 and to last for five years. The cause of action alleged was that the failure on the part of the defendant to act up to the Karar, that is, the agreement to lease and the improper resumption of the village which had been put into possession of the plaintiff. It may also be pointed out that the contract to give a lease was not in writing. No doubt the offer was in writing, but the communication of the acceptance of the offer to the proposed tenant was not in writing. On examination of the printed paper, I find that Exhibits IV and J in that case which showed the acceptance of the offer were only communications addressed by the Diwan of the Zamindar to his own subordinate, the Tahsildar, and were not communications to the tenant. That is why the later Full Bench pointed out that the agreement to lease set up in the earlier case was only an oral agreement. When the facts are understood it is clear that the decision in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], has really no application to the present case.

A general argument was advanced that it is anomalous to construe the section so as to preclude the reception of the document in a suit for damages while the statute as it stands now permits the use of the document in a suit for specific performance by reason of the proviso to section 49 of the Act. No doubt the resultant situation may look anomalous. The reason however for the anomaly is to be found only in the piecemeal legislation effected by the Indian Legislature by introducing the proviso (be it noted, not an Explanation) and in terms confining it to certain cases only. The section as construed prior to the proviso applied equally to suits for specific performance and to suits for damages as pointed out already. There was nothing anomalous in that and in fact, it was quite logical to apply it to both cases as pointed out by the Division Bench in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[3]. The scope of section 49 (*c*) cannot however be taken away in cases where the proviso does not in terms apply.

I am accordingly of the opinion that this reference should be answered in the negative.

Viswanatha Sastri, J.—As my learned brethren are not unanimous in their conclusion, I consider it not inappropriate to add a few words of my own. Few expressions in the Registration Act have been more often discussed than the words "affect immoveable property" and "a transaction affecting such property" occurring in section 49 (*a*) and (*c*) of the Registration Act hereinafter referred to as "the Act". It is not every contract in which immoveable property comes into the picture that

1. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
2. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
3. (1917) 33 M.L.J. 596.

can be said to "affect" it. A building contract or a contract to instal sanitary or electric fittings in a house, in some sense, affects immoveable property. Such a contract, though unregistered, would be admissible in a suit for specific performance or damages for its breach. It is a personal contract not affecting immoveable property in any real or legal sense and the relief sought is personal redress for its wrongful breach. It is also necessary to put aside cases where two or more distinct contracts are rolled up in one document, as for instance a mortgage containing a personal covenant to pay and also a collateral security of immoveable property for the debt. In such a case Courts have held that the mortgage deed though unregistered might be received in evidence to charge the person, though not the land, with liability for the debt, *Ulfatannussa* v. *Hossain Khan*[1] and *Kunhu Moidu* v. *Madhava Menon*[2]. Again an unregistered deed may be inoperative to effect a valid transfer of immoveable property or an interest therein but may be effective to transfer title to moveable property or a chose in action comprised therein, *Imperial Bank of India* v. *Bengal National Bank*[3]. In these cases section 49 of the Registration Act does not come into play.

A contract to sell or lease immoveable property "affects" the property though it may not create or transfer any interest in the property and such a contract for sale or lease is a transaction "affecting" immoveable property. Section 54 of the Transfer of Property Act does not adopt the English equitable doctrine that a contract for sale of immoveable property creates an equitable interest in the property in the purchaser. *Maung Shwe Goh* v. *Maung Inn*[4], *Miran Pir Bux* v. *Sardar Mohamed Tahar*[5] and *Ariff* v. *Jadunmal*[6]. But on that account it could not be said that a contract for sale of land does not "affect" land. That a contract or covenant though it does not create an interest in land may yet "affect" it, is recognised by the Legislature in section 40 of the Transfer of Property Act and section 91 of the Trusts Act. An easement may be created by a grant and restrictive covenants as regards the user of property may be entered into without the creation of an interest in the property of the grantor or covenantor. In such cases immoveable property is "affected" though no interest therein is created while rights under a contract may be assigned, a duty or liability arising out of a contract is unassignable. If, however, immoveable property is transferred, the transferee with notice takes it subject to restrictive covenants running with the land, though such covenants do not create an interest in land. Section 27 (*b*) of the Specific Relief Act gives a right to specific performance against a subsequent purchaser of land with notice of a prior contract for sale, evidently because the prior contract "affects" the land and not merely the person of the vendor. In *Skinner* v. *Skinner*[7], the Judicial Committee ruled that an agreement for the sale of immoveable property was a transaction "affecting" the property within the meaning of section 49 (*c*) of the Act inasmuch as if carried out, it would bring about a change of ownership. Their Lordships relied on the exemption created by section 17 (2) (*v*) of the Act to reinforce their interpretation of section 49 (*c*) of the Act. The exemption would be unnecessary if a contract for a sale or lease of immoveable property was not a transaction affecting such property. The view of the Full Bench in *Narayana Chetti* v. *Muthiah Servai*[8], must be accepted as correct so far as this point is concerned. I find it difficult to accept the dictum of Spencer, J., in *Saraswatamma* v. *Paddayya*[9], quoted with approval in *Kanji and Moolji Bros.* v. *Shanmugam Pillai*[10], that the word "affect" in section 49 of the Act is a compendious expression conveying only the same idea as the expressions "create, declare, assign, limit or extinguish any right, title or interest" found in section 17 (1) (*b*) of the Act.

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1. (1883) I.L.R. 9 Cal. 520 (F.B.).
2. (1909) 19 M.L.J. 584 : I.L.R. 32 Mad. 410 (F.B.).
3. (1931) 61 M.L.J. 589 : L.R. 58 I.A. 323 (P.C.).
4. (1916) 32 M.L.J. 6 : L.R. 44 I.A. 15 : I.L.R. 44 Cal. 542 (P.C.).
5. (1934) 67 M.L.J. 865 : L.R. 61 I.A. 388 : I.L.R. 58 Bom. 650 (P.C.).
6. (1931) 60 M.L.J. 538 : L.R. 58 I.A. 91 : I.L.R. 58 Cal. 1235 (P.C.).
7. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 : I.L.R. 61 All. 771 (P.C.).
8. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
9. (1922) 44 M.L.J. 45 : I.L.R. 46 Mad. 349.
10. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.

Courts in India, however, held that a contract for sale of land was merely a document creating a right to obtain another document and was exempted from registration by section 17 (2) (v) of the Act, even though it contained an acknowledgment of earnest money or receipt of part payment of the price. These decisions were upset by the Judicial Committee in *Dayal Singh* v. *Inder Singh*[1], but the Legislature promptly nullified the effect of this decision and restored the previous view of the law by adding an Explanation to section 17 of the Act in 1927. In *Skinner* v. *Skinner*[2], the Judicial Committee while recognising that a mere agreement for the sale of land, though it affected the land was exempt from registration and therefore freed from the prohibition in section 49 by reason of section 17 (2) (v) of the Act, held that an unregistered sale deed which purported to create an interest in land was inadmissible in evidence to prove the contract of sale contained therein in a suit for specific performance. The Legislature again nullified the effect of this decision by inserting a proviso to section 49 of the Act. Thereafter this Court held that an unregistered sale deed could be received in evidence in a suit by the vendor for recovery of the purchase money, the suit being viewed as one for specific performance, *Subramania Chettiar* v. *Arunachala Chetti*[3]. Unregistered sale deeds of immoveable properties are now admissible in evidence in suits for specific performance of the contract of sale under the proviso to section 49 of the Act. A contract for sale of immoveable property, though it is a transaction affecting it, is exempt from registration under section 17 (2) (v) and would, though unregistered, be admissible in evidence in a suit for specific performance or for damages for its breach.

A "lease" is defined in section 2 (7) of the Act as including "an agreement to lease". A lease is the transfer of an interest in immoveable property and creates a right *in rem*. If an agreement to lease fixes the terms of the lease and gives the lessee a right to possession of immoveable property, either immediately or at a future date, the document is treated for purposes of registration as a lease, though it does not purport to transfer an interest in the property by way of lease. This is the effect of the decisions in *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[4], *Port Canning Land Improvement Corporation* v. *Katyani Debi*[5], *Swaminatha Mudaliar* v. *Ramaswami Mudaliar*[6], *Mopurappa* v. *Ramaswami Gramani*[7]. While discarding the English doctrine of an equitable interest arising from a contract for the sale of immoveable property the Legislature, perhaps unconsciously, adopted the equitable doctrine with reference to agreements to leases not only by omitting to enact a proviso similar to that of section 54 in section 105, Transfer of Property Act, but also by including "an agreement to lease" within the definition of a lease in section 2 (7) of the Act. An agreement which does not give the lessee a right to possession either immediately or at a future date but which only binds the parties, the one to create and the other to accept a lease hereafter, is a mere agreement for a lease and stands on a different footing. An agreement to lease operating as an actual demise of immoveable property falls within sections 2 (7) and 17 (1) (d) of the Act, and is not exempted by section 17 (2) (v) and must be registered. It is a transaction "affecting" immoveable property and being unregistered would be inadmissible in a suit for specific performance or damages according to *Narayana Chetti* v. *Muthiah Servai*[8], though the actual relief sought in that case was specific performance. The same rule was applied to a suit for damages in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[9]. Such an agreement to lease, though unregistered, has since been rendered admissible in evidence in a suit for specific performance of the contract by reason of the proviso to section 49 of the Act enacted in 1929. Section 27-A of the Specific Relief Act and section 53-A, Transfer of Property Act, enacted at the same time as the proviso to section 49 of the Act permit the reception in evidence of an unregistered agreement to lease effecting a present demise, to sustain a claim for specific performance

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1. (1926) 51 M.L.J. 788 : L.R. 53 I.A. 214 (P.C.).
2. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 : I.L.R. 51 All. 771 (P.C.).
3. (1943) 2 M.L.J. 424 (F.B.).
4. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
5. (1919) I.L.R. 47 Cal. 280 (P.C.).
6. (1920) 40 M.L.J. 161 : I.L.R. 44 Mad. 399.
7. (1933) 67 M.L.J. 54 : I.L.R. 57 Mad. 760.
8. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
9. (1917) 33 M.L.J. 596.

or a defence of part-performance. To this extent the decision in *Narayana Chettiar* v. *Muthiah Servai*[1], has been superseded by legislation. Is an unregistered lease or an unregistered agreement to lease falling within the definition of a "lease" in section 2 (7) of the Act admissible in evidence in a suit for damages for breach of contract or is it ruled out by section 49 (*c*) of the Act as held in *Narayana Chetti* v. *Muthiah Servai*[1] and *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[2]?

A claim for damages for a breach of contract is different from a claim for specific performance, though compensation, not be it observed, damages, can be awarded in addition to or in substitution for specific performance under section 19 of the Specific Relief Act. Damages was the only remedy available at common law for a breach of contract while specific performance was an equitable remedy available in Chancery and in spite of the fusion of law and equity, the two reliefs are distinct. The compensation referred to in section 19 of the Specific Relief Act is awarded in the exercise and as part of the equitable jurisdiction to grant specific performance, in contradistinction to the common law remedy by way of damages, *Mama* v. *Flora Sassoon*[3]. The two reliefs, specific performance and damages, are alternative and not cumulative. The proviso to section 49 of the Act refers to a suit for specific performance falling within section 27 of the Specific Relief Act and cannot be construed as including within its ambit and scope a suit for damages for breach of contract. Nor can I accept the argument that the unregistered agreement to lease is sought to be adduced as evidence of a collateral transaction not required to be effected by a registered document. There is only one transaction, namely, an agreement to lease which may give rise to different reliefs by way of specific performance or damages and that transaction "affects" immoveable property.

An unregistered agreement to lease which effects an actual demise of immoveable property, though it does not transfer any interest by way of a lease and though it contemplates the execution of a lease deed transferring such an interest, nevertheless "affects" immoveable property. It is compulsorily registrable under section 17 (1) (*d*) read with section 2 (7) of the Act and is not exempt from registration under section 17 (2) (*v*) of the Act. The reference to "an agreement to lease" in the sequel is only to this type of agreements. Such an agreement to lease, if unregistered, cannot "affect" immoveable property under section 49 (*a*) or "be received as evidence of any transaction affecting such property" under section 49 (*c*) of the Act. Section 49 (*c*) is a substantive provision which strikes the transaction with sterility while section 49 (*c*) bars the reception of the agreement in evidence. Section 49 (*c*) does not concern itself with the reliefs available in respect of a "transaction affecting immoveable property" but shuts out the unregistered agreement as evidence of the transaction itself. The transaction affecting the immoveable property is the agreement to lease. Under section 91 of the Evidence Act, the transaction cannot be proved otherwise than by the written agreement itself. Section 49 (*c*) prevents the agreement to lease, if left unregistered from being received as evidence of the transaction. Of that which does not exist and that which does not appear in evidence, the reckoning in a Court of Law is the same, said Bowen, L.J. It follows logically that neither specific performance nor damages for breach of contract could be decreed without proof of the transaction, *i.e.*, the agreement to lease. It was so held by this Court in *Sreeramulu Naidu* v. *Ramaswami Mudaliar*[2]. The proviso to section 49 is an exception to section 49 (*c*) of the Act introduced in 1929 and allows the unregistered agreement to lease to be given in evidence of the transaction only in a suit for specific performance. It does not refer to suits for damages.

Dealing with an unregistered memorandum of lease under which possession was taken in *Port Canning Land Improvement Corporation* v. *Katyani Debi*[4], the Judicial Committee observed :

"Being unregistered it is inadmissible in evidence, and no effect can be given to it."

1. (1910) 21 M.L.J. 44 : I.L.R. 35 Mad. 63 (F.B.).
2. (1917) 33 M.L.J. 596.
3. (1928) 55 M.L.J. 523 : L.R. 55 I.A. 360 : I.L.R. 52 Bom. 597 (P.C.).
4. (1919) I.L.R. 47 Cal. 280 (P.C.).

The suit was for fixing a fair rent and the memorandum was given in evidence to show the rent previously agreed. With reference to the admissibility of an unregistered agreement to lease in a suit for specific performance, the Judicial Committee observed,

"If the document in question can be regarded as a 'lease' within the meaning of this definition section 2 (7) it could not be received in evidence." *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[1]

It would not have made any difference to the application of this rule if the suit had been for damages for breach of the agreement to lease instead of specific performance. An action for damages in respect of the violation of a contract is as much an action upon the contract as a suit for specific performance; it may be the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance had become impossible. *Windsor and Annapolis Railway Co.* v. *Queen and Western Counties Railway Co.*[2]. Whether the claim is for specific performance or for damages, what is sought to be enforced is a contract affecting immoveable property of which the only evidence permissible under the Evidence Act is the unregistered agreement to lease and that evidence is shut out by section 49 (*c*) of the Act. The proviso to section 49 introduced in 1929 while it relaxed the prohibition in section 49 (*c*) in the case of suits for specific performance did not extend or include suits for damages within its scope. I find it difficult to accept the contention that the Legislature when it enacted the proviso must be deemed to have proceeded on the view that there was no need for legislation with reference to suits for damages because in 1929 when the proviso was added the decisions of this and the other High Courts were by no means uniform and if anything, the balance of authority was against the admissibility of an unregistered agreement to lease in a suit for damages for breach of the contract.

The decision of the Judicial Committee in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[3], was given in a suit for damages for breach of an unregistered contract for sale. The contract of sale and its breach were admitted and there was no need to prove the transaction. The Judicial Committee held that the point as to non-registration of the agreement was not open to the appellant. Nevertheless they referred to section 49 (*a*) and (*c*) of the Act and felt bound to make a palinode of their previous dicta in *Dayal Singh's case*[4] and *Skinner's case*[5], as the report of the argument reported in 36 C.W.N. 677 shows. The Judicial Committee said:

"Their Lordships are satisfied that there is nothing in the section cited (section 49), when properly construed, to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document . . . . Further the proceedings do not in any way affect any immoveable property. The immoveable property affected by the agreement long since passed out of the picture and the only claim in these proceedings is a personal one for damages for breach of an admitted contract."

No reference was made to the previous decisions of the Board cited during the arguments. I do not comprehend—I am sure the fault is wholly mine—the process of reasoning which led their Lordships to paraphrase the language of section 49 in the manner they did. Their Lordships evidently took the same view as the Calcutta High Court did in *Uttafunnissa's case*[6], a case which was cited before the Board during the arguments, namely, that the words "transaction affecting immoveable property" in section 49 (*c*) mean "so as to affect immoveable property" or "so far as it affects immoveable property". This is also the interpretation which has commended itself to my Lord in the present case. The reference to the "foundation of a judgment affecting immoveable property" and to the immoveable property having "passed out of the picture" in the judgment of the Privy Council justify this interpretation. Though it was an *obiter dictum* of the Judicial Committee,

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1. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).
2. (1886) 11 A.C. 607, 613-614.
3. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).
4. (1926) 51 M.L.J. 788 : L.R. 53 I.A. 214 (P.C.).
5. (1929) 57 M.L.J. 765 : L.R. 56 I.A. 363 : I.L.R. 51 All. 771 (P.C.).
6. (1883) I.L.R. 9 Cal. 520 (F.B.).

the observation was deliberately made after a full argument in which all the relevant cases were cited before the Board. It coincides, strangely enough, with the view of the Full Bench of this Court in *Rajah of Venkatagiri* v. *Narayana Reddi*[1], which, in my opinion, supports the appellant entirely. I need not rehearse the facts of this case or the conclusion reached by the Full Bench for my learned brother Satyanarayana Rao, J., has dealt with the case very fully. Uninstructed by these two decisions and the opinions of the majority of my learned brethren, I should have come to the conclusion on the strict language of section 49 (*c*) that an unregistered agreement to lease effecting an actual demise of land, is inadmissible in evidence for the purpose of sustaining a claim for damages for breach of the agreement, just as it would have been inadmissible in evidence, before the proviso to section 49, in a suit for specific performance. The chameleon-like quality of the same agreement, in changing from an inadmissible document when one relief in respect of a breach of contract is sought into an admissible document when another relief is sought, both reliefs being *in personam* is an odd result of the appellant's contention. It is however rendered inevitable by the two decisions above referred to. I have reached this point in drafting my opinion when I had the advantage of reading the opinion of Panchapagesa Sastri, J. I find I follow him all along the route till he reaches the decisions in *M. E. Moolla Sons, Ltd.* v. *Burjorjee*[2] and *Rajah of Venkatagiri* v. *Narayana Reddi*[1]. He has explained them away but I am unable to accompany him in leaping the fence. I need not refer to the other decisions of this Court expressing conflicting opinions on the question under reference for they were decided before *Hemanta Kumari's case*[3], when the difference between a mere agreement for a lease and an agreement to lease effecting a present demise, had not always been kept in view. Further my learned brother Satyanarayana Rao, J., has assembled all the relevant decisions in his judgment which I had the privilege of studying and it is unnecessary to duplicate the argument.

I cannot say I have found the solution of the problem which has puzzled a generation of Judges, other than difficult. The principles of construction abhor, if it can be avoided, a *casus omissus* especially one so obvious as in the present case. Section 49 (*c*) of the Act is a disabling provision which excluded material evidence and if it is fairly capable of two constructions, I should prefer that which is in harmony with what is just and reasonable. In view of the evasive language of section 49 of the Act, the interpretation put upon it by the Judicial Committee and a Full Bench of five Judges of this Court, and the conclusion reached by my Lord and Satyanarayana Rao, J., I would minimise the conflict of judicial opinions of which section 49 of the Registration Act has been the unfortunate victim, by answering the question referred to us in the affirmative.

Somasundaram, J.—The question has been fully dealt with in the judgment of my learned brother Satyanarayana Rao, J. I am in entire agreement with him. I would answer the reference in the affirmative.

By the Court.—In accordance with the opinion of the majority of the Full Bench the question referred to is answered in the affirmative. The second appeal will be posted for final disposal before Raghava Rao, J.

This appeal coming on for final hearing before Raghava Rao, J., on 19th July, 1950, the Court delivered the following

JUDGMENT.—In consequence of the view of the majority of the Full Bench the suit is remanded to the Court of the District Munsiff of Karur for disposal on the merits. Costs to abide the result including costs of the Full Bench hearing. Court-fee in this Court as well as in the lower appellate Court to be refunded. The fees for argument before the Full Bench are fixed at Rs. 100.

V.S. —— *Suit remanded.*

[END OF (1950) 2 M.L.J.]

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1. (1894) 4 M.L.J. 198 : I.L.R. 17 Mad. 456 (F.B.).
2. (1932) 63 M.L.J. 131 : L.R. 59 I.A. 161 : I.L.R. 10 Rang. 242 (P.C.).
3. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 (P.C.).

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COMPARATIVE TABLE.

[1950]

(1950) 1 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
1	1062	—	779
5	—	15	—
7	—	—	—
12	—	18	—
13	—	19	—
15	—	47 (2)	—
18	—	11	—
20	—	57	—
22	—	44	—
26	—	36	—
27	18	34	1035
29	—	52	—
31	65	41 (1)	—
32	76	220 (1)	—
33	29	—	—
35	26 (1)	221 (1)	—
36	94	139	1113
38	—	16	—
40	—	13	—
42	—	164	—
50	167	358	755
54 (F.B.)	32	125	874
63	21	—	—
68	72	74	—
69	63	150	—
71	66 (1)	302 (2)	—
72	67 (2)	90	844
75	66 (3)	220 (2)	—
76	82	69	—
78	67 (1)	152 (1)	—
79	70	67	775
81	52	—	—
82	66 (2)	302 (1)	—
83	74	70	—
85	20	5	—
87	80	—	—
88	79	218	—
89	75	100	—
90	250	—	788
95	84	78	—
100 (P.C.)	1	—	—
105	106	73	1031
106	209	219	—
107	—	—	—
110	—	222 (1)	—
111	225	111	—
113	—	82	—
114	—	157	—
117	217	98	—
120	—	—	—
123 (F.B.)	115	—	895
151	304	—	—
158	77	341	—
161	—	118	—
163 (P.C.)	45	—	—
170 (P.C.)	89	152 (2)	—
172 (P.C.)	91	—	862
176 (P.C.)	41	—	—

(1950) 1 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
179	81	72	—
180	161	120 (1)	—
181	104	116	—
183	155 (1)	217 (1)	—
184	—	—	—
186	244	108	—
190	162	133	—
192	153	101	—
194	145	155	—
196 (F.B.)	155 (2)	182	974
201	—	142	—
204	227	—	—
206	177	—	—
209	221	—	—
210	190	—	—
213	409	148	—
215	146	103	1022
219	229	145	—
222	180	107	—
224	210	352	—
231	—	233	—
235	195	263	—
237	174	—	—
241 (P.C.)	108	166	—
243 (P.C.)	110	170	—
249 (F.C.)	—	—	—
270 (F.C.)	1156	—	—
272 (F.C.)	1158	—	—
274 (F.C.)	1160	—	—
276	—	—	—
278	204	—	1110
283	219	280	—
286 (P.C.)	163	154	—
288 (P.C.)	144	—	—
289 (P.C.)	150	—	—
292 (P.C.)	142	—	—
294 (P.C.)	184	—	—
297 (P.C.)	165	—	—
300 (P.C.)	193	—	—
302 (P.C.)	197	217 (2)	—
304	—	289	—
306	—	282	—
309	—	248	—
313	—	—	—
314	—	—	—
315 (F.B.)	234	187	987
325	310	242	—
326	247	—	—
329	—	236	—
330	331	215	—
332	—	—	—
336	—	216	—
337	—	231	—
340	279	257 (1)	—
341	—	—	—
342	—	239	—
344	187	137	—
347	202	237	—
350	258	—	1084
363 (F.B.)	283	196	—
383	—	—	—
385	—	—	—
393	—	—	—
399	311	317	—
403	443	—	—
406	271	243	—
408	—	404	—
411	407	253	—
413	73	112	—
414	182	—	—
417 (P.C.)	232	168	—

(1950) 1 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
419 (P.C.)	—	175	—
423 (P.C.)	—	178	—
428	315	260	—
432	—	240	—
436	—	—	—
437 (F.B.)	328	265	—
441	1161	291	—
443	376	254	—
446	222	—	—
449	347	—	—
454	325	245	—
458 (P.C.)	273	—	959
463	—	—	—
465	300	339	—
467	—	297	—
469	366 (2)	—	—
471	322	—	—
475	298	343	—
476	388	311	—
483	—	51	—
484 (F.B.)	333	267	—
499	399	—	—
504	387	—	—
505	318	401	—
508	—	24	—
518	181	892	—
519	366 (1)	900	—
520	371	334	—
521	381	395	—
524	394	417 (1)	—
525	352	—	—
527 (F.B.)	356	303	1053
537	395	393	—
540	404	—	—
543	372	398	—
547	446	—	—
551	397	428	—
552	410	387	—
554	378	—	—
556	321	—	—
557	—	389	—
561	354	337	—
563	398	372	—
564	413	—	—
586 (F.C.)	504	—	—
612 (F.C.)	530	—	—
647	—	376	—
648	467	380	—
649	474 (1)	381	—
650	612	330	—
652	—	296	—
654	—	344	—
655	610	373	—
657	369	—	—
659	449	293	—
663	—	333	—
665	—	416	—
667	—	326	—
668	—	—	—
670	575	421	—
675	474 (2)	—	—
683 (F.C.)	—	—	—
709	468	320	—
715	—	—	—
719	441	420	—
720	588	368	—
725	—	366	—
727	—	—	—
732	—	—	—
736	456	—	—
745	564	424	—

(1950) 1 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
745	564	424	—
750	466	374	—
752 (F.C.)	—	—	—
760 (F.C.)	—	222 (2)	—
770	—	—	—
771	—	382	—
775	453	377	—
779	—	—	—
787	583	—	—
792	593	—	—
794	379	251	—
796	614	417 (2)	—
799	—	345	—
805	302	—	—
807	595	—	—
808	579	406	—
813	442	335	—

(1950) 2 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
1 (P.C.)	434	—	—
9	1010	—	—
13	384	—	—
17	280	285	—
21	569	—	1076
27	—	—	—
33	616	—	—
42 (S.C.)	698	495	—
159	762	410	—
162	764	485	—
163	605	412	—
168	761	601	—
169	1002	—	—
171	865	599	—
173	766	471	—
177	625	447	—
186	769	608	—
189 (F.B.)	633	861	—
194	997	—	—
195	841	602	—
199	1016	893 (1)	—
200	—	877	—
201	835	723	—
206	999	—	—
207	1035	718	—
213 (F.B.)	753	625	—
216 (F.B.)	756	—	—
220	1101	—	607
239	1018	—	—
245	—	—	—
247	—	—	—
255	1017	—	—
256	772	456	—
261	996	—	—
262	1004	—	—
264	785	893 (2)	—
268	1000	—	—
271	795	—	—
278	781	487	1119
280	1023	—	—
282	759	616	—
284	783	621	—
286	1027	493	—
290	802	464	—
298	839	896	—
300	—	474	—
313	777	—	—
317	860	460	—

(1950) 2 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
333	816	899	—
334	998	898	—
335	926	—	—
336	821	—	—
338	854	611	—
344 (S.C.)	495	—	—
350 (S.C.)	1025	738	—
353	—	—	—
369	1015	—	—
370	—	—	—
372	—	—	—
373	—	870	—
378	830 (1)	—	—
379	789	—	—
385	—	488	—
390 (S.C.)	929	435	—
396	942	618	—
399	829	—	—
400	1031	—	—
404 (F.B.)	895	627	—
431 (S.C.)	934	429	—
438	830 (2)	—	—
442	809	—	—
443 (F.N.)	811	—	—
448	869 (1)	—	—
449	925	—	—
450	852	623	—
453	889	655	—
459	845	—	—
466	1006	691	—
470	—	686	—
472	—	798	—
474	951	689	—
475	987	—	—
479	—	—	—
482	961	690	—
484	—	705	—
486	965	699	—
489	834	—	—
490	949	695	—
492	968	687	—
494	1141	698	—
495	—	797	—
496	963	795	—
499	959	703	—
501	956	713	—
505	947	716	—
506	1173	684	—
509	945	702	—
511	—	—	799
535	940	763	—
537	993	—	—
539	1146	—	—
544	—	—	—
545	1048	735	—
549	1150	—	—
551	975	—	—
553	991	—	—
555 (S.C.)	1142		—
559 (S.C.)	559	—	—
564 (S.C.)	—	740	—
569	969	—	—
572	972	681	—
575	952	710	—
579	1176	—	—
580	1041	—	—
587	977	—	—
592	1031	675	—
597	—	668	—
605	927	—	—
607	921	707	—

(1950) 2 M.L.J.	63 L.W.	1950 M.W.N.	I.L.R. (1950) Mad.
611	—	—	—
616	1124	865	—
623	888	—	—
624	983	650	—
629	—	—	—
630	—	—	—
631	—	776 (2)	—
632	—	778	—
634	—	781	—
636	—	—	—
639	—	783	—
642	—	785	—
644	—	779	—
647	—	800	—
650	—	—	—
653	—	791	—
655	1122	—	—
656	—	788	—
658	—	793	—
661	—	774	—
663	—	—	—
665	—	—	—
668	1152	—	—
670	—	—	—
672	—	—	—
674 (F.B.)	1130	851	—
686 (F.B.)	—	878	—
703 (S.C.)	—	802	—
757	—	—	—
759	—	—	—
760	—	—	—
761	—	—	—
763	—	—	—
764	—	—	—
766	—	—	—
767	—	—	—
770	—	—	—
773	—	—	—
774	—	—	—
775	—	—	—
776	—	—	—
777	—	—	—
798	—	—	—
801	—	—	—
804	—	—	—
807	—	—	—
810	—	—	—
812	1120	—	—
814	—	—	—
817	—	—	—
818 (F.B.)	—	—	—

1950 M.W.N.	M.L.J.			1950 M.W.N.	M.L.J.		
1	(1949)	2	804	36	(1950)	1	26
3	"	2	839	37	(1949)	2	773
5	(1950)	1	85	38	"	2	745
7	"	1	63	39	"	2	819
10	"	1	81	41 (1)	(1950)	1	91
11	"	1	18	41 (2)	(1949)	2	744
13	"	1	40	42	"	2	782
15	"	1	5	44	(1950)	1	22
16	"	1	38	47 (1)	(1949)	2	821
18	"	1	12	47 (2)	(1950)	1	15
19	"	1	13	50	(1949)	2	822
21 (P.C.)	(1949)	2	461	51	(1950)	1	483
24	(1950)	1	508	52	"	1	29
34	"	1	27	53	(1949)	2	779

120 (1)	—	,,	1	180	302 (1)	—	,,	1	82
120 (2)	—	(1949)	2	617	303 (F.B.)	—	,,	1	527
125 (F.B.)	—	(1950)	1	54	311	—	,,	1	476
133	—	,,	1	190	317	—	,,	1	399
134	—	,,	1	414	320	—	,,	1	709
137	—	,,	1	341	326	—	,,	1	667
139	—	,,	1	36	327 (F.C.)	—		..	..
142	—	,,	1	201	330	—	,,	1	650
144	—	,,	1	87	333	—	,,	1	663
145	—	,,	1	219	334	—	,,	1	520
147	—	(1949)	2	388	335	—	,,	1	813
148	—	(1950)	1	213	337	—	,,	1	561
150	—	,,	1	69	339	—	,,	1	465
152 (1)	—	,,	1	78	341	—	,,	1	158
152 (2) (P.C.)	—	,,	1	170	343	—	,,	1	475
154 (P.C.)	—	,,	1	286	344	—	,,	1	654
155	—	,,	1	194	345	—	,,	1	799
157	—	,,	1	114	350	—	,,	1	668
159	—	(1949)	2	836	352	—	,,	1	224
161	—	,,	2	776	358	—	,,	1	50
164	—	(1950)	1	42	363	—	(1949)	2	809
165 (P.C.)	—	,,	1	300	366	—	(1950)	1	725
166 (P.C.)	—	,,	1	241	368	—	,,	1	720
168 (P.C.)	—	,,	1	417	372	—	,,	1	563
170 (P.C.)	—	,,	1	243	373	—	,,	1	655
175 (P.C.)	—	,,	1	419	374	—	,,	1	750
178 (P.C.)	—	,,	1	423	376	—	,,	1	647
182 (F.B.)	—	,,	1	196	377	—	,,	1	775
187 (F.B.)	—	,,	1	315	380	—	,,	1	648
196 (F.B.)	—	,,	1	363	381	—	,,	1	649
213	—	,,	1	204	382	—	,,	1	771
215	—	,,	1	330	384	—	(1949)	2	434
216	—	,,	1	336	387	—	(1950)	1	552
217 (1)	—	,,	1	183	389	—	,,	1	557
217 (2) (P.C.)	—	,,	1	302	393	—	,,	1	537
218	—	,,	1	88	395	—	,,	1	521
219	—	,,	1	106	398	—	,,	1	543
220 (1)	—	,,	1	32	401	—	,,	1	505
220 (2)	—	,,	1	75	404	—	,,	1	408
221 (1)	—	,,	1	35	406	—	,,	1	808
221 (2)	—	(1949)	2	557	410	—	,,	2	159
222 (1)	—	(1950)	1	110	412	—	,,	2	163
222 (2) (F.C.)	—	,,	1	760	416	—	,,	1	665
231	—	,,	1	337	417 (1)	—	,,	1	524
233	—	,,	1	231	417 (2)	—	,,	1	796
236	—	,,	1	329	420 (1)	—	,,	1	719

1950 M.W.N.		M.L.J.		
420 (2)	=	(1950)	1	504
421	=	,,	1	670
424	=	,,	1	745
428	=	,,	1	551
429 (S.C.)	=	,,	2	431
435 (S.C.)	=	,,	2	390
440 (S.C.)	=	,,	2	278
447	=	,,	2	177
456	=	,,	2	256
460	=	,,	2	317
464	=	,,	2	290
471	=	,,	2	173
474	=	,,	2	300
485	=	,,	2	162
487	=	,,	2	278
488	=	,,	2	385
492	=	,,	2	286
495 (S.C.)	=	,,	2	42
599	=	,,	2	171
601	=	,,	2	168
602	=	,,	2	195
605 (S.C.)	=		..	..
608 (S.C.)	=	,,	2	186
611	=	,,	2	338
616	=	,,	2	282
618	=	,,	2	396
621	=	,,	2	284
623	=	,,	2	450
625 (F.B.)	=	,,	2	213
627 (F.B.)	=	,,	2	404
650	=	,,	2	624
655	=	,,	2	453
660	=	,,	2	475
664	=	,,	2	587
668	=	,,	2	597
675	=	,,	2	592
679	=		..	..
681	=	,,	2	572
684	=	,,	2	506
686	=	,,	2	470
687	=	,,	2	492
689	=	,,	2	474
690	=	,,	2	482
691	=	,,	2	466
695	=	,,	2	490
697	=	,,	2	605
698	=	,,	2	494
699	=	,,	2	486

1950 M.W.N.		M.L.J.		
702	=	(1950)	2	509
703	=	,,	2	499
705	=	,,	2	484
707	=	,,	2	607
710	=	,,	2	575
713	=	,,	2	501
716	=	,,	2	505
718	=	,,	2	207
723	=	,,	2	201
727 (S.C.)	=		..	..
735	=	,,	2	545
738 (S.C.)	=	,,	2	350
740 (S.C.)	=	,,	2	564
763	=	,,	2	525
765	=	,,	2	569
774	=	,,	2	661
776 (1)	=	,,	2	759
776 (2)	=	,,	2	631
778	=	,,	2	632
779	=	,,	2	641
781	=	,,	2	634
783	=	,,	2	639
785	=	,,	2	642
787	=	,,	2	656
788	=	,,	2	663
789	=		..	..
791	=	,,	2	653
793	=	,,	2	658
795	=	,,	2	496
797	=	,,	2	495
798	=	,,	2	472
800	=	,,	2	647
802 (S.C.)	=	,,	2	703
851 (F.B.)	=	,,	2	674
861 (F.B.)	=	,,	2	189
865	=	,,	2	616
870	=	,,	2	373
875 (1)	=		..	..
875 (2)	=	,,	2	662
877	=	,,	2	200
878 (F.B.)	=	,,	2	686
892	=	,,	1	518
893	=	,,	2	199
893 (2)	=	,,	2	264
896	=	,,	2	298
898	=	,,	2	334
899	=	,,	2	333
900	=	,,	1	519

63 Law Weekly.		M.L.J.		
1 (P.C.)	=	(1950)	1	100
6 (P.C.)	=	(1949)	2	6
12 (P.C.)	=	,,	1	235
16	=	,,	2	804
18	=	(1950)	1	27
20	=	,,	1	85
21	=	,,	1	63
25	=	(1949)	2	822
26 (1)	=	(1950)	2	35
26 (2)	=	(1949)	2	732
29	=	(1950)	2	33
31	=	(1949)	2	802
32 (F.B.)	=	(1950)	2	54
41 (P.C.)	=	,,	2	176
43	=	(1949)	2	735
45 (P.C.)	=	(1950)	1	163
52	=	,,	1	81
53	=	(1949)	2	738
54	=	,,	2	741
56	=	,,	2	744
58	=	,,	2	737

63 Law Weekly.		M.L.J.		
59	=	(1949)	2	740
61	=	,,	2	745
62	=	,,	2	747
63	=	(1950)	1	69
65	=	,,	1	31
66 (1)	=	,,	1	71
66 (2)	=	,,	1	82
66 (3)	=	,,	1	75
67 (1)	=	,,	1	78
67 (2)	=	,,	1	72
70	=	,,	1	79
72	=	,,	1	68
73	=	,,	1	413
74	=	,,	1	83
75	=	,,	1	89
76	=	,,	1	32
77	=	,,	1	158
79	=	,,	1	88
80	=	,,	1	87
81	=	,,	1	179
82	=	,,	1	76

63 Law Weekly			M.L.J.	
84	—	(1950)	1	95
89 (P.C.)	—	,,	1	170
91 (P.C.)	—	,,	1	172
94	—	,,	1	36
97	—	,,	1	43
104	—	,,	1	181
106	—	,,	1	105
108 (P.C.)	—	,,	1	241
110 (P.C.)	—	,,	1	243
115 (F.B.)	—	,,	1	123
142 (P.C.)	—	,,	1	292
144 (P.C.)	—	,,	1	288
145	—	,,	1	194
146	—	,,	1	215
150 (P.C.)	—	,,	1	289
153	—	,,	1	192
155 (1)	—	,,	1	183
155 (2) (F.B.)	—	,,	1	196
161	—	,,	1	180
162	—	,,	1	190
163 (P.C.)	—	,,	1	286
165 (P.C.)	—	,,	1	297
167	—	,,	1	50
174	—	,,	1	237
177	—	,,	1	206
180	—	,,	1	222
181	—	,,	1	518
182	—	,,	1	414
184 (P.C.)	—	,,	1	294
187	—	,,	1	344
190	—	,,	1	210
193 (P.C.)	—	,,	1	300
195	—	,,	1	235
197 (P.C.)	—	,,	1	302
198 (P.C.)	—		..	..
202	—	,,	1	347
204	—	,,	1	278
209	—	,,	1	106
210	—	,,	1	224
217	—	,,	1	117
219	—	,,	1	283
221	—	,,	1	209
222	—	,,	1	446
225	—	,,	1	111
227	—	,,	1	204
229	—	,,	1	219
232 (P.C.)	—	,,	1	417
234 (F.B.)	—	,,	1	315
244	—	,,	1	186
247	—	,,	1	326
250	—	,,	1	90
255 (P.C.)	—		..	..
258	—	,,	1	350
270	—	(1948)	2	649
271	—	(1950)	1	406
273 (P.C.)	—	,,	1	458
279	—	,,	1	340
280	—	,,	2	17
283	—	,,	1	363
298	—	,,	1	475
300	—	,,	1	465
302	—	,,	1	805
304	—	,,	1	151
310	—	,,	1	325
311	—	,,	1	399
315	—	,,	1	428
319	—	,,	1	505
321	—	,,	1	556
322	—	,,	1	471
325	—	,,	1	454
328	—	,,	1	437
331	—	,,	1	330

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352	—	,,	1	525
354	—	,,	1	561
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366 (1)	—	,,	1	519
366 (2)	—	,,	1	469
369	—	,,	1	657
371	—	,,	1	520
372	—	,,	1	543
376	—	,,	1	443
378	—	,,	1	554
379	—	,,	1	794
381	—	,,	1	521
384 (2)	—	,,	2	13
387	—	,,	1	504
388	—	,,	1	476
394	—	,,	1	521
395	—	,,	1	537
397	—	,,	1	551
398	—	,,	1	563
399	—	,,	1	499
404	—	,,	1	540
407	—	,,	1	411
409	—	,,	1	213
410	—	,,	1	552
413	—	,,	1	564
434 (P.C.)	—	,,	2	1
441	—	,,	1	719
442	—	,,	1	813
443	—	,,	1	403
446	—	,,	1	547
449	—	,,	1	659
453	—	,,	1	775
456	—	,,	1	736
466	—	,,	1	750
467	—	,,	1	648
468	—	,,	1	709
474 (1)	—	,,	1	649
474 (2)	—	,,	1	675
482	—	(1948)	2	559
490	—	,,	2	618
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501 (F.C.)	—		..	..
504 (F.C.)	—	,,	1	586
530 (F.C.)	—	,,	1	612
564	—	,,	1	745
569	—	,,	2	21
575	—	,,	1	670
579	—	,,	1	808
583	—	,,	1	787
588	—	,,	1	720
593	—	,,	1	792
595	—	,,	1	807
597 (P.C.)	—		..	..
605	—	,,	2	163
610	—	,,	1	655
612	—	,,	1	650
614	—	,,	1	796
616	—	,,	2	33
625	—	,,	2	177
633 (F.B.)	—	,,	2	189
638	—	,,	2	42
753 (F.B.)	—	,,	2	213
756	—	,,	2	216
759	—	,,	2	282
761	—	,,	2	168
762	—	,,	2	159
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785	=	,,	2	264
789	=	,,	2	379
795	=	,,	2	271
802	=	,,	2	290
809	=	,,	2	442
811 (F.N.)	=	,,	2	443
816	=	,,	2	333
817	=	,,	2	328
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823	=	,,	2	322
829	=	,,	2	399
830 (1)	=	,,	2	378
830 (2)	=	,,	2	438
834	=	,,	2	489
835	=	,,	2	201
839	=	,,	2	298
841	=	,,	2	195
845	=	,,	2	459
852	=	,,	2	450
854	=	,,	2	338
860	=	,,	2	317
865	=	,,	2	171
867 (1)	=	,,	2	448
867 (2)	=		..	..
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875 (S.C.)	=		..	..
878 (S.C.)	=		..	..
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926	=	,,	2	335
927	=	,,	2	605
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940	=	,,	2	535
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945	=	,,	2	509
947		,,	2	505
949	=	,,	2	490
951	=	,,	2	474
952	=	,,	2	575
956	=	,,	2	501
959	=	,,	2	499
961	=	,,	2	482
963	=	,,	2	496
965	=	,,	2	486
968	=	,,	2	492
969	=	,,	2	569
972	=	,,	2	572
975	=	,,	2	551

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987	=	,,	2	475
991	=	,,	2	553
993	=	,,	2	537
996	=	,,	2	261
997	=	,,	2	194
998	=	,,	2	334
999	=	,,	2	206
1000	=	,,	2	268
1002	=	,,	2	169
1004	=	,,	2	262
1006	=	,,	2	466
1010	=	,,	2	9
1015	=	,,	2	369
1016	=	,,	2	199
1017	=	,,	2	255
1018	=	,,	2	239
1023	=	,,	2	280
1025 (S.C.)	=	,,	2	350
1027	=	,,	2	286
1031	=	,,	2	400
1035	=	,,	2	207
1041	=	,,	2	580
1048	=	,,	2	545
1051	=	,,	2	592
1055	=	(1949)	1	475
1059	=	,,	1	452
1062	=	(1950)	1	1
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1089	=	,,	2	343
1101	=	(1950)	2	220
1120	=	,,	2	812
1122	=	,,	2	655
1124	=	,,	2	616
1130 (F.B.)	=	,,	2	674
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1146	=	,,	2	539
1150	=	,,	2	549
1152	=	,,	2	668
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1161	=	,,	1	441
1163 (P.C.)	=	,,	1	419
1166 (P.C.)	=	,,	1	423
1172	=	,,	2	484
1173	=	,,	2	506
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1 (P.C.)	=	(1949)	1	505
10 (F.B.)	=	,,	2	235
19	=	,,	1	475
28	=	,,	1	471
34	=	,,	1	379
39	=	,,	1	320
59	=	,,	1	269
83	=	,,	1	248
85	=	,,	1	228
89 (P.C.)	=	,,	2	1
101 (F.B.)	=	,,	1	593
118 (F.B.)	=	,,	1	488
152	=	,,	1	452
159	=	,,	1	550

I.L.R. (1950) Mad.			M.L.J.	
167	=	(1949)	2	61
175	=	,,	1	511
179 (P.C.)	=	,,	2	119
191 (F.B.)	=	,,	2	171
242	=	,,	2	117
245	=	,,	1	518
248	=	,,	2	74
251	=	,,	2	70
260	=	,,	2	114
267	=	,,	2	84
275 (P.C.)	=	,,	2	264
285 (F.B.)	=	,,	2	217
326	=	,,	2	413
339	=	,,	2	88

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365	=	(1949)	2	143
369	=	,,	2	192
381	=	,,	2	343
411	=	,,	2	147
421	=	,,	1	530
436	=	,,	1	650
448	=	,,	1	503
451	=	,,	2	75
461	=	,,	2	199
502	=	,,	2	268
555	=	,,	2	258
567 (P.C.)	=	,,	2	500
607	=	(1950)	2	220
651	=	(1949)	2	617
665	=	,,	2	525
679 (P.C.)	=	,,	2	495
692	=	,,	2	682
697	=	,,	2	725
709	=	,,	2	684
718	=	,,	2	647
738	=	,,	2	591
742	=	,,	2	604
747	=	,,	2	641
755	=	(1950)	1	50
764	=	(1949)	2	705

I.L.R. (1950) Mad.		M.L.J.		
772	=	(1949)	2	632
775	=	(1950)	1	79
779	=	,,	1	1
788	=	,,	1	90
799	=	,,	2	511
844	=	,,	1	72
852	=	(1949)	2	782
858	=	,,	2	703
862 (P.C.)	=	(1950)	1	172
874 (F.B.)	=	,,	1	54
895 (F.B.)	=	,,	1	123
959 (P.C.)	=	,,	1	458
971 (F.B.)	=	,,	1	196
987 (F.B.)	=	,,	1	315
1010	=	,,	1	278
1022	=	,,	1	215
1031	=	,,	1	105
1035	=	,,	1	27
1039 (P.C.)	=		..	..
1053 (F.B.)	=	,,	1	527
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